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CALIFORNIA REPORTER

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(176 Cal. 676)

POWELL v. POWELL et al. (S. F. 8554.)

(Supreme Court of California. Dec. 13, 1917.)

EXCEPTIONS, BILL OF 🔑55(4)—APPLICATION FOR LEAVE TO PROVE.

Where plaintiffs applied under Code Civ. Proc. § 652, for leave to prove a bill of exceptions, an order to show cause having been made, the parties appeared, and defendants indicated their willingness to abide by suggestions that certain changes desired by plaintiffs should be made in the bill as same was proposed to be settled by the trial judge, and filed their written consent and undertaking that such changes should be made, the order to show cause will be discharged and the proceeding dismissed without prejudice to a future application in event the changes consented to be not made.

In Bank. Action by Laura G. Powell, as administratrix of the estate of Chas. G. Powell, deceased, against J. A. Powell and others. Petition by plaintiff against defendants and W. M. Conley, as judge of the superior court, for leave to prove bill of exceptions. Order to show cause discharged, and proceeding dismissed, without prejudice.

Howard Harron and Brewton A. Hayne, both of San Francisco, for petitioner. W. H. L. Hynes and Walter J. Burpee, both of Oakland, for respondent.

PER CURIAM. This is an application for leave to prove a bill of exceptions under sec-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tion 652, Code of Civil Procedure. An order to show cause was made, and on the return the whole matter was referred to the Chief Justice for consideration and action. The parties appeared before the Chief Justice and a hearing was there had. At the conclusion of such hearing the respondents indicated their willingness to abide by the suggestions of the Chief Justice that certain changes should be made in the bill of exceptions as the same is proposed to be settled by the trial judge, and accordingly have filed in this court their written consent and undertaking that such changes shall be made.

These proposed changes are in number four. If these changes are made in the bill, the bill as proposed to be settled by the trial judge, will sufficiently present appellant's case to enable her to make such points as she is entitled to make on her appeal, and a settlement of the bill of exceptions by this court will be unnecessary.

It is ordered that the order to show cause heretofore made in this matter be and the same is hereby discharged, and the proceeding dismissed without prejudice to a further application in the event that the changes consented to by the defendants and shown by their written consent filed herein are not in fact made.

(177 Cal. 159)

HOLLENBECK-BUSH PLANING MILL CO. v. AMWEG et al. (Sac. 2470, 2503.)

(Supreme Court of California. Dec. 31, 1917. Rehearing Denied Jan. 28, 1918.)

1. MECHANICS' LIENS 🔑227—SURETY BONDS —CONSTRUCTION.

Where a contractor entered into two contracts filed on different dates for different parts of the same work, a bond of a surety company purporting to cover a single contract filed on one of the dates, reciting a consideration equal to the sum of the two, covers both contracts, and can be sued on without demand or reformation, as surety bonds should be construed in the light of the circumstances attending the transaction.

2. MECHANICS' LIENS 🔑3 — CONTRACTORS' BONDS—STATUTES — CONSTITUTIONALITY — PENALTIES.

Code Civ. Proc. § 1183, as amended by St. 1911, p. 1313, making owners of lands liable for liens to the extent of the value of the labor and material if they do not provide a bond, is not invalid as contravening constitutional inhibitions of the imposition of penalties, as it really confers a right in limiting the liability if a bond is filed.

3. MECHANICS' LIENS 🔑223—CONTRACTORS' BONDS—TIME OF FILING—EFFECT.

Under Code Civ. Proc. § 1183, relating to contractors' bonds, the failure to file the surety bond before work is commenced and at the time of filing the contractor's bond does not invalidate the contract of the surety company.

4. CONSTITUTIONAL LAW 🔑244, 300—MECHANICS' LIENS 🔑3—CONSTITUTIONALITY —DUE PROCESS OF LAW.

Const. art. 22, § 15, authorizing liens for labor and material in excess of contract price of work, does not contravene Const. U. S. Amend. 14, by denying equal protection of the law, or by depriving owners of real estate of property without due prcoess of law.

5. MECHANICS' LIENS 🔑229—CONTRACTORS' BOND—TIME OF FILING—EFFECT.

Under Code Civ. Proc. § 1183, relating to contractors' bonds, the owner is liable for the full value of labor and material if the bond and contract are not filed before the work has commenced.

Department 2. Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Separate actions by the Hollenbeck-Bush Planing Mill Company, a corporation, Robert Currie and others, the Pioneer Brick Company, a corporation, the Citrus City Lumber Company, a corporation, and Fred W. Stone and others, against F. J. Amweg, doing business as the F. J. Amweg Company, the Bradley Company, a corporation, R. Bradley, and the National Surety Company, a corporation, to foreclose mechanics' liens. From a judgment, the Bradley Company and others appeal. Affirmed in part, and reversed in part.

Orville C. Pratt, Jr., of San Francisco, for appellant. Power & McFadzean, of Visalia, Murry & Knupp, of Porterville, and Heller, Powers & Ehrman, of San Francisco, for respondent National Surety Co.

MELVIN, J. It has been stipulated that one transcript be used in the appeals from the judgment in these consolidated actions.

The appellants, except R. Bradley and Bradley Company (appellants in the appeal numbered Sac. 2470), are materialmen or laborers who commenced separate actions for the foreclosure of mechanics' liens upon certain real property in the city of Porterville, Tulare county. Bradley Company is the owner of the property on which is the building for the construction of which the liens were asserted. Defendant F. J. Amweg (doing business as F. J. Amweg Company) was the contractor who undertook the erection of said building, and the National Surety Company executed the bond in behalf of the contractor under the provisions of section 1183, Code of Civil Procedure.

In the five actions consolidated for trial a personal judgment was rendered against the contractor (who did not defend) for the full amounts of the asserted indebtedness, and liens for these sums were declared upon the real property upon which the building was erected. It was also adjudged that the owner, materialmen, and laborers could recover nothing from the National Surety Company. We will first consider the appeal from that portion of the judgment thus exonerating the surety company.

The contractor Amweg and the respondent Bradley Company entered into two written agreements for the construction of the building. Both were made on July 19, 1913. One covered all of the labor and material except the brickwork. The contract price was $8,222. This instrument was filed in the recorder's office on July 21, 1913. The second agreement was for the labor and material to be used in the construction of the brickwork in the building, and was for the sum of $3,000. This was recorded on July 25, 1913. On July 19, 1913, the National Surety Company executed and delivered the bond here in controversy, in the sum of $5,611, one-half of the aggregate amount of the two contracts for the construction of the building. In this bond it is recited that under date of July 19, 1913, Amweg entered into "a certain contract" for the erection of a building in Porterville for the sum of $11,222. This is the aggregate of the two sums specified in the two writings of that date. The agreement for the construction of the building is described in the singular throughout the bond. This bond was filed August 9, 1913. It was avowedly executed for the purpose of complying with the provisions of section 1183, Code of Civil Procedure, as amended in 1911 (St. 1911, p. 1313).

[1] Respondent surety company contends that the bond in the singular number refers to an entirely different contract from the two agreements for the construction of the building; and that if as a matter of fact the parties intended it as one having application to those two writings there should have been a demand and if necessary an action for the reformation of said bond before plaintiffs could recover upon it. Both of these contentions are without merit. It is true that the liability of a surety is measured by the terms of the agreement, and that courts are not swift to extend that liability by construction; but a surety is not hedged by any sanctity which prevents the application of the same rules to the construction of its agreements as are used to admeasure the obligations arising under other contracts. The extent of the surety's liability must be gathered from the language used when read in the light of the circumstances attending the transaction. 5 Elliott on Contracts, § 3941. The circumstances surrounding the execution of this bond were such that there can be no rational doubt regarding the intention of the surety to indemnify its principal for certain losses which might arise under the two building contracts of the same date. The use of the singular rather than the plural amounts, at most, to a mere clerical error which could not have operated to the prejudice or injury of the surety. Hence it is not relieved from liability. 32 Cyc. 69; Stiewell v. American Surety Co., 70 Ark. 512, 68 S. W. 1021; Austin v. Union Paving & Contracting Co., 4 Cal. App. 610, 88 Pac. 731; Swain v. Graves, 8 Cal. 549; Morgan v. Thrift, 2 Cal. 562. We conclude, therefore, that the court properly found the bond to have been executed and delivered "in order to secure the faithful performance of said two contracts by the said defendant F. J. Amweg."

The court having reached a conclusion of law to the effect that the bond of the National Surety Company was invalid, that respondent seeks to uphold that conclusion upon the theory that section 1183, Code of Civil Procedure, providing for such a bond is unconstitutional, its counsel expressing a hope that this court will entertain "a new viewpoint" upon the subject and one different from that occupied by the court in bank when Roystone Co. v. Darling, 171 Cal. 526, 154 Pac. 15, was decided. But after an examination of the able discussion of the objections to said section 1183, Code of Civil Procedure, contained in the briefs of the respondent surety company we are constrained to adhere to the doctrines and conclusion of that case. Counsel's first attack upon the constitutionality of the statute is based upon the supposed violation of section 25 of article 4 of the Constitution inhibiting the passage of special laws. But this is not a new viewpoint. The same objection to the constitutionality of the act was urged in the Roystone Case, and Mr. Justice Shaw in his opinion in that case used the following language at page 542 of 171 Cal., at page 22 of 154 Pac.:

> "It is urged that the provisions of the act requiring persons who make building contracts to file a bond, while no such requirement is made of any other person who may wish to make other kinds of contracts, creates a lack of uniformity, and is class legislation. There is an intimation to this effect in Shaughnessy v. American Surety Co., 138 Cal. 543, 69 Pac. 250, 71 Pac. 701, but the point was not directly involved, and the case does not hold to that doctrine. It is not sustained by authority. The rules regarding legislation respecting classes have been thoroughly settled in this state. The case most often cited is Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604. The decision in that case has been followed in very many cases since it was rendered. The principle announced is that a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction. To this it has been added, in some cases, that the distinction must have some reasonable relation to the legislation enacted respecting the class. The fact that the Constitution confers upon persons performing labor or furnishing materials for the construction of a building the right to a lien thereon at once establishes these persons as a class, and makes a constitutional distinction between them and all other persons making contracts. This justifies legislation for the benefit of such claimants and governing the conduct and contracts of the owner of the property and the person contracting to construct buildings thereon. There is no improper classification."

Further, respondent attempts to show that section 1203, Code of Civil Procedure, as it stood prior to 1911 and the provisions for a bond contained in section 1183, Code of Civil Procedure, as amended in 1911, are the same in result to the owner as each imposed upon him an improper burden in addition to the right of lien given to the persons furnishing labor and materials. This same matter was discussed and decided adversly to respondent's contention in Roystone Co. v. Darling, supra.

[2] It is further argued that the provisions exempting the owner from liability beyond the contract price if he file a bond and making him liable for liens to the extent of the value of the labor and materials if he do not provide such bond is in violation of constitutional inhibitions of the imposition of penalties by legislative enactment. The Constitution (section 15, art. 22) guarantees a lien to the mechanic and materialman extending to the full value of all labor bestowed and material furnished. But the Legislature may, under authority given by the Constitution, provide certain conditions upon compliance with which the owner may restrict recovery to the sum mentioned in the contract. Such provision does not impair any existing right of the owner—does not, in short, penalize him—but the effect is "to confer a right not previously existing by which his liability may, under certain circumstances, be curtailed." Stimson Mill Co. v. Nolan, 5 Cal. App. 754, 91 Pac. 262.

Nor does the statute in question discriminate against the owners of real property. Respondent by way of illustration refers to work which might be done upon a gold dredger of equal value with that bestowed upon a building attached to real property, implying that the owner of the dredger would not be compelled to protect himself by filing a bond while the owner of the building would be required to furnish such security. The illustration proves no unconstitutional discrimination. In either case a lien for the full value of the labor would attach if the owner did not protect himself by a bond. In the one case the lien would attach incidentally to the land as well as to the building, but that is due to the Constitution itself, and not do anything in the criticized statute. Other points made by respondent are fully met by the authorities cited above, and require no further discussion. If the court's determination that the contract was invalid was based upon the supposed unconstitutionality of section 1183, Code of Civil Procedure, such conclusion was erroneous.

[3] The failure to file the surety bond before work was commenced and at the time of the filing of the contractor's bond did not invalidate the contract of the surety company. Hammond Lumber Co. v. Willis, 171 Cal. 565, 153 Pac. 947. It follows that the portion of the judgment relieving the National Surety Company from all liability under its bond must be reversed.

We now come to the consideration of Sac. No. 2470, which is the appeal of the Bradley Company. R. Bradley, the other appellant, is but a nominal party, and will be disregarded in the following discussion.

The liens foreclosed by the judgment amount to $4,731.92, exclusive of interest and costs. The unpaid balance of the contract price remaining in the hands of the owner, after deducting the necessary outlay for completing the building—the contractor having abandoned it—amounts to $2,913.60. This appellant, the owner of the property, contends that the judgment of foreclosure is erroneous and excessive to the extent of the discrepancy between these two amounts, conceding its liability and the binding effect of the liens upon its land up to the amount last specified, namely, $2,913.60.

[4] Appellant contends that it has complied substantially with the provisions of section 1183, Code of Civil Procedure, and so has limited its liability to the unpaid portion of the contract price. It also contends that section 15 of article 22 of the Constitution of California, interpreted by our decisions as authorizing liens for work and material in excess of the contract price, is itself in violation of the Fourteenth Amendment of the Constitution of the United States, which forbids any state to deny to any one within its jurisdiction the equal protection of its laws or to deprive any such person of property without due process of law.

Considering the latter contention first we find Californian authority in Stimson Mill Co. v. Nolan, supra, supporting the validity of our own constitutional provision regarding liens as not authorizing the taking of property without due process of law. It is true that that case was decided before the amendment to section 1183, Code of Civil Procedure, but the reasoning is none the less applicable to an interpretation of that statute in its present form and of the constitutional provision giving to laborers and materialmen liens to the extent of the value of their services and the materials furnished. The court said, in part (5 Cal. App. at page 760, 91 Pac. at page 265):

> "Assuming, as we do, the validity of section 15, article 22, of the Constitution, which guarantees the lien, we find that this constitutional right of the laborer and materialman extends to the full value of all labor and materials bestowed or furnished; and, without legislation, such value is the measure of recovery. The Legislature has seen fit, under the authority given it by the Constitution, to provide by the sections complained of certain conditions, upon the observance of which the constitutional measure of lien and recovery is restricted to the sum specified in the contract between the owner and contractor. There is no attempt to enlarge the rights of lien claimants under any circumstances, for under the sections mentioned, where a valid contract is made, the value of the thing furnished measures the extent to which any claim can be found. The effect, therefore, of these sections is not to impair any existing right of the owner, but, in effect, to confer a right not previously existing by which his liability may, under certain circumstances, be curtailed. The owner's liberty of action in relation to this property is not invaded by the statute. He need not employ an intermediary to erect his building, but if he does, the law ingrafts upon his act certain consequences. Henry v. Evans, 97 Mo. 47, 10 S. W. 872 [3 L. R. A. 332]. There is no taking of property without due process of law. The contract by the owner is made voluntarily and with the Constitution and laws in mind, and they form part of such contract; and

he must be taken to have consented to the effect of such enactments."

Similar doctrine is contained in the opinion in Jones v. Great Southern Fireproof Hotel Co., 86 Fed. 370, 30 C. C. A. 108, written by the late Judge Lurton, who afterwards became a Justice of the Supreme Court of the United States. Commenting upon the lien statute of the state of Ohio, the learned judge said:

> "Such statutes rest upon the principle of natural justice which lies at the foundation of the many liens or preferences among creditors which we have cited from both the common and civil law. It is true that a lien is created in favor of one with whom the owner has no direct contractual relations. But, if the owner makes the contract with the law before him, the law enters into and becomes a part of the contract. The legal effect of the contract is to give a lien to all who, at the instance of his contractor, shall be employed to furnish labor or materials for the work which he has let out. So far as such a statute is limited to future contracts, it cannot be said to impair the obligation of a contract. If the law be subject to no other objections, it impairs no contract, for all thereafter made are entered into upon the basis of the law. 'The inhibition of the Constitution is wholly prospective. The states may legislate as to contracts thereafter made as they see fit. It is only those in existence when the hostile law is passed that are protected from its effect.' Edwards v. Kearney, 96 U. S. 595 [24 L. Ed. 793]; Greenwood v. Freight Co., 105 U. S. 13 [26 L. Ed. 961]; Denny v. Bennett, 128 U. S. 489, 9 Sup. Ct. 134 [32 L. Ed. 491]; Smith v. Parsons, 1 Ohio, 236 [13 Am. Dec. 608]; Weil v. State, 46 Ohio St. 450, 21 N. E. 643. Neither can the owner be said to be thereby deprived of his property without due process of law. He has voluntarily made a contract with the law before him. He has thereby subjected his property to liability for certain debts of the contractor. His own voluntary consent is an element in the transaction. He knows what the law is, and makes a contract under that law. It is idle to say that under such circumstances he is deprived of his property without due process of law. Provident Inst. for Savings v. Jersey City, 113 U. S. 506–514, 5 Sup. Ct. 612 [28 L. Ed. 1102]."

It is true that the statute under review in that case expressly provided that liens should be limited in amount to the contract price, but that fact does not impair the reasoning of the court as applicable to our Constitution as interpreted by this court. Judge Lurton's opinion is supported by citations to the rulings of courts of different states in cases involving interpretation of statutes providing for liens which attach without respect to the indebtedness of the owner to the contractor.

The weight of authority is in favor of the validity of statutes and constitutional provisions like our own, and in this behalf respondents have cited the following cases which amply support their views: Henry v. Evans, 97 Mo. 47, 10 S. W. 868, 3 L. R. A. 332; Mallory v. La Crosse Abattoir Co., 80 Wis. 170, 49 N. W. 1071; Smith v. Newbaur, 144 Ind. 95, 42 N. E. 40, 1094, 33 L. R. A. 685; Hightower v. Bailey, 108 Ky. 198, 56 S. W. 147, 49 L. R. A. 255, 94 Am. St. Rep. 350; Laird v. Moonan, 32 Minn. 358, 20 N. W. 354; The Victorian, 24 Or. 121, 32 Pac. 1040, 41 Am. St. Rep. 838; Barrett v. Millikan, 156 Ind. 510, 60 N. E. 310, 83 Am. St. Rep. 220.

[5] To the contention that the appellant, who is the owner of the property, is entitled to relief in equity notwithstanding its failure to file the bond at the time indicated by the statute, respondent cites the case of Hammond Lumber Co. v. Willis, supra, and Roystone Co. v. Darling, supra, where it was held that the failure to file the building contract and bond as provided by section 1183, Code of Civil Procedure, entitled each lien claimant to a lien against the property to the full amount of the materials used or the labor expended thereon less any credits justly to be made in favor of the owner or contractor. We can see no method distinguishing this case from the Hammond Lumber Company Case. The fact that the contract was tardily filed in this case and not filed at all in the other case makes no difference. But although the failure to file the building contract in this case subjects appellant Bradley Company to a lien upon its property for the full amount due from the plaintiffs the Bradley Company has its remedy against the surety company for the difference between the full amount due plaintiff and the fund in the hands of the owner, provided such amount shall not exceed the penal sum of the surety company's bond. In this connection it is to be noticed that the bond by its terms placed an obligation upon the surety to protect its principal from all liens against its property in excess of the contract price, even if section 1183, Code of Civil Procedure, should be declared unconstitutional.

That part of the judgment in the appeal known as "Sacramento No. 2503" which exonerates the National Surety Company from all liability is reversed, with directions to the superior court to enter judgment in accordance with the views herein expressed. That part of the judgment from which the Bradley Company appeals is affirmed.

We concur: HENSHAW, J.; VICTOR E. SHAW, Judge pro tem.

(176 Cal. 610)

BERTON v. ALL PERSONS, etc.
(S. F. 6873.)

(Supreme Court of California. Dec. 7, 1917. Rehearing Denied Jan. 3, 1918.)

1. BOUNDARIES 🔑33 — DESCRIPTION—HIGHWAY.

The presumption created by Civ. Code, §§ 831, 1112, that a landowner owns the fee to the middle of the street, is overcome where the deeds from the original platter conveyed only to, and along, the street line.

2. EASEMENTS 🔑58(1) — CONVEYANCE OF PLATTED LAND—OBSTRUCTIONS.

Where the owner of land platted it with a cul-de-sac marked "F. Place," and conveyed with reference to the plat, retaining the fee, he could not obstruct the "place" whether a public highway or a private easement.

3. DEDICATION 🔑19(5) — REQUISITES—SALE WITH REFERENCE TO PLAT.

Where abutting lands were conveyed with reference to a recorded plat showing a cul-de-sac marked "Frank Place," but the deeds did not describe such passageway except one which called it a private alleyway, there was a dedication.

4. QUIETING TITLE 🔑44(2)—ADMISSIBILITY OF EVIDENCE.

In an action to quiet plaintiff's title in an alleged public street, a deed by which the platter had conveyed his interest in the street to the abutting owners is admissible, where the platter had not previously conveyed his fee title to the street.

5. QUIETING TITLE 🔑52—MCENERNEY ACT —JUDGMENT—CONCLUSIVENESS.

Action to restore records destroyed by public disaster, and to quiet title, brought under the McEnerney Act (St. 1906, Ex. Sess. p. 78), is in rem, and the judgment therein if valid on its face is absolutely conclusive upon all private rights.

6. STATUTES 🔑233—CONSTRUCTION AS BINDING STATE—PRESUMPTIONS.

Since a state becomes subject to its own laws only by its own grace, its submission is never inferred, but must be shown expressly or by fair intendment.

7. QUIETING TITLE 🔑52—MCENERNEY ACT—JUDGMENT—CONCLUSIVENESS—"PERSON."

"Persons," as used in the McEnerney Act, making judgment in action to restore records destroyed by public disaster, and to quiet title conclusive on all persons, does not apply to the state, which is not a person, nor to the city and county of San Francisco, so as to determine public rights in a dedicated street; such corporations being in that regard representative of the state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Person.]

8. QUIETING TITLE 🔑44(2)—EVIDENCE—ADMISSIBILITY.

Judgment roll under McEnerney Act in action to restore records destroyed by public disaster and to quiet title is not admissible against city and county of San Francisco in subsequent action to quiet title.

In Bank. Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

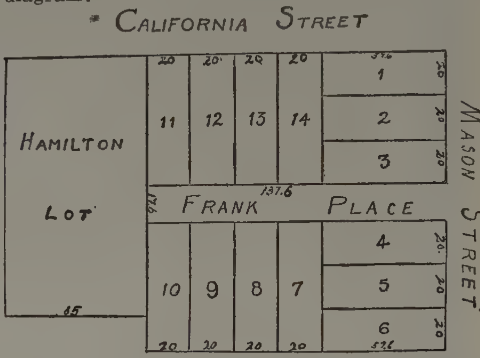
Action to quiet title by Marie E. E. Berton against all persons claiming any interest in, or lien upon, the real property herein described, or any part thereof, City and County of San Francisco, Mary Hamilton, and the Anglo-American Securities Company. Judgment for defendants named, and plaintiff appeals. Affirmed. On rehearing in bank. Affirmed.

Harding & Monroe and J. R. Pringle, all of San Francisco (Robert H. Borland, of San Francisco, of counsel), for appellant. Percy V. Long, N. J. Manson, Dorn & Dorn & Savage, and Theodore J. Savage, all of San Francisco, for respondents. Burrell G. White, Stoney, Rouleau, Stoney & Palmer, and Garret W. McEnerney, all of San Francisco, amici curiæ.

PER CURIAM. The above-entitled cause was heard in department, and the following opinion and decision handed down:

"The action was to quiet title. The appeal is from the judgment given in favor of defendants and against plaintiff.

"The common source of title was in Edward Franklin. He plotted his land, dividing it into numbered lots as shown by the accompanying diagram:



"Frank place is thus shown as a cul-de-sac, extending to and abutting on the land of Hamilton, which land Franklin did not own. In 1853 Franklin began the sale of these lots. The first was of a lot described by metes and bounds, and further described as 'subdivision No. 4 of said 50-vara lot No. 596 * * * as per plan annexed.' Annexed to this deed and recorded with it was the diagram, plot or plan as herein delineated, saving that the Hamilton lot was not thereon indicated. Thereafter Franklin conveyed all of the other lots to various grantees, in each case describing the portion conveyed by the lot number. The first of these deeds made reference to Frank place as 'a private alleyway.' In no other deed was there any such designation. By successive conveyances Franklin divested himself in terms of title to all of the 14 lots. Thereafter, in 1864, he made a deed to Lacy in which, declaring himself to have been the owner of this 50-vara lot No. 596, and reciting that he had at various times sold to divers persons subdivisions of this vara lot fronting on a street or place called 'Franklin Place,' he remised and released unto Lacy and other owners and holders of portions and subdivisions of vara lot No. 596, fronting on Frank place, all his right and title to Frank place 'to be used and kept open as a public street and highway and for no other use whatever.' Frank place was continuously kept open and used as a public street until plaintiff acquired title to lots 9, 10, 11, and 12, when she proceeded to inclose that portion of Frank place fronting her lots by bulkheading across Frank place along the extension of the easterly line of her lots 9 and 12. She followed these obstructions with this action. The defendants are the city and county of San Francisco, insisting that the land in controversy is one of its public streets; the defendant Hamilton urging the same contention, and being especially interested by reason of the location of her own lot, and the Anglo-American Securities Company owning a lot fronting on Frank place and immediately adjacent upon the east to plaintiff's land.

"Appellant's first and most serious contention is over the introduction in evidence against her objection of the deed by Franklin to Lacy. The injury caused to appellant's case by the introduction of this deed, if Franklin at the time he made it had no title in Frank place which he could thus dedicate, is of course apparent. Appellant's contention is that he had no such title. Her argument in this behalf is based upon the language of section 831 of the Civil Code, to the effect that 'an owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown,' and section 1112 of the Civil Code, to the effect that 'a transfer of land bounded by a highway passes the title of a person whose estate is transferred to the soil in front to the center thereof unless a different intent appears from the grant.' The only California case which appellant cites is Masterson v. Munro, 105 Cal. 431, 38 Pac. 1106, 45 Am. St. Rep. 57, which simply announces the indisputable proposition that where the description in the deed to the grantee is of a numbered lot of land according to the official map of the city, and the deed contains a further description by metes and bounds, courses and distances, which latter description is in conflict with the measurements and dimensions of the lot number, the latter will control. The argument, supported by citations of authority from courts other than our own, is then advanced that, treating these descriptions as merely descriptions by lot number, the presumption will arise, in accordance with the sections of the Code above quoted that the conveyance was made of each lot by lot number and carried title to the middle of Frank place. Appellant is driven to invoke this rule of construction because the facts are that in each of the deeds which Franklin made he carried out a description by metes and bounds, and the side lines of Frank place are in each instance given as a boundary. Thus, 'to the northerly line of Frank place and easterly along said line.'

[1] "The decisions of our court are to the effect that while the presumption declared by the Codes will in all proper cases be given effect, it is one which in many ways may be rebutted, and one of the specific ways in which it is declared that it is rebutted is by a description precisely such as the grantor Franklin made in these deeds. Thus, where the description read, 'thence along the eastern line of Sacramento street 150 feet,' this court declared, 'It is very clear, therefore, that the parties to the instrument intended that the lot should run up to the eastern line and not to the middle of the street.' Severy v. C. P. R. R. Co., 51 Cal. 194. See, also, Macadamizing Co. v. Williams, 70 Cal. 534, 12 Pac. 530.

[2] "Moreover, a reliance by appellant upon these Code sections must necessarily result in a surrender of her case, for the presumption which extends title to the middle of a street or highway necessarily presupposes the existence of such street or highway, and if such street or highway therefore was dedicated and does exist, plaintiff has absolutely no right to obstruct it, and since the whole controversy is over her right to obstruct it, we are justified in assuming that a decree of a court that she owns the naked fee, subject to the easement of a highway, or even of a private way, would be of little value. For whether considered as a public highway or a private way, the rights of all the abutting property owners are so well defined as to forbid the thought that their use of this way could be interfered with. Williams v. Los Angeles Ry. Co., 150 Cal. 594, 89 Pac. 330; Petitpierre v. Maguire, 155 Cal. 242, 100 Pac. 690.

[3] "So far as we have proceeded with this discussion it has remained a matter of indifference whether Frank place was in law a public street or a private way. But no doubt can be entertained that it is a public highway of the city and county of San Francisco, and this for the following reasons: But one of the deeds—and that the first one—made by Franklin spoke of Frank place as a private way. The others are silent. He recorded a map showing this street, and sold his lots by descriptions running along the lines of this street. Under these sales, for the reasons above given, he still retained in himself the fee of Frank place, subject to the easement. His recording of this plat and the selling of his lands by specific reference to it, accomplished a complete dedication or offer of dedication which was accepted by use of the public. Stone v. Brooks, 35 Cal. 489; Archer v. Salinas, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145; San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405; Smith v. City of San Luis Obispo, 95 Cal. 463, 30 Pac. 591; Los Angeles v. McCollum, 156 Cal. 148, 103 Pac. 914, 23 L. R. A. (N. S.) 378; 3 Dill. Mun. Corp. (5th Ed.) § 1079.

[4] "Up to this point, then, we have the case of a public highway with a fee to the soil, subject to the public use, in Franklin. Thereafter he conveyed his fee to the respective lot owners in proportion to their ownership of the lots fronting on Frank place, the effect of which was simply to give this plaintiff title to such portion of Frank place as fronts her lots, subject to the easement of the public highway. Such being the unquestioned condition of the titles, it was not error for the court to admit the deed in controversy, and all other asserted errors growing out of the introduction of ordinances and maps and judgment rolls require no consideration."

In appellant's petition for hearing before the court in bank which followed, the very just complaint was made that the department had omitted to discuss and to pass upon the asserted error of the trial court in refusing to admit in evidence a judgment roll in an action previously brought by the plaintiff under the McEnerney Act, by the judgment in which action, which had become final, the title of appellant to the land in dispute had been quieted against all the world. Upon this showing a hearing before the court in bank was ordered primarily for a consideration of this ruling of the trial court in refusing to admit this judgment roll in evidence.

[5] The McEnerney Act is drafted as its very title imports for the twofold purpose of restoring records of title destroyed by public disaster as in the fire succeeding the earthquake of April, 1906, in San Francisco, and, second, to quiet the title of the plaintiff or petitioner after such restoration. It is an action in rem. Title, etc., Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199; Hoffman v. Superior Court, 151 Cal. 386, 90 Pac. 939. An inspection of the judgment roll offered in evidence discloses: First, that the city and county of San Francisco was not named therein as one of the persons, parties, or corporations claiming an interest in the property, and that, therefore, there was nothing in the action to bring directly to the attention of the authorities of the city and county of San Francisco the fact that the city's rights were or might be involved. Second, it is made to appear from the evidence taken by the court upon the question of the right to introduce this judgment roll that the

city and county of San Francisco did not appear in that action: "The Court: The city and county made no claim? Mr. Pringle: No, your honor." Third, that in plaintiff's affidavit declaring the names of the persons whom affiant knew or believed to claim an interest in the property no mention is made of the city and county of San Francisco. In the present action the city and county of San Francisco did appear by answer asserting its rights in the disputed property as a public highway of the city.

It is apparent, therefore, that the binding and conclusive force of the earlier judgment as against the city and county of San Francisco must come, if it exists at all, from the fact that a judgment under the McEnerney Act, valid on its face, is a judgment in rem and so "binding on the whole world," unless and until set aside under familiar equitable principles.

That the judgment here offered is valid upon its face cannot be disputed. As little may it be questioned but that such a judgment is conclusive upon all private rights and so is conclusive against all the rights of private persons, individuals, associations, and corporations whether in the judgment named or unnamed. Thus beyond question this previous judgment was binding upon all the private litigants in the present action.

[6] It is to be considered, however, what may be its binding force and effect upon the state itself and upon the state's public agencies and mandatories such as for some purposes municipal corporations always are. In brief, our inquiry is, What was the effect of this previous judgment upon the city and county of San Francisco, present and objecting to its introduction as an estoppel against its own claim? Law is a rule of conduct dictated by the superior, the state, for the conduct and control of its people. It is only by its own grace that the state ever becomes subject to the operation of its own laws, and while in later governmental development the state frequently makes declaration that it will submit its own rights to determination in its own or other courts, yet as such declarations are always in the nature of impairments of the sovereign power, this submission of the state is never inferred in favor of the private litigant, but must be found either actually expressed in an act or by fair intendment and interpretation to belong in the act. It is unnecessary to cite illustrations of this. They are too familiar. Suffice it to refer to the fact that title by adverse possession as against the state can only be secured under such permissive law. The mechanics' lien law of universality in its operation does not apply to the land and buildings of the state.

[7] A reading of the McEnerney Act discloses not only a failure by the state to declare itself bound by decrees so obtained, but makes manifest that the statute was dealing only with the private rights of private persons. Giving to "persons" its broad and indubitable meaning the statute was dealing with the private rights of individuals, associations, copartnerships, and corporations other than public agencies acting in their public capacity. A sovereign state is not a person.

Certain considerations briefly stated must serve to confirm this view. Sections 749, 750, and 751 of the Code of Civil Procedure were the law of this state before the adoption of the McEnerney Act. A reference to the language of these sections and to the language of the McEnerney Act will disclose that in some respects the latter act carefully followed the language of the earlier sections of the Code dealing, as does the McEnerney Act, with the determination of adverse claims to real property and to the quieting of title. In section 751 it is declared that a judgment so obtained against persons known and unknown "shall have the effect of a judgment in rem except as against the state of California and the United States." The McEnerney Act was passed to enable private owners to clear up the multitudinous questions that inevitably arose by the destruction of the records of their titles, for in this state the utmost dependence in all land transactions had come to be placed upon such records. In its essence it is a private statute taking on its unquestioned public character from the very multitude of private interests which were involved. Nothing in the language of the statute even conduces to the belief that it was designed that claims held by public agencies and public mandatories for the sake of the public, as in the matter of highways, parks, wharves, and the like, would ever be determined in such an action, at least, without notice to the agencies charged with the duty of protecting the public rights. In this sense the city and county of San Francisco is a representative of the state. The state's exclusion from the scope of such judgments is the exclusion of the city and county of San Francisco. We do not mean here to be understood as saying, for we do not decide, that such an agency may not be brought in by appropriate pleading, and that so brought in the conflicting rights may not be heard and determined. What we do hold is this, that unless those rights have been so heard and determined the judgment in rem rendered will not be held to include them nor the trustee or agency charged with the duty of maintaining and upholding them.

We think this to be a perfectly sound enunciation of the underlying legal and equitable principles involved, but, in addition, the argument of inconvenience has its force. It would open the door upon the one hand to great frauds, upon the other hand, to great labor and expense upon the part of municipalities, if under circumstances such as here presented, such a decree could deprive without the slightest notice to the municipality, and without anything other than the constructive notice to put it on its guard, a city of its public park, of a portion of its streets, or of a section of its water front; while to avoid this, if such were the law, would entail the onerous labor and expense of an examination of every pleading in every action brought under this act.

[8] It is concluded, therefore, that while as between these private litigants the judgment roll was admissible as a determination by the estoppel of a judgment of their private rights pro and con over the private rights of way, that as against the city and county of San Francisco contending for the existence of a public highway the judgment was without force and was properly refused admission in evidence, and as this conclusion, for the reasons given in the department opinion above set forth, is determinative of the question here in controversy against the contention of appellant, and as the other propositions advanced for reconsideration before the court in bank have been adequately and satisfactorily treated in the department opinion, the judgment appealed from is affirmed.

(34 Cal. App. 576)

GEORGE COPLE CO. v. HINDES.
(S. F. 7509.)

(Supreme Court of California. Nov. 6, 1917.)

1. Fraud ⟹43—Exchange of Property—Action for Damages—Sufficiency of Complaint.

A complaint in an action for damages for defendant's fraud and in exchange of property, alleging that the building conveyed was erected upon a grade below the established official grade of San Francisco, that defendant concealed the fact that it was built below such grade, and that it was six inches below the curb of the street as established by the board of public works which under the charter had control of the grades of public streets, was sufficient as against a special demurrer that the complaint did not show by what authority the board could establish any grade other than street grades, since, the charter of the city of San Francisco being a state law, it was not necessary to plead its terms to show such authority.

2. Fraud ⟹47—Complaint—Damages.

The complaint, specifically alleging that to cure defects in the construction of the building's basement floor would cost $3,430, that to raise it to the official grade would cost $5,203, and alleging other matters out of which the existence of general damages would necessarily arise, and that plaintiff was damaged in the amount of $10,000, was not demurrable on the ground that it did not show how plaintiff had been damaged in the sum of $10,000 or in any other sum, as the necessary inference was that all damages over the alleged special damages were general damages.

3. Fraud ⟹59(2)—Measure of Damages.

The measure of damages in an action for fraud and deceit in the exchange of properties is the difference between the actual value of what the defrauded party received and the value which he would have received had the representations been true.

In Bank. Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by the George Cople Company against Edward B. Hindes. Judgment for defendant, which on plaintiff's appeal was reversed, with instruction to overrule the defendant's demurrer, and defendant petitioned the Supreme Court for a transfer to and a hearing in that court. Petition denied.

The following is the opinion of Richards, J., in the District Court of Appeal, with whom Lennon, P. J., and Kerrigan, J., concurred:

This is an appeal from a judgment against the plaintiff after an order sustaining the defendant's demurrer to the plaintiff's second amended complaint, the plaintiff having declined to further amend its pleading.

The action is one for the recovery of damages for the alleged fraud and deceit of the defendant occurring in the course of an exchange of real properties between the parties to the action. The property which the plaintiff received in such exchange consisted of a piece of real estate in the city of San Francisco upon which a building had been erected prior to said exchange. The complaint undertakes to set forth circumstantially and in detail the particulars wherein the alleged fraudulent misrepresentations and concealments of the defendant consisted, and it is at certain of these averments that the special demurrer of the defendant is aimed.

[1] The complaint alleged that the building which the plaintiff received from the defendant "was erected upon a grade below the official grade theretofore established by the board of public works for said Sixth street for the erection of said building thereon," and further alleges, as one of the specifications of fraud, "that defendant concealed from plaintiff the fact that the building was built far below the official grade required by the building laws of the city and county of San Francisco." It is averred in this connection that the building was found to be a mean depth of six inches below the curb line of the street as established by the board of public works; and it is also alleged that the board of public works has control of the grades of public streets by virtue of its powers derived from the charter of the city. The special demurrer aimed at these allegations was that "it cannot be ascertained therefrom by what authority the board of public works therein mentioned established, or could establish, any grade other than grades upon which streets must be constructed." We are of the opinion that the complaint was sufficiently definite to avoid this ground of demurrer. The board of public works of the city of San Francisco derives its powers from the charter of said municipality, and, the charter being a state law, it was not necessary to plead its terms in order to show that the board had the authority it is alleged to have exercised in the establishment of the official grade of Sixth street, and we think it otherwise sufficiently clear that the gravamen of the plaintiff's complaint in regard to this particular charge was that the building had been erected below the official grade of the street, which fact had been concealed from the plaintiff by the defendant in making the exchange in question. Whether such concealment was actionable must, of course, depend upon the proofs at the trial of the cause.

[2] The other ground of special demurrer urg-

ed by the respondent before the trial court was that it could not be ascertained from the plaintiff's complaint how the plaintiff had been damaged in the sum of $10,000 or any other sum. The complaint in this behalf alleged that to cure certain alleged defects in the construction of the basement floor of the building would cost $3,430, and that to raise the building to the official grade would cost $5,203. These are items of special damage, and are therefore specifically set forth in the complaint, and it is also and further alleged therein that the plaintiff has been damaged in the sum of $10,000, for which sum judgment is sought. The respondent adds together the two above specified items of special damage, and finds that they aggregate only $8,633, and hence argues that an uncertainty arises out of the fact that the plaintiff alleges his total damages to be $10,000. But no such uncertainty exists. The complaint alleged certain matters out of the existence of which general damages would necessarily arise. It was not necessary to specify these in the complaint; they were covered by the general averment of the prayer; and the fact that the items of damage which were required to be specifically averred did not aggregate the total damages alleged to have been sustained created no uncertainty in the complaint, since the necessary inference was that all of the damages claimed by the plaintiff above the aggregate of the alleged special damages were general damages, and recoverable as such. We are therefore of the opinion that in so far as the general order of the trial court is to be construed as sustaining the special demurrer of the defendant, the court was in error.

It is, however, contended by the respondent that if the order of the court sustaining his demurrer can be justified upon any of the grounds alleged therein, this appeal must fail. There is no doubt as to the correctness of this position; but in order to sustain the ruling of the trial court, the respondent must succeed in showing that his general demurrer was good.

[3] The only objection urged against the sufficiency of the complaint as stating a cause of action is that the complaint fails to show that the property which the plaintiff received in the exchange was actually of less value than the property which it gave in the exchange. It was the contention of the respondent in the trial court and his contention here that the rule and measure of damages in cases of this character is such that a plaintiff is only entitled to recover the difference between the actual value of that which he parts with and the actual value which he receives under the cotnract or exchange, and that this plaintiff, in failing to bring the averments of his complaint within this rule, has failed to state a cause of action. The difficulty with respondent's position is that the Supreme Court of this state, in the recent case of Hines v. Brode, 168 Cal. 510, 143 Pac. 730, has seen fit to declare a different rule of damages in cases of this character than that for which the respondent contends, viz.: "That the measure of damages which a person is ordinarily entitled to recover in an action for deceit in the sale of property is the difference between the actual value of the property and its value had the property been as represented."

It is conceded that the plaintiff's complaint is sufficiently tested by this rule, and since the above statement of the rule in Hines v. Brode, supra, is in our opinion not dictum in that case, it is binding upon this court, and hence an extended review of the cases cited by the respondent from other jurisdictions in an effort to overthrow the rule would serve no useful purpose.

Tested by the foregoing rule the plaintiff's complaint was sufficient as against the defendant's general demurrer, and hence the order of the court sustaining the same was error.

The judgment is reversed, with instructions to the trial court to overrule the defendant's demurrer on all the grounds urged therein.

John Ralph Wilson, of San Francisco, for appellant. Perry Evans, of San Francisco, for respondent.

PER CURIAM. The petition for transfer to, and hearing in, this court is denied.

The opinion of the District Court of Appeal declares the law of this state, with respect to the measure of damages in an action for deceit in the sale or exchange of property, to be settled by our decision in Hines v. Brode, 168 Cal. 507, and cases there cited. The rule thus laid down is that the party defrauded is entitled to recover the difference between the actual value of what he received and the value which it would have had if the representations had been true. While the authorities in other jurisdictions are conflicting, the weight of decision, and, we think, the better reasoning, support this rule.

There would be no occasion to say more on the subject, but for the fact that the respondent contends, with some justice, that our own decisions on the point are not in harmony. He calls attention, in particular, to Cross v. Bouck, 53 Cal. Dec. 701, decided in this court since the case of Hines v. Brode. In Cross v. Bouck it was held that on an exchange of property fraudulently induced, the plaintiffs, who had received nothing of value, might recover the actual value of the consideration transferred to the defendants. On the facts of the case, as it was presented, the rule was proper. One who has, by fraud, been induced to part with property, receiving nothing in return, must be entitled to recover at least the value of what he has thus given. He is certainly damaged to the extent of the consideration thus obtained from him. And this was all that was sought by the plaintiffs in Cross v. Bouck. They did not ask for the more liberal award which they might have claimed upon showing the value which would have attached to the property they bargained for, if the facts had been as represented. The opinion, like all opinions, must be read in the light of the case presented for decision. The expressions of the court in Cross v. Bouck, while not so carefully guarded as they might have been, were not intended to throw any doubt upon the soundness of the rule established in this state by Hines v. Brode and earlier cases.

177 Cal. 194

HEAD DRILLING CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

(S. F. 8257.)

(Supreme Court of California. Jan. 9, 1918. Rehearing Denied Feb. 7, 1918.)

1. MASTER AND SERVANT 🔑376(1) — INJURY TO SERVANT — WORKMEN'S COMPENSATION — "FURTHER DISABILITY."

Under Workmen's Compensation Act (St. 1913, p. 283) § 12, imposing upon the employer the burden of compensating his employés for disability caused by personal injury sustained by accident only when such injury happens in the course of the employment and arises out of it, and section 16, subsec. "c," as amended by St. 1915, p. 1085, permitting compensation for "further disability" only when the original injury has caused the further disability, a "further disability" caused by the employé's negligence, and not happening in the course of a subsequent employment by the same employer, and arising out of it, is not compensable.

2. MASTER AND SERVANT 🔑376(1) — WORKMEN'S COMPENSATION—INJURY TO SERVANT—FURTHER DISABILITY.

A subsequent accident resulting in "further disability," where not the result of lack of ordinary care of the injured employé, may be regarded as a part of the proximate consequences of the original accident within Workmen's Compensation Act, § 16, subsec. "c," as amended by St. 1915, p. 1085, as to compensation for "further disability."

3. MASTER AND SERVANT 🔑417(7) — WORKMEN'S COMPENSATION — FINDINGS OF COMMISSION—REVIEW.

A finding of the Industrial Accident Commission will not be disturbed where it cannot be said as a matter of law that it is without evidence to support it.

In Bank. Proceedings before the Industrial Accident Commission by W. H. Scott, employé, against the Head Drilling Company, employer, and the Georgia Casualty Company, insurer. Award for employé and employer, and insurance carrier makes application for a writ of review. Award affirmed.

Redman & Alexander, of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

ANGELLOTTI, C. J. This is a proceeding to review an award in favor of one W. H. Scott for injuries due to accident on February 24, 1916, in the course of and arising out of his employment, against the Head Drilling Company, his employer, and the Georgia Casualty Company, insurer of the employer. It was concluded by the commission that the disability of Scott, continued up to and still existed at the time of judgment by the commission, and the award was for $243.12 as the balance due as disability indemnity to September 15, 1916, and for the further sum of $15.56 per week from that date until the termination of the disability or the further order of the commission, not to exceed in all 240 weeks. The award is attacked solely on the ground that any disability beyond the period of 14 weeks from March 10, 1916, was in fact due to a second accident and injury which did not occur in the course of Scott's employment, and on account of which the employer is in no way responsible, and that the commission had no jurisdiction to award compensation for the disability in so far as it was caused by the second injury.

On February 24, 1916, Scott, while removing a sprocket from an engine, was struck by a flywheel, sustaining a fracture of several ribs and a Pott's fracture of the left leg. The fracture of the leg was further described in the findings as a spiral fracture, and the evidence disclosed that the fibula was badly comminuted. He was taken to a hospital, where he remained till April 12th, being attended by a doctor who was paid by the insurance company. There appears to be no question as to the very serious nature of the fracture, the difficulty of setting the bones in place and in thereafter holding them in place until a permanent union was effected, and the slowness of complete recovery. According to some of the evidence, a recovery within four months "would be very good." After reducing the swelling and removing "several little fragments" of bone, the doctor "tried to get the bone lined up in proper apposition," and "used kangaroo tendon to support the broken fragments in place," and put the leg from the toes to just below the knee in a plaster cast. At the end of four or five weeks the cast was split and opened for "massage and manipulation," but still used as a protection, being held by bandages over it. An X-ray taken by the doctor indicated, according to his testimony, that the bones were "in good position." There is some uncertainty in the evidence of the doctor as to the exact date when this X-ray was taken. We assume it was after the cast was opened, but there is testimony that this was some little time before Scott's discharge from the hospital. About the 12th day of April he was discharged from the hospital, the doctor deeming it best that he should begin to use the leg, but still supervising the case. He went to his home, the cast still on the leg, using crutches. On the evening of April 15th what is called the "second accident" occurred. Scott testified that he was sitting at the dining room table, and arose to get some kodak pictures that were on a wardrobe shelf just back of him. He said:

> "I raised up and turned around like this and got the pictures, and when I turned back there was a wrinkle in the rug that straightened out under the good foot. I didn't have to take a step, but when the wrinkle straightened out I caught my hand on the table and chair, and this heel struck the pedestal of the table or a chair. I don't know which it was. I never fell. I never fell to the floor. It hurt me quite a bit for about an hour, and after that I didn't realize any more pain, and I slept all right that night."

An X-ray taken within two or three days thereafter showed that the fragments of bone were not entirely in place.

The Accident Commission made the following finding:

> "That during the course of the employé's convalescence from his injuries, and while his fractured leg was still in a cast, it was found, on or about April 15, 1916, that the broken portions of the fibula, previously placed in apposition for healing, had separated, necessitating further surgical treatment and prolonged disability; that the danger of such separation from natural causes in a fracture of this type, a spiral fracture, is very great and of frequent occurrence, with or without any immediate exciting cause; that the danger of such subsequent separation is to be anticipated in fractures of this type and is a natural consequence of the original injury; that the evidence is insufficient to show that the separation was due to any substantial independent intervening cause or to any independent intervening cause; but that said separation was instead a proximate and natural result of the original injury."

It is earnestly argued that there is no support in the evidence for this finding in so far as it establishes that the separation of the broken portions of the fibula was not due to any independent intervening cause, but was in fact a proximate and natural result of the original injury. Of course, the basis for this contention is the claim that the evidence establishes without conflict that the incident of April 15th caused the displacement. There certainly is strong support for this theory in the record, and it may be that the claim is well based, but, if this be so, we do not think it disposes of the case. We are of the opinion that a subsequent incident or accident aggravating the original injury may be of such a nature and occur under such circumstances as to make such aggravation the proximate and natural result of the original injury. Whether the subsequent incident or accident is such, or should be regarded as an independent intervening cause is a question of fact for the commission, to be decided in view of all the circumstances, and its conclusion must be sustained by the courts whenever there is any reasonable theory evidenced by the record on which the conclusion can be upheld. The testimony of Scott, as to exactly what occurred on the evening of April 15th must be accepted here as true. According to this, there was nothing but the accidental striking by Scott of the heel of the foot of the injured limb against the pedestal of the table or a chair, done in the attempt to save himself from a fall, something to have been reasonably anticipated when he was discharged from the hospital in the condition in which he then was, and all of which happened without any negligence on his part. Surely, if such a thing might cause a displacement of the bones, he was in no condition to be called on to go about without an attendant, and it was reasonably to be anticipated that if he was left thus to care for himself, such a thing would occur. We have already noted the serious nature of the fracture, the length of time required to effect a permanent reunion of the bones, and the extreme difficulty of keeping the bones in place and preventing displacement. Under all the circumstances it appears to us that it might well be concluded, as was concluded by the commission, that such an incident as was described by Scott was not an independent, intervening cause, within the meaning of the law, but that the striking of the heel and consequent separation of the bones, which had been partially, but not permanently, united, was simply a proximate and natural result of the original injury. Our conclusion is not at all opposed, in our opinion, to what is said in Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 Pac. 24. The question there was whether the commission is authorized by the act to award compensation to the employé "for an additional injury sustained by him afterward, not in the course of his employment, by an accident or act which aggravates the first injury and prolongs the disability." The answer was that it had no such authority if the subsequent injury "is neither the natural nor the proximate result of the injury received in the course of the employment." It was fully recognized in that case, we think, that the subsequent injury may be the proximate result of the injury received in the course of the employment, and compensable under the act, and the finding to that effect in this matter has sufficient support in the evidence.

The award is affirmed.

I concur: LAWLOR, J.

SHAW, J. (concurring). [1-3] The Workmen's Compensation Act imposes upon the employer the duty and burden of compensating his employé for a disability caused by a personal injury sustained by accident, only when such injury happens in the course of the employment and arises out of it. Section 12. Compensation for a "further disability," under subsection "c" of section 16, as amended in 1915 (Stats. 1915, p. 1085), is allowed only when "the original injury has caused further disability." It follows that a "further disability" not caused by the original injury, but by the employé's own negligence, and not happening in the course of a subsequent employment by the same employer, and arising out of it, is not compensable at all under the act. This being so, the award for the further disability here under review can be sustained only upon the ground that the subsequent accident and resulting displacement of the fractured bone was not the result of a lack of ordinary care on the part of the injured employé. An injury so occurring subsequently may be regarded as a part of the proximate consequences of the original accident. The finding of the commission is in effect a finding that at the time of the second accident Scott was not guilty of a lack of the ordinary care which reasonably prudent persons in his condition exercise for their own safety from injury. I think it cannot be said, as matter of law, that such finding is without any evidence to support it. For these reasons I concur with the conclusion of the Chief Justice.

We concur: SLOSS, J.; MELVIN, J.; WILBUR, J.

(177 Cal. 190)

POAK v. PACIFIC ELECTRIC RY. CO.

(L. A. 4114.)

(Supreme Court of California. Jan. 9, 1918. Rehearing Denied Feb. 7, 1918.)

1. Carriers 🔑315(4)—Injuries to Passenger—Pleading and Proof—Variance.

Where a complaint alleged that defendant negligently started a street car while plaintiff was on the car step getting off, there was no fatal variance with a finding that the car started while plaintiff was in the car, but that she went on out and stepped off, thinking the car stationary, under Code Civ. Proc. § 469, relating to review on appeal.

2. Carriers 🔑303(4)—Injuries to Passenger—Starting of Car—Duty of Conductor.

Where a conductor rings to go on while in the front of a street car without looking back to see if any one was rising to get off, he is negligent.

3. Carriers 🔑347(11)—Injuries to Passenger—Leaving Moving Car—Contributory Negligence—Question of Fact.

Whether an old woman defective of sight and hearing was guilty of contributory negligence in stepping off of a moving street car, *held*, under the evidence, a question of fact for the trial court, in the absence of a jury.

Department 1. Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Mary S. Poak against the Pacific Electric Railway Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Karr, R. C. Gortner, and A. W. Ashburn, all of Los Angeles, for appellant. Foster C. Wright, of Los Angeles, for respondent.

SLOSS, J. Action against a street railway company to recover damages for personal injuries. A jury was waived, and the court gave judgment in favor of the plaintiff for $1,000 and costs. The defendant appeals from the judgment, and from an order denying its motion for a new trial.

The allegations of the complaint, with respect to negligence, are that while plaintiff, a passenger on one of defendant's cars, was in the act of alighting, the car was started without warning or notice to her, throwing her upon the pavement of the street.

The findings are not in exact accord with these averments. In substance, the court found that the car had stopped at a street crossing, which was plaintiff's destination; that while the car was slowing down to make the stop, the plaintiff arose from her seat in the inclosed or center part of the car, and walked toward the rear platform, from which steps led to the ground. The conductor, who was at the front of the car, did not look back, and did not see that plaintiff was going out, although there was nothing to obstruct his view in her direction. He gave the starting signal, and the car started, while plaintiff was still a few feet from the exit steps. The motion of the car was gradual and even, "and was not evident to plaintiff's senses." It was dark, and the street pavement was such that it did not "afford easy suggestion, by inspection, of movement above or past it." Believing that the car was at rest, the plaintiff stepped from it after it had run about 75 feet, and was thrown violently to the street.

[1] We think, however, that there was no such variance between the facts alleged and those found as would justify a reversal of the judgment. The allegation of the complaint was that the car was negligently started while plaintiff was on the steps, and that she was thereby thrown from the car. The finding was that the car had already started before plaintiff had reached the steps, and that she was thrown to the pavement in consequence of her endeavoring to alight from the moving car, which she thought to be stationary. But the essential act of negligence was the same under either state of facts. Whether we take the theory of the complaint or that of the findings, the fault of the conductor lay in starting the car after it had been brought to a stop, and before the passenger had time to alight, as she desired to do. Whatever may have been the precise position of the plaintiff at the moment the car started, she was attempting to leave the car, and was acting in the belief that the car was and would be kept at rest. The case is not like those in which it has been held that a plaintiff who relies, in his pleading, upon the negligent starting of a car while he is attempting to alight or get on, cannot recover upon proof of an attempt to alight from or board a moving car. Chicago City Ry. Co. v. Gates, 135 Ill. App. 180; Peterson v. Metropolitan Str. Ry. Co., 211 Mo. 498, 111 S. W. 37; Patterson v. Westchester Elec. Ry. Co., 26 App. Div. 336, 49 N. Y. Supp. 796. In the cases cited, it did not appear, as it does here, that the person injured had acted in the belief, reasonable under the circumstances, that the car was at rest. There was, therefore, no ground for claiming that the injuries were due to the negligent starting of the car, which was the sole act of negligence alleged. But in the present case, although the car was moving when plaintiff left it, the negligent act upon which the court based its conclusion was still the improper starting of the car,

and this, as we have pointed out, was the very breach of duty asserted in the complaint.

It is quite plain, from a reading of the record, that the discrepancy between the pleading and the proof could not have misled the defendant to its prejudice. Under these circumstances, we would be required, under section 469 of the Code of Civil Procedure, to treat the variance as immaterial, without the necessity, even, of resorting to the liberal provision of section 4½ of article 6 of the Constitution.

[2] The contention that the court erred in holding the starting of the car to be an act of negligence is without merit. It was found that the conductor did not look toward the rear of the car before giving the starting signal, and, in effect, that he could and would have seen plaintiff moving toward the exit if he had so looked. Clearly it was his duty to take reasonable care to see whether any passenger was preparing to alight before giving the signal to start the car. Leavenworth Elec. R. Co. v. Cusick, 60 Kan. 590, 57 Pac. 519, 72 Am. St. Rep. 374; Memphis Str. Ry. Co. v. Shaw, 110 Tenn. 467, 75 S. W. 713; Birmingham Union Ry. Co. v. Smith, 90 Ala. 60, 8 South. 86, 24 Am. St. Rep. 761; Britton v. Street Ry. Co., 90 Mich. 159, 51 N. W. 276. Booth on Street Railways (2d Ed.) § 349.

[3] Nor can it be said that plaintiff was, as matter of law, guilty of contributory negligence. While it is, ordinarily, negligence per se for a passenger to attempt to alight from a moving car (Joyce v. Los Angeles Ry. Co., 147 Cal. 274, 82 Pac. 204), there may be circumstances which would warrant a different conclusion. Here it appears that the plaintiff was somewhat advanced in years, her hearing was not of the best, and her sight was slightly impaired. She did not know that the car was in motion, and the evidence warranted the conclusion that she was not at fault in failing to know this. Under these circumstances, the question whether she had been guilty of negligence was one of fact for the trial court, and the finding in her favor cannot be held to be without support.

The judgment and the order appealed from are affirmed.

We concur: SHAW, J.; LAWLOR, J.

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35 Cal. App. 394

BLAIR v. BROWNSTONE OIL & REFINING CO. et al. (Civ. 1922.)

(District Court of Appeal, Second District, California. Nov. 23, 1917. Rehearing Denied Dec. 22, 1917.)

1. DAMAGES 🔑45—BREACH OF CONTRACT—EXPENDITURES.

Where plaintiff was prevented from keeping a well-digging contract by defendant's failure to furnish necessary tools and appliances as agreed, the profits lost by plaintiff did not constitute the exclusive measure of damages, and plaintiff could recover the amount which he was induced to expend on the faith of the contract, including a fair allowance for his own time and services in the absence of any showing that such expenses were extravagant and unnecessary for the purpose of carrying out the contract, as one who has voluntarily and wrongfully put an end to a contract cannot say that the party injured has not been damaged to the amount of what he has been induced fairly and in good faith to expend.

2. WORK AND LABOR 🔑14(1)—RESCISSION OF CONTRACT—RECOVERY ON QUANTUM MERUIT.

When a party injured by the stoppage of a contract elects to rescind, he cannot recover any damages for the breach of the contract either for outlay or for loss of profits, but recovers the value of his services actually performed as upon a quantum meruit.

3. CONTRACTS 🔑313(1)—BREACH—RENUNCIATION OF CONTRACT.

Though when one party puts an end to a contract the other party cannot sue on the stipulations contained in the contract, the willful and wrongful putting an end to a contract and preventing the other party from carrying it out is itself a breach of the contract for which an action will lie for the recovery of all damages which the injured party has sustained.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Charles H. Blair against the Brownstone Oil & Refining Company and another. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Leonard B. Slosson, of Los Angeles, and Geo. E. Farrand, of Ventura, for appellants. William H. Fuller and Chas. E. Putnam, both of Los Angeles, for respondent.

WORKS, Judge pro tem. This case has been heard three times in the trial court, by a different judge on each occasion. On each of the two earlier trials judgment went for the defendant, but the judgments were reversed on appeal in each instance. Blair v. Brownstone Oil & Refining Co., 17 Cal. App. 471, 120 Pac. 41; Id., 168 Cal. 632, 143 Pac. 1022. On the trial which last took place judgment was recovered by the plaintiff. The defendant appeals from the judgment and from an order denying its motion for a new trial.

The parties entered into a contract by which Blair agreed to deepen a well for the Brownstone Company at an agreed price for each foot of increase of depth. By the contract the company bound itself to supply to Blair all tools, machinery, and appliances to be used in the performance of his work. Blair had proceeded to a certain stage of the work, when its further prosecution was stopped by the refusal of the company to furnish a certain cable needed in his operations, and which it was the company's duty to supply under the clause of the contract binding it to provide tools and appliances. Blair brought this action in two counts to recover from the company for his operations under the contract. The first count is for damages, the second for the reasonable value of the work done. The trial court determined that the same sum was due upon each of these alternative counts, and rendered judgment for the amount.

[1] Under the count for damages evidence was received of the amount of Blair's expenditures under his partial performance of the agreement, as well as evidence showing the value of his own services. The amount for which judgment was rendered is the total of these figures. No evidence was offered tending to show what profit Blair lost by reason of his cessation of work under the contract. The company contends that the only proper measure of damages in the case is the loss of profit, and that, as there was no evidence upon that point, the finding of the court that Blair was damaged in the amount for which judgment was allowed is not supported by the evidence.

[2, 3] To the proposition that the amount of profits lost is the sole measure of damages counsel cite Hale v. Trout, 35 Cal. 229; Winans v. Sierra Lumber Co., 66 Cal. 61, 4 Pac. 952; McConnell v. Corona City Water Co., 149 Cal. 60, 85 Pac. 929, 8 L. R. A. (N. S.) 1171; and Ahlers v. Smiley, 163 Cal. 200, 124 Pac. 827. These cases lay down the familiar rule that loss of prospective profits under an uncompleted contract is a proper measure of damages, but they decide nothing as to the exclusiveness of that measure. The rule which supports the judgment in this action is well expressed in United States v. Behan, 110 U. S. 338, 345, 347, 4 Sup. Ct. 81, 84 (28 L. Ed. 168), where it is said:

> "When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he cannot recover any damages for a breach of the contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a quantum meruit. There is then no question of losses or profits. But when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services. If he chooses to go further and claims for the loss of anticipated profits, he may do so, subject to the rules of law as to the character of profits which may be thus claimed. It does not lie, however, in the mouth of the party who has voluntarily and wrongfully put an end to the contract to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend (including his own services) after making allowance for the value of materials on hand; at least it does not lie in the mouth of the party in fault to say this, unless he can show that the expenses of the party injured have been extravagant, and unnecessary for the purpose of carrying out the contract. * * * It is to be observed that when it is said in some of the books that, where one party puts an end to the contract, the other party cannot sue on the contract, but must sue for the work actually done under it, as upon a quantum meruit, this only means that he cannot sue the party in fault upon the stipulations contained in the contract, for he himself has been prevented from performing his own part of the contract upon which the stipulations depend. But surely the willful and wrongful putting an end to a contract, and preventing the other party from carrying it out, is itself a breach of the contract for which an action will lie for the recovery of all damage which the injured party has sustained. The distinction between those claims under a contract which result from a performance of it on the part of a claimant, and those claims under it which result from being prevented by the other party from performing it, has not always been attended to. The party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred."

The rule thus strikingly laid down finds support in other authorities, in which further cases will be found plentifully cited upon the point. 3 Sutherland on Damages (3d Ed.) § 713, pp. 2182, 2183; Cederberg v. Robison, 100 Cal. 93, 34 Pac. 625; Holt v. United Security L. Ins. & Trust Co., 76 N. J. Law, 585, 72 Atl. 301, 307, 21 L. R. A. (N. S.) 691; Brady v. Oliver, 125 Tenn. 595, 147 S. W. 1135, 1142, 41 L. R. A. (N. S.) 60, Ann. Cas. 1913C, 376.

As the judgment is sustainable under the count for damages, it is not necessary to consider objections made by the appellant to the judgment as depending upon the other count.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

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35 Cal App. 372

BARTOLLOTTI v. POLICE COURT OF CITY OF LOS ANGELES et al.

(Civ. 2412.)

(District Court of Appeal, Second District, California. Nov. 22, 1917.)

1. Constitutional Law 🔑208(6½)—Class Legislation—Statutes.

St. 1911, p. 416, § 1, declares that persons engaged in manufacturing, bottling, and selling certain commodities, may file in the office of the secretary of state a description of the marks, names, or devices used on the receptacles in which the commodities are sold, while section 2 declares that it shall be unlawful for any person or persons, corporation or corporations, to fill with olive oil, salad oil, or any substitution therefor, or similar to olive oil, ripe or green olives, soda waters, mineral or aerated waters, porter, ale, cider, ginger ale, milk, cream, beer, small beer, lager beer, weiss beer, white beer, or other beverages, etc., any bottle, box, siphon, or keg, marked or distinguished with or by any name, mark, or device of which a description shall have been filed and published, as provided in section 1, or deface, erase, obliterate, cover up, or otherwise remove or conceal any such name, mark, or device thereon, or to sell, buy, give, take, or otherwise dispose of or traffic in the same, without the written consent of the persons or corporations whose mark or device shall be or shall have been in or upon the bottle, box, siphon, etc. *Held*, that in view of the fact that the statute not only protected persons engaged in bottling and using bottles and other similar containers for their goods, but also protected the public against adulteration of such articles, the statute was not invalid under

Const. art. 1, § 11, declaring that all laws of a general nature shall have a uniform operation, or under Const. U. S. Amend. 14, declaring that no state shall deny to any persons within its jurisdiction the equal protection of the law, the legislation not being improper as class legislation, and the statute being directed in part against the refilling of receptacles with adulterated products.

2. PROHIBITION 🔑28—SCOPE OF INQUIRY—ASSUMPTIONS.

Where the petition for a writ of prohibition to restrain prosecution under St. 1911, p. 416, relating to refilling marked bottles, showed that petitioner could have been arrested under the general statutes without any recourse to the search warrant provided for in the statute of 1911, it must be assumed that he was so arrested, and the constitutionality of the search warrant provisions need not be determined.

3. PROHIBITION 🔑20—PETITION—CONSTRUCTION.

An averment in a petition for prohibition that a search warrant was served does not show invasion of petitioner's premises for service, and cannot be so construed to sustain petitioner's contention as to the invalidity of the statute under which the search warrant was issued.

4. PROHIBITION 🔑13—NATURE OF REMEDY.

Though the proceedings under a search warrant under which petitioner's premises were invaded were illegal, prohibition is not an appropriate remedy for redress, the act already having been completed.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Petition by Frank Bartollotti for a writ of prohibition against the Police Court of the City of Los Angeles and George S. Richardson. From a judgment for respondents, petitioner appeals. Affirmed.

James W. Bell, of Los Angeles, and Noel C. Edwards, for appellant. Rose S. Phillips, Deputy City Prosecutor, and Martin E. Geibel, both of Los Angeles, for respondents.

WORKS, Judge pro tem. In this proceeding the appellant seeks a writ of prohibition restraining the respondent police court from trying him under a charge of having committed a misdemeanor in violating the provisions of a certain act of the Legislature. The respondents answered and made a motion for judgment on the pleadings, which was granted. The appeal is from the judgment.

[1] The act under which it is sought to punish Bartollotti is found at page 416, Statutes of 1911 (Deering's Gen. Laws, Act 4122). Section 1 of the act provides, to state it in general terms, that persons engaged in manufacturing, bottling, and selling certain commodities, also specifically mentioned in section 2, which is set forth below, may file in the office of the county clerk and of the secretary of state a description of the names, marks, or devices used on the receptacles in which the commodities are sold, and cause the description to be published for a certain period in a newspaper.

Section 2 of the act follows:

"It is hereby declared to be unlawful for any person or persons, corporation or corporations, to fill with olive oil, salad oil, or any substitution for, or similar to olive oil, ripe or green olives, soda waters, mineral or aerated waters, porter, ale, cider, ginger ale, milk, cream, beer, small beer, lager beer, weiss beer, white beer, or other beverages, or Worcestershire or other sauce or sauces, or with medicine, compounds, or mixtures, any bottle, box, siphon or keg, so marked or distinguished as aforesaid, with or by any name, mark or device, of which a description shall have been filed and published, as provided in section one of this act, or deface, erase, obliterate, cover up, or otherwise remove or conceal any such name, mark or device thereon, or to sell, buy, give, take or otherwise dispose of or traffic in the same, without the written consent of, or unless the same shall have been purchased from the person or persons, corporation or corporations, whose mark or device shall be or shall have been in or upon the bottle, box, siphon, or keg so filled, trafficked in, used, or handled as aforesaid. It is hereby declared to be unlawful for any person, firm, or corporation engaged in the manufacture, preparation or selling of drugs, or food products to use bottles, in bottling or packing their products that have been previously used for other purposes. Any person or persons or corporation offending against the provisions of this section shall be deemed guilty of a misdemeanor, and shall be punished for the first offense by imprisonment of not less than ten days nor more than six months or by a fine of fifty cents for each and every such bottle, box, siphon or keg so filled, sold, used, disposed of, bought, or trafficked in, or by both such fine and imprisonment; and for each subsequent offense by imprisonment not less than twenty days nor more than one year, or by a fine of not less than one dollar nor more than five dollars for each and every bottle, box, siphon, and keg so filled, sold, used, disposed of, bought or trafficked in, or by both such fine and imprisonment, in the discretion of the magistrate before whom the offense shall be tried."

In passing this law the Legislature had at least two purposes in view. One of these was to protect the owners of a certain kind of property, peculiar in character and devoted to a peculiar use, as compared with property generally. Another object was the protection of the general public from fraud, imposition, and deception. It is from both these aspects that the statute must be viewed from time to time, as we consider the various objections which are made to its constitutionality by the appellant.

It is insisted that the act is invalid because it makes it unlawful for any person to refill receptacles marked or distinguished as provided in the act, or to sell, or traffic in them, without the written consent of the person whose mark is upon the receptacle. In considering this point we are to regard the statute as one for the protection of the owners of receptacles and not as one for the protection of the general public. No argument need precede the assertion that the protection or good of the general public cannot constitutionally be made to depend upon the consent of any private individual or group of individuals.

That the statute is constitutional in that feature of it which looks to the protection of individuals is now comparatively well settled.

There are statutes upon the general subject in many of the states of the Union. Some of these have been held unconstitutional, but they have been so declared largely, but not altogether, because of differences between them and the act which is now before us. The California law is the counterpart of acts which have been passed in several of the states. Where that general form of statute is in effect it has been generally, if not always, held to be constitutional as against all grounds of assault upon it. While we speak now only of the feature of the statute designed to protect ownership in receptacles, by requiring the written consent of the owners to their use, the cases which we cite cover other objections which have been made to the constitutionality of such enactments. People v. Cannon, 63 Hun, 306, 18 N. Y. Supp. 25; People v. Cannon, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668; Commonwealth v. Anselvich, 186 Mass. 376, 71 N. E. 790, 104 Am. St. Rep. 590; Commonwealth v. Goldburg, 167 Ky. 96, 180 S. W. 68. These cases thoroughly meet the contention that the act is unconstitutional upon the ground now under consideration. That it provides for the protection of the property rights of a certain class of citizens there can be no doubt; but the classification is entirely justified for the reason that the property is of a peculiar character and devoted to a peculiar use as we have already stated. The owners of the property are entitled, therefore, in the exercise of a discretion which has been left to the legislative will, to a peculiar protection in their ownership. Commonwealth v. Anselvich, supra.

The most exhaustive, as well as one of the latest, cases on the particular subject under present discussion, as well as upon the general constitutional questions in this action presented, is Commonwealth v. Goldburg, supra. The Court of Appeals of Kentucky there said:

> "It is of course, manifest that in the enactment of this law the Legislature intended to, and did, create a class, and intended to, and did, protect this class in the use of the branded containers employed by it in its business. And to make more effective the purpose of the law, it provided means by and through which persons violating its provisions might be punished. But so far as the mere question of the authority for legislative classification is concerned, there is no room for dispute. It has been time and again settled by courts everywhere that it is competent for the Legislature to create classes and deal with these classes, both in respect to civil as well as criminal rights and liabilities, separately, the only limitation being that the classification must rest upon some reasonable difference existing between the class selected for treatment and other classes of persons or property. So that the mere fact that the Legislature may confer upon a certain class rights and privileges not enjoyed by other classes is in itself no objection to the statute unless the classification is arbitrary or unreasonable. * * * The criminal laws of the state are made up of classifications. Almost every criminal statute selects a class and treats it separately. The statutes that impose a punishment for forgery, larceny, embezzlement, destroying property, obtaining money by false pretenses, giving worthless checks, making false statements, selling mortgaged property, wrongfully converting money or property, and for selling misbranded seeds or foods, are pertinent illustrations of the right of classification and the extent to which it has been carried. So, too, this same rule of classification has been extended with equal freedom and equal authority to statutes not penal in their nature but only intended to regulate civil or contract rights and liabilities. Examples of this character of legislation are found in the banking laws, the insurance laws, laws relating to negotiable instruments, and laws regulating telephone and telegraph companies, common carriers, and the sale of foodstuffs."

In a case not cited above (Rhodes v. Sperry & Hutchinson Co., 193 N. Y. 223, 85 N. E. 1097, 34 L. R. A. [N. S.] 1143, 127 Am. St. Rep. 945), language was used by the court which is in point here, although the action was not a criminal one, but was a civil action for damages and for an injunction. It was brought under a statute of New York which provided that the portrait of any living person should not be used for advertising purposes without his consent. The court said:

> "While it appears to be conceded by counsel for the appellant that the Legislature may declare any act to be a private tort which it may declare to be a public offense, the requirement of a written consent to authorize the use of one's name or portrait by others for advertising or trade purposes is denounced as an interference with personal liberty 'without due process of law.' I am unable to see that this requirement is any more objectionable than was that in the statutes under consideration in the case of People v. Cannon, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668, commonly known as the 'Bottling Act' (Laws 1887, p. 475, c. 377, amended by Laws 1888, p. 242, c. 181). That statute declared it to be unlawful for any person to fill with beverages or medicine any marked bottle, without the written consent of the person or corporation whose mark or device had been placed upon the bottle, and it was construed to be constitutional in all respects. It would not be difficult to refer to many examples of legislation in which the right to a civil remedy was made dependent upon the absence of consent in behalf of the party claiming to be injured. Thus, the copyright laws of the United States prescribe the forfeiture of a book published in violation thereof, and permit a civil action for damages only where the publication of the copyrighted work is made 'without the consent of the proprietor of the copyright first obtained in writing signed in the presence of two or more witnesses.' Rev. St. U. S. § 4964 (U. S. Comp. St. 1901, p. 3413)."

Bartollotti contends that the act violates the provisions of section 11 of article 1 of the Constitution of the state, which reads that "all laws of a general nature shall have a uniform operation," as well as the clause of the Fourteenth Amendment to the federal Constitution to the effect that no state shall "deny to any person within its jurisdiction the equal protection of the laws"; in brief, that the act is class legislation.

In support of this general claim as to the invalidity of the act, a discussion of which has to some extent been anticipated above, Bartollotti specifies certain more particular objections. He points out that the statute is silent as to the disposition of the contents of refilled receptacles; that it is not concerned with the intent operating in the mind of one who refills them, although it makes the refilling a crime; that it is not, therefore, directed at the possible adulteration of contents; and that it is designed solely for the protection of the owners of receptacles.

If these assertions were all justly made there would be some room for the contention that the statute is class legislation, for the Legislature may not pass laws intended to protect the owners of specific kinds of property in their ownership to the exclusion of all other kinds, unless the property the owners of which are so protected is so different from property generally as to require or deserve the enactment of special laws in regard to it. This particular question we have discussed above. This law, however, was enacted partially for the purpose, as we have already stated, of protecting the public from the adulteration or imitation of a large and general class of commodities which lend themselves, with greater or less ease, to adulteration and imitation. It happens, incidentally, looking now at the act as for the protection of the public alone and forgetting what we have said above as to its features as a protection of ownership, that the venders of such commodities are by it protected in the use and ownership of the receptacles in which their wares are customarily sold. This is no objection to the validity of the statute. If the general public is protected by a statute in those matters in which the lawmaking power owes protection to the public in a due exercise of the police power, it can make no difference that the statute at the same time yields a peculiar benefit to some class or classes of persons. The commodities mentioned in the act may very well become known, and it is a matter of common knowledge that they do become known, by the coverings under which they are vended. Adulteration and imitation could therefore readily be accomplished if the receptacles were permitted indiscriminately to be reused by any but the producers of the articles which they were originally designed to cover and which they have come to be recognized by the world as actually covering. The subject-matter of the act bears a distinct and appropriate relation to its purpose to protect the public. In re Griffenhagen, 18 N. Y. Supp. 29, note; People v. Cannon, supra; Commonwealth v. Anselvich, supra; Commonwealth v. Goldburg, supra.

[2] Section 4 of the act provides that whenever any person who has registered a description of the name or mark used by him on receptacles in which he vends his wares, as allowed by section 1, makes oath before a magistrate that he has reason to believe that any of his receptacles are being unlawfully used or filled by any person, "the said magistrate must thereupon issue a search warrant to discover and obtain the same." Thereupon the magistrate may cause the alleged illicit holder of the receptacles to be brought before him, may inquire into the circumstances of his possession, must punish him if he finds him guilty, and must, in that event, award the possession of any property taken under the search warrant to the owner.

Bartollotti contends that section 4 is unconstitutional both as invading his right to personal liberty and his right of property. The record does not present the question of an unconstitutional invasion of the right to personal liberty. The amended petition for prohibition contains, aside from the statement of certain conclusions of law as to unconstitutionality, only the following allegation concerning the search warrant, omitting formal verbiage:

> "That * * * one Nate Volen made application to the said police court * * * for two search warrants in the form of affidavits, * * * and thereupon the said police court * * * issued two search warrants; * * * that thereafter * * * your petitioner herein was served with said search warrants and at the same time placed under arrest for the alleged violation" of the statute.

From this language it plainly appears that the arrest may have been entirely separate and apart from all questions involving either the issuance or service or the conduct of any proceedings whatever under the search warrant. Under the law Bartollotti could have been arrested under the provisions of section 2 of the act, without any attempt to resort to proceedings under search warrant (Pen. Code, §§ 1426, 1426a, 1427), and we must assume against the pleader that he was so arrested. As a matter of fact, it is that section which he is charged with having violated.

[3, 4] Nor can any question arise here on the score of an invasion of Bartollotti's premises for the purpose of prosecuting search under the warrant. It will be noted that the amended petition alleges only that the search warrant was "served." This falls far short of a statement that Bartollotti's property was invaded for the purpose of making search. It is conceivable that one to whom a search warrant is delivered by an officer might surrender without search the property described in the warrant. But if we pass this question by, it is sufficient to say, granting that there was an invasion of Bartollotti's property under the search warrant, that the act has been completed, and that prohibition, from its very nature, cannot be invoked to prevent it.

It is palpable, also, that in this case no question can be presented because of the constitutional provision that property cannot be taken without due process of law, under the language of the statute commanding the magistrate to award to the owner any property taken under search warrant. Even if we concede that the allegation of the petition that the warrant was served includes the statement that search was made under it, there is no allegation whatever that any property was either found or taken.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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35 Cal. App. 450

GREAT WESTERN ELECTRO-CHEMICAL CO. et al. v. INDUSTRIAL ACC. COMMISSION et al. (Civ. 2339.)

(District Court of Appeal, First District, California. Dec. 3, 1917.)

MASTER AND SERVANT 🔑405(4)—WORKMEN'S COMPENSATION ACT—CAUSE OF INJURY—JURISDICTION OF INDUSTRIAL ACCIDENT COMMISSION—EVIDENCE.

In proceedings for compensation under the Workmen's Compensation Act, it being claimed that the employé was injured by getting caustic in his eye because he did not wear glasses, thus violating a rule of the employment, on evidence that the caustic was spilled on the employé's back when he was stooping down, and only got into his eyes when an attempt was being made to pull his shirt off over his head, and that the injury to his eye would probably have occurred whether he had on his glasses or not, the Industrial Accident Commission had jurisdiction to determine that failure of the employé to wear his glasses was not the cause of the injury.

Petition for writ of review, by the Great Western Electro-Chemical Company, employer, and the Employers' Liability Assurance Corporation, Limited, against the Industrial Accident Commission and Peter J. Connelly, employé, to review an award under the Workmen's Compensation Act in favor of Connelly. Petition denied.

Redman & Alexander, of San Francisco, for petitioners. Chris. M. Bradley, of San Francisco, for respondents.

PER CURIAM. The petitioners herein contend that the Industrial Accident Commission acted beyond and in excess of their jurisdiction in the making of an award in favor of Peter J. Connelly, an applicant before it, in his application against the Great Western Electro-Chemical Company, his employers, and their insurer, Employers' Liability Assurance Corporation, Limited, the basis of their contention being that the undisputed evidence in the case shows that at the time of receiving the injuries for which the applicant, Peter J. Connelly, claimed compensation, he was guilty of willful misconduct from which his injuries directly arose, such willful misconduct consisting in his willful disobedience of the orders and instructions of his employers with respect to the wearing of glasses in connection with the doing of the work in which he was engaged at the time of the injury of which he complains.

The Great Western Electro-Chemical Company was engaged in the business of making caustic, which it was dangerous for its employés to handle or work with unless their eyes were protected by the wearing of glasses, which the said corporation furnished to its employés, and directly and expressly instructed them to wear when engaged in their work. The applicant for compensation had always worn such glasses theretofore in obedience to such express instructions, but a few moments before his injuries had taken off his glasses and omitted to replace them when he undertook to fill his kettle from a tank containing caustic by means of a pump connected with said tank. While so engaged a quantity of the caustic from the valves of said pump or tank was spilled upon his back, and from thence got into one of his eyes, causing the injury of which he complains.

The petitioner's contention is that the caustic got into the eye of the injured employé because his glasses were off, and that, having removed his glasses in direct violation of the positive instructions of his employer, he was guilty of willful misconduct, by reason of which he is not entitled to recover. An examination of the entire evidence taken before the Industrial Accident Commission, however, convinces us that there was a very serious question as to whether or not the absence of the glasses in any way contributed to or caused the applicant's injury, the evidence seeming to show quite clearly that when he was injured he was stooping down, and that while in this position the caustic was spilled upon his back, and only got into his eyes while an attempt was being made to pull his shirt off over his head, and that the injury to his eye would probably have occurred whether he had his glasses on at that time or not, and hence that the absence of the glasses was not a contributing cause of his injury. Such being the state of the evidence, we are unable to say that the Commission did not have jurisdiction to determine that the omission of the applicant to wear his glasses at the moment of his injuries was the cause of such injuries.

The petitioners herein further contend that the applicant should not have recovered because the evidence showed that in his manner of using the pump which caused the caustic to be spilled upon his back, the applicant did not follow his instructions as to the manner in which such pump was to be operated. We do not find, however, from a reading of the entire record that the applicant had ever received any instructions from a superior officer or employé as to the manner in which such pump should be operated, and that the utmost that can be said with reference to this matter is that he was simply negligent in the use of said pump, but was not guilty of any willful misconduct in that connection at the time of his injuries.

The Commission so found, and we think the evidence justifies their conclusion in that regard.

The petition is denied.

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35 Cal. App. 429

PEOPLE v. BONES. (Cr. 402.)

(District Court of Appeal, Third District, California. Dec. 1, 1917.)

1. Homicide 🔑139 — Manslaughter — Indictment—Sufficiency.

Indictment alleging that defendant willfully, unlawfully, and feloniously killed a human being sufficiently charges the offense of manslaughter under Pen. Code, § 192, defining manslaughter.

2. Homicide 🔑127 — Manslaughter — Indictment—Sufficiency.

In information charging manslaughter under Pen. Code, § 192, defining the offense, it is not necessary to allege whether the homicide was voluntary or involuntary.

3. Homicide 🔑255(2) — Manslaughter — Evidence—Sufficiency.

Evidence *held* to warrant submission to jury of forms of verdict for both voluntary and involuntary manslaughter.

4. Criminal Law 🔑1172(1) — Appeal — Harmless Error.

Punishment for manslaughter under Pen. Code, § 193, being the same whether the manslaughter is voluntary or involuntary, accused is not prejudiced by submission of general verdict of "guilty as charged" or "not guilty," though the evidence warranted submission of both classes of manslaughter.

5. Homicide 🔑286(1) — Instructions — Intent.

Instruction that intent in homicide need not be proved by positive and direct evidence, but may be proved by all the facts and circumstances and testimony, is not objectionable as charging that the intent to do an unlawful act is presumed from the commission of the act.

6. Homicide 🔑300(3)—Defenses—Self-Defense.

The instruction to weigh the defense of self-defense by what a reasonable man would have done under the circumstances, and that, if a reasonable person would have believed he was in danger of receiving bodily harm, and that the danger was pressing and imminent, he would be justified in using such force as would protect him from bodily harm, is proper.

7. Homicide 🔑340(2)—Appeal—Harmless Error.

In prosecution for manslaughter, instruction on malice, although improper, was without prejudice.

8. Homicide 🔑164 — Evidence — Admissibility.

Accused in prosecution for manslaughter having produced evidence that deceased was a large strong man, and accused was a small man, and having asked a physician whether a man of accused's size could strike a blow sufficient to kill deceased, the state could show accused's ability as an athlete, and that he had, a few years previous, engaged in boxing matches.

9. Criminal Law 🔑1169(8) — Appeal — Harmless Error—Evidence.

In such case accused was in no event prejudiced when the witness stated that it was his opinion that accused was a very unskillful boxer.

10. Criminal Law 🔑939(1)—New Trial—Newly Discovered Evidence—Diligence.

Accused was not entitled to new trial on ground of newly discovered evidence consisting of testimony of persons present at the time of the homicide, which occurred in a community of small population, and of testimony as to deceased's habits when intoxicated, since any diligence must have produced such testimony at the trial.

11. Criminal Law 🔑938(1)—New Trial—Newly Discovered Evidence—Diligence.

Whether a motion for new trial should be granted on ground of newly discovered evidence is addressed to sound discretion of trial court.

12. Homicide 🔑250—Manslaughter—Evidence—Sufficiency.

Evidence *held* to sustain conviction of the crime of manslaughter.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Ira Leslie Bones was convicted of manslaughter, and from such judgment and order denying motion for new trial, he appeals. Affirmed.

W. F. Cowan and C. E. Davis, both of Santa Rosa, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was convicted of the crime of manslaughter, and was sentenced to suffer imprisonment in the state prison for the term of 3½ years. He appeals from the judgment and the order denying his motion for a new trial.

The homicide occurred in a saloon at Bodega bay, Sonoma county, on the 23d day of August, 1916. The deceased, Miles Gaffney, a dairyman by occupation and engaged in said business in the vicinity of Bodega Bay, had been in the said saloon at several different times during the day of the homicide. Late in the afternoon of said day, at about 5 o'clock, the defendant, accompanied by one Eugene Elphick, entered the saloon, and there met the deceased. Elphick and the deceased shortly thereafter engaged in a dice-throwing game to determine which of the two should pay for a watermelon. Elphick won the game, and the deceased then said that he would treat to the drinks, whereupon he placed a piece of money on the bar, and the three men, Gaffney, Elphick, and Bones, drank. A controversy then arose between Gaffney and Elphick relative to the watermelon for which the dice game had been played, and it appears that the position of the deceased was that, having paid for the drinks, he was not obligated to pay for a watermelon for Elphick. The price of the melon was greater than the amount paid by Gaffney for the drinks, and it seems, as we understand the record, which is not entirely clear as to that particular matter, Elphick wanted Gaffney to pay him the difference between the two amounts. At any rate, during the progress of the controversy, Elphick appealed to the barkeeper to say whether he was or was not right in his contention, whereupon the defendant interposed the observation, "Yes; that is right," or words to that effect. The deceased thereupon said to the defendant, "What the h——ll are you butting in for?" or "What are you butting in for?" there being testimony that the expression was in both of the forms as thus given.

Continuing the narration of the facts as they were testified to by the witness Roberts, testifying for the people, it appears that after the above remark by Gaffney to Bones the latter, addressing the former, said, "You have been giving me the worst of it all day." Gaffney made no reply to Bones, but within a brief space of time thereafter Bones struck Gaffney two blows with his hands or fists on each side of the jaw. At this time Gaffney was standing near or against the wall of the building or room, with his hands down by his sides, and had previously made no demonstration indicating an intention to assault or strike Bones. Upon being struck by Bones as stated, Gaffney turned his head sideways, and then fell or slid down the wall to the floor in a lump. Bones hastily left the saloon, exclaiming, as he was passing through the door, "Come on out." Gaffney did not fall to the floor violently or strike his head either against the wall or floor. It was soon discovered, upon examination, that Gaffney was unconscious, and immediately those present, including the defendant, made an unavailing attempt to resuscitate him by rubbing his body and pouring water over his chest. The deceased was then carried by several men, Bones assisting, to a garage near by, where he expired. A doctor was called to attend him, but arrived after the death of Gaffney.

An autoptical examination of the deceased disclosed that his neck had been severely injured and a small part of the spinal cord chipped or broken, causing a hemorrhage, which, declared the doctor who conducted the autopsy, caused his death. The doctor testified that the injury to the spinal cord was undoubtedly caused by violence and that it could have been produced by a blow upon the neck, whereby the neck could be sufficiently thrown out to pinch the spinal cord, and so cause the hemorrhage from which Gaffney died.

[1] 1. The point first made by the defendant is that the information upon which he was tried and convicted does not charge the crime of manslaughter, or, for that matter, any crime. The charging part of the information is as follows:

> "The said Ira Leslie Bones, on or about the 23d day of August, A. D., one thousand nine hundred and sixteen, at and in the county of Sonoma, state of California, did willfully, unlawfully, and feloniously kill and murder one Miles Gaffney, a human being, contrary," etc.

It will be observed that there was no attempt to charge the defendant with the crime of murder, as that offense is defined by section 187 of the Penal Code; the element of malice not entering into the charge as laid. The contention of the defendant is, however, that the information fails to charge the crime of manslaughter because it does not directly allege that the killing was done without malice. It is further contended that, assuming that the information sufficiently charged the crime of manslaughter, the information is still insufficient because it does not state whether the crime was voluntary or involuntary manslaughter. It is argued, in support of the last-stated proposition, that the defendant was entitled to be informed by the accusatory pleading of the precise crime for which he was to be tried, and that the information did not furnish him with that information.

Section 192 of the Penal Code defines manslaughter as follows:

> "Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds: 1. Voluntary—upon a sudden quarrel or heat of passion. 2. Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

The information, it will be observed, charges that the killing was willfully, unlawfully, and feloniously done. Thus, it not being charged that the killing was done "with malice aforethought," it necessarily follows and is implied that the crime as charged amounts to manslaughter, and no more. So viewing the information, it may properly be said that it charges the crime defined in section 192 of the Penal Code substantially in the language of said section, and it is therefore sufficient to have apprised the defendant of the particular offense to which he was required to plead and interpose any defense which might be available to him.

[2] We do not agree to the proposition that it was necessary to show by proper averment in the information which one of the two kinds of manslaughter it was intended to accuse the defendant of. As where murder is charged and to the jury is left the determination from the evidence under appropriate instructions of which degree thereof, if any, the defendant is guilty, so in a case where manslaughter is charged it is for the jury to decide upon the evidence, under proper instructions, of which kind, if of any, the defendant is guilty. Of course, it is a cardinal rule of criminal pleading that a public offense must be so charged and described in the indictment or information that the accused may experience no difficulty in ascertaining from the accusatory pleading precisely what he is expected and will be called upon in law to meet. This is manifestly essential to the interposition in a full and proper manner of any defense the accused may have to make to the charge. The rule thus stated was not varied from in the present case. Whether manslaughter be volun-

tary or involuntary, it is the unlawful act whereby human life is taken that constitutes the offense in either case. While there exists a distinction between the two kinds of manslaughter, resulting, however, only from the difference in the circumstances under which the act of killing is committed, still no difficulty can be encountered by one accused by an information charging manslaughter generally, or without reference to the particular kind which the evidence may show it to be, to make as complete and perfect a defense against either kind of manslaughter as he might if one of the two kinds were specifically charged. A person so charged can certainly be placed at no greater disadvantage or inconvenience in making his defense than may a person charged with the crime of murder by an information which does not specify, as the law does not require to be specified, the degree of that crime of which it is sought to charge and convict him.

[3, 4] 2. The court, in an instruction proposed by the accused, told the jury that the information charged the defendant with the crime of manslaughter, but on its own motion added to said instruction the following:

> "It is not claimed by the prosecution that defendant is guilty of murder in any degree, but it is claimed that he is guilty of involuntary manslaughter. This is the issue for you to determine."

In turning the case over to the jury, after the reading of the instructions had been concluded, the court presented to the jury two forms of verdict, viz.:

> (1) "We, the jury, find the defendant guilty of involuntary manslaughter."
>
> (2) "We, the jury, find the defendant not guilty."

Before the jury retired, however, the court withdrew the form first above given and substituted therefor the following form:

> "We, the jury, find the defendant guilty as charged in the information."

And in this form the jury returned their verdict of conviction.

It is contended that the prosecution of the defendant was conducted solely upon the theory that, if the defendant was guilty of any offense at all, it was that of involuntary manslaughter, that the giving to the jury of the form of verdict in which they returned their conclusion to the court amounted to an instruction that the defendant might properly be convicted of voluntary manslaughter, and that the direction so given was inconsistent with the instruction first above referred to, and therefore tended to confuse the jury as to their duty under the evidence.

We think the evidence was such as to have justified the court in submitting to the jury a form of verdict for both voluntary and involuntary manslaughter; but it cannot be said that the defendant was prejudiced by the failure of the court to do so. The punishment for manslaughter of either kind is the same, viz. by imprisonment in the state prison not exceeding 10 years (Pen. Code, § 193), and we cannot say that the punishment imposed upon the defendant would have been any less than or different from that meted out by the court had the jury found and returned a verdict specifically finding the defendant guilty of involuntary manslaughter. In the matter of punishment the court appears to have been guided by considerations of clemency, when it is considered that in the exercise of its discretion in that respect it might have imposed a much heavier penalty. Indeed, the punishment imposed—3½ years in the penitentiary—would seem to be such as might reasonably have been imposed had the accused been specifically adjudged guilty of involuntary manslaughter.

[5] 3. The court, after explaining to the jury in apt language that, to consummate a crime, there must be a concurrence or joint operation of act and intent, proceeded:

> "The intent must be proved. But it is never required of the prosecution to prove an unlawful intent by positive and direct evidence. In many cases such proof could not be made. Intent may be proved by all the facts and circumstances disclosed by the evidence and testimony taken in connection with the case."

It is said that this instruction in effect declares:

> "That the intent to do an unlawful act is presumed when the commission of the act is shown."

We do not so read the instruction. Of course, the instruction does in effect say that the intent must be inferred from all the circumstances shown in connection with the case, and this is obviously a correct statement of the rule. Indeed, the intent with which any act may be done can be shown in no other way; for intent has its seat in the human mind, and cannot be proved as physical facts or those which are the objects of the senses may be shown. It must be shown by external circumstances—that is, as the court stated, by the circumstances surrounding and characterizing the act.

[6] 4. It is said that the court's instruction on the law of self-defense was not sufficiently full and complete properly to enlighten the jury on that important feature of the case; the accused having testified that the deceased was the aggressor in the affray, first attacked him, and that he deemed it necessary under the circumstances as they appeared to his mind to strike the deceased for his own protection against bodily injury. There is no ground for complaint in this respect. The court submitted to the jury the law of justifiable homicide as it is written in the Code. Furthermore, the court read to the jury the following concrete instruction:

> "It is the claim of the defendant that he was justified in striking Miles Gaffney; that he acted in necessary defense of his person. I charge you that in determining that issue you must apply this rule: What would a reasonable person, situated as the defendant was, seeing what he saw and knowing what he knew, have done under the circumstances that confronted Bones? If a reasonable person would have believed that he was in danger of receiv-

> ing bodily harm, and that said danger was pressing and imminent, then he would be justified in using such force as would protect him from bodily harm."

The instructions upon self-defense were full and clearly expressed. The difficulty appears to have been that the evidence addressed to that defense did not measure up, in the judgment of the jury, to the law upon that subject as it was stated by the court.

[7] 5. Some criticism is made of the instruction in which the court defined the malice which must characterize the act of taking human life to make it murder. The instruction was out of place in this case, as malice is not an element of the offense charged in the information herein. But the instruction was clearly without prejudice.

[8] 6. It is urged that the court committed prejudicial error in its ruling whereby the prosecution was permitted to question the witness Mathews relative to the defendant's ability as an athlete and the fact that he had several years previous to the trial engaged in boxing matches. It was shown by the testimony that the deceased was a very large man physically, being about six feet in stature and weighing approximately 200 pounds, and that the defendant was a small man, both in stature and avoirdupois, weighing between 110 and 115 pounds. On cross-examination the attorney for the defendant asked the doctor who made the autoptical examination of the deceased and who testified for the people the following question:

> "In your knowledge as a physician, would you say that a man weighing between 110 and 115 pounds could deliver a blow that would cause death in that manner?" referring to the cause of Gaffney's death as explained by the witness.

The doctor answered:

> "That depends upon the training of the man as to his power to strike a blow, and the condition of the man receiving it."

Other questions on the same line were propounded to the doctor by counsel for the defendant; the obvious purpose thereof being to show that the blows delivered upon the jaws of the deceased by Bones could not have had any direct connection with the cause of death.

The object of the testimony relative to Bones' athletic training and activities was evidently to show that, although small physically, he was capable of delivering blows with his fists or hands with great force and violence. This testimony was objected to by the defendant, but the court, in overruling the objection, explicitly stated that no prejudice against the accused because he might have engaged in boxing should be assumed by the jury, "but that the sole purpose is to show whether he is a man of physical power," and solely upon that theory and in rebuttal of any inference unfavorable to the people's case which the jury might draw from the questioning of the doctor by defendant's attorney, as above indicated, the testimony was allowed.

[9] We think the testimony was proper. The issue as to the ability of the defendant to inflict a violent blow upon the person of another was injected or introduced into the trial by counsel for the defendant himself, and it thereupon became important for the prosecution to show, if it could, that by the mere size or physical appearance of the defendant the jury were not to be entirely governed in determining whether the blows inflicted by him upon the deceased were or could have been of sufficient force to produce the injury from the effect of which he is supposed to have died. This is particularly true in view of the fact that the defendant sought to establish the proposition through the cross-examination of the people's main medical witness that the cause of death was chronic heart affliction. But in no event could the testimony complained of have worked very serious damage to the defendant, since the witness Mathews declared that, when he saw the boxing match between the defendant and another party several years before, he formed the opinion that the accused was a very unskillful boxer.

[10, 11] 7. One of the grounds upon which the motion for a new trial was based and pressed was that of newly discovered evidence. In support of the motion on this ground a number of affidavits by an equal number of persons were filed. Some of the affiants deposed that Gaffney was intoxicated on the day and at the time he was struck by defendant, and that they witnessed a part of the difficulty leading to the death of Gaffney, and then recited in their affidavits certain facts and circumstances to which they would testify if a new trial were granted, and which would tend or appear to tend to the vindication of the conduct of the accused in striking the deceased. Others deposed that they had known the deceased for many years in the vicinity of Bodega Bay, and that they could and would testify that, when under the influence of intoxicating liquor, he was of a quarrelsome and belligerent disposition. Again, others of the affiants declared, in addition to stating that Gaffney was intoxicated on that day and was the aggressor in the trouble with the defendant, that the chief witness for the people, Roberts, was himself greatly intoxicated on the occasion of the difficulty; the inference being that his mental condition was such that he could not have formed a very clear or accurate conception of how it occurred or who started it or how it started, notwithstanding that he was present at the commencement, during the progress, and at the termination of the trouble.

A new trial may be granted "when new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." Pen. Code, § 1181, subd. 7.

It is apparent even from the record as it is presented to this court that the defendant could not have exercised the degree of diligence required to procure the testimony which the affidavits state the makers of them would give in the event of a new trial. Some of the affiants were, as seen, in the saloon at the time the difficulty was begun and in progress. These witnesses should certainly have been known to the defendant. As to the testimony respecting the character of the deceased for peace and quiet, the defendant surely ought to have been able, by proper diligence, to have procured its presentation to the jury. He had known the deceased in Bodega Bay and vicinity, no doubt a small community, so far as population is concerned, in which presumably everybody knows every other resident and is more or less familiar with his personal character and disposition. But, however that may be, it is settled:

> That "whether a motion for a new trial should or should not be granted upon the ground of newly discovered evidence is a proposition which is addressed to the sound discretion of the trial court, and that the denial of a new trial on that ground will not be reversed unless it clearly appears that the court abused its discretion by its action in that regard." People v. Lim Foon, 29 Cal. App. 270, 283, 155 Pac. 477; People v. Loui Tung, 90 Cal. 377, 27 Pac. 295; People v. Tallmadge, 114 Cal. 427, 430, 46 Pac. 282.

Quite clearly it cannot be said in this case that the trial court abused its discretion in denying a new trial on the ground of newly discovered evidence.

[12] Lastly, it is contended that the evidence does not support the verdict. We have by the above recital of the facts shown that there is no tenable ground for this contention. The testimony alone of the witness Roberts, who was in no degree impeached, except in so far as testimony introduced by the defense varied from his, is amply sufficient to support the verdict and to have justified it, if the jury, as appears to be true, believed it.

No legal reason has been shown for sending the case back for a trial de novo, and therefore the judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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35 Cal. App. 452

PEOPLE v. PEDONE. (Cr. 693.)

(District Court of Appeal, First District, California. Dec. 3, 1917.)

1. Criminal Law ⇨1170½(5) — Harmless Error—Cross-Examination of Defendant to Show Aliases.

In a prosecution for murder, where the evidence overwhelmingly showed defendant's guilt, cross-examination of defendant by the prosecuting officer, who asked him if he had not, at various times and different places, been known by names other than the one he gave, though ordinarily not proper, was not reversible error.

2. Criminal Law ⇨730(2)—Appeal—Harmless Error — Statement of Prosecuting Attorney.

In a prosecution for murder, where the prosecuting officer told the jury that the people hoped to show that defendant had entered into a conspiracy to murder deceased because he refused to pay Black Hand money, that it would be shown that defendant and his coconspirators shortly before the homicide had caused to be sent to deceased letters in which it was stated that, unless deceased deposited $2,000 at a certain place, a terrible tragedy would occur in his family, and that on the day of the murder deceased had received one of such letters, which was in his possession at the time of his death, the action of the prosecuting officer in making such statements was harmless to defendant, though the letters were not admissible in evidence, the court at once instructing that the statement was not evidence, that the jury as reasonable and intelligent men knew as much, but that if they did not they were so advised.

3. Criminal Law ⇨1037(1) — Appeal — Waiver of Objection to Acts.

Defendant, during the trial not having assigned as misconduct acts of the prosecuting officer objected to on appeal, must be deemed to have waived any objection.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Joseph Pedone was convicted of murder in the first degree, and from the judgment and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

C. V. Riccardi, of Los Angeles, and J. L. Maloy, of San Jose, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

KERRIGAN, J. Defendant was jointly indicted with his brother, Antone Pedone, Sr., and the latter's son, Antone Pedone, Jr., for the crime of murder, it being alleged that on the 30th day of November, 1916, at the city and county of San Francisco, they killed Gaetano Ingrassia. Defendant demanded a separate trial, which being duly had, the jury returned a verdict finding him guilty of murder in the first degree and fixing his punishment at life imprisonment. He now appeals from said judgment and the order denying his motion for a new trial.

The defendant testified at the trial in his own behalf, and claimed that the deceased, being a stranger to him, was the aggressor in the encounter which led to his death, and that he, the defendant, took his life only in self-defense. On the other hand, the testimony introduced on behalf of the people showed that the deceased was, without warning, set upon by the three Pedones, who were armed with pistols and a rifle, and was killed with these weapons, two of the wounds being received by the deceased after he was disabled and was lying prostrate upon the ground behind some chicken coops in front of a grocery store where he had taken refuge.

There is no claim—nor could there be—

that the evidence does not sustain the verdict. In fact the record overwhelmingly shows that the deceased was brutally murdered, and that the defendant was guilty of the crime.

[1] On direct examination the defendant gave his name as Joseph Pedone. On cross-examination the prosecuting officer, over the objection of defendant's counsel, was allowed to ask him if he had not at various times and different places been known by other names, to each of which questions he answered in the negative. It has been quite recently held by our Supreme Court that such cross-examination ordinarily is not proper. People v. Mohr, 157 Cal. 732, 109 Pac. 476; People v. Fleming, 166 Cal. 381, 136 Pac. 291, Ann. Cas. 1915B, 881; contra, People v. Meyer, 75 Cal. 383, 17 Pac. 431; but the case at bar, we think, is readily distinguishable from the Mohr and the Fleming Cases. In those cases the cross-examination of the defendants was attended by circumstances prejudicial to them. In the Mohr Case the entire cross-examination consisted of an attempt to show that the defendant had been known by a number of different names, and it was conducted in such a manner as to indicate to the jury that the prosecuting officer was in a position to show by written data that the unfavorable intimations contained in the questions were true. The court said:

> "It appears * * * that these questions were asked in such a manner as to indicate that the district attorney had in his hands, at the time he asked the questions, written data to support the same."

In the Fleming Case the defendant answered a similar question in the affirmative, and was compelled to make an explanation of why he had gone under an assumed name, which explanation brought out a circumstance which reflected discreditably upon him. That case, too, on the evidence was very close—unlike the present one—and grave doubt was entertained by the appellate court as to the defendant's guilt. It concluded therefore that it was only reasonable to infer that the explanation drawn from the defendant materially contributed to the verdict. For that and other reasons the judgment was reversed. No such condition here exists, and the act of the district attorney complained of does not constitute reversible error.

[2] In his opening statement the prosecuting officer told the jury that the people hoped to prove that the defendant with his brother and nephew had entered into a conspiracy to murder the deceased, because "he had refused to pay them $2,000 that they had demanded of him as Black Hand money"; that it would be shown that the Pedones shortly before the homicide had caused to be sent to the deceased letters, in which it was stated that, unless the deceased deposited at a certain place $2,000, a terrible tragedy would occur in his family, and that on the very day of the murder the deceased had received one of those letters, which was in his possession at the time of his death. At the time this statement was made defendant's counsel objected to it—without, however, assigning the making of it as misconduct—saying that the prosecuting officer knew that these letters were not admissible in evidence, and that they had been offered in evidence in the trial of one of the other persons charged with this crime held before another judge, and rejected. During the trial the letters were in fact offered in evidence, although not in the presence of the jury, and rejected for the reason that the people failed to show that the defendant either sent or caused them to be sent to the deceased.

We are unable to say that the prosecuting attorney acted in bad faith in making this statement to the jury of what he would show to them; but in any event, and whatever motive may have prompted the observation, we are satisfied that no substantial injury resulted to the defendant therefrom, for the court at once instructed the jury that the statement was not evidence; that they (the jury), as reasonable and intelligent men knew as much, but that if they did not they were so advised; and added:

> "You are instructed at this time that any statement of counsel is not evidence. Counsel is stating to you on behalf of the people the facts that he intends to prove, which by no means are to be considered by you men as having been proved."

Early in the trial of the case, and doubtless in order to establish a motive for the crime, the people introduced evidence tending to show that the deceased was a man of some means, owning a piece of real property and having $4,000 on deposit in a bank; but upon it appearing that the prosecution was unable to prove that the deceased was generally reputed to be a man of wealth, or that the defendant knew anything about his financial condition, the court struck out this testimony, and cautioned the jury to disregard it.

[3] Another act of the prosecuting officer is argued in the defendant's brief as constituting misconduct, but little attention appears to have been paid to the matter at the time it occurred, and it was not assigned as such. In fact none of the acts of the prosecuting officer now complained of as misconduct were so characterized at the time they occurred, and in every instance except the one just referred to the court struck out the objectionable matter, and of its own motion promptly and emphatically instructed the jury to disregard it. It is well settled in this state that, the defendant, not having during the trial assigned as misconduct the acts now objected to, he must be deemed to have waived any objection thereto, and that, even if he had made such assignment, the trial court having cautioned the jury as to its duty in the premises, it will ordinarily be presumed upon appeal that the jury followed

the court's admonition, and that no prejudice, therefore, resulted to the defendant in the trial of his case.

In conclusion it may be added that while we think the prosecuting attorney overstepped the bounds of strict legal propriety in some of the instances pointed out by the defendant, yet, as before stated, a review of the record satisfies us, particularly in view of the prompt action of the trial court in reference thereto, that neither the misconduct of the prosecutor nor the cross-examination of the defendant in respect of his being known by another name had any appreciable effect upon the jury in the consideration of their verdict.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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35 Cal. App. 457

TITLOW et al. v. FLORENCE TRADING CO.

BELL et al. v. SAME.

(Civ. 1939.)

(District Court of Appeal, Second District, California. Dec. 3, 1917.)

1. Explosives ⚷9—Negligence in Selling Gasoline for Kerosene — Explosion of Lamp—Sufficiency of Evidence.

In an action against a trading company for negligence in filling a can for kerosene with gasoline, evidence *held* to show that the customer's lamp did not explode up to the time his wife ran to call a neighbor.

2. Explosives ⚷9 — Contributory Negligence—Question for Jury.

In such action, whether the customer's wife acted as an ordinarily prudent person in leaving the lamp after lighting it while she ran for a neighbor on perceiving the lamp's peculiar behavior was a question for the jury.

3. Explosives ⚷9—Negligence in Selling Gasoline for Kerosene—Proximate Cause —Sufficiency of Evidence.

In such action, defendant's negligence having been shown, evidence *held* sufficient to justify the jury in taking the position that the immediate cause for the precipitation of the customer's lamp to the floor was the natural and to be expected consequence of defendant's negligence, so that such negligence was the proximate cause of the damage.

4. Trial ⚷260(1) — Instructions — Repetition.

Instructions covered by other instructions given, so far as they properly stated the law, were properly refused.

Appeals from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Actions by Charles Titlow and another, and by Stella K. Bell and the Concordia Fire Insurance Company of Milwaukee, a corporation, against the Florence Trading Company, a corporation. From judgments for plaintiffs, and orders denying its motions for new trials, defendant appeals. Judgments and orders affirmed.

Fred W. Morrison, of Los Angeles, for appellant. Hindman & Yakey and Raymond E. Hoyt, all of Los Angeles, for respondents.

WORKS, Judge pro tem. These two actions were consolidated and tried together before a jury. The respondent Charles Titlow was the occupant, and the respondent Stella K. Bell was the owner, of a certain dwelling house which was destroyed by fire, the action having been commenced to recover damages from the Florence Trading Company for the negligence of one of its servants, which negligence is alleged to have been the proximate cause of the loss which respondents Titlow and Mrs. Bell suffered. Judgments were rendered in favor of the respondents and it is from these judgments and from orders denying motions for new trials that the trading company appeals.

[1] The appellant contends that the evidence fails to show that the negligence charged against it, granting that such negligence existed, was the proximate cause of the fire, and that, accordingly, the verdict is without the support of evidence in that particular. The jury was justified in finding the following facts to exist: The trading company was, during the period of interest to us now, in the mercantile business, and sold gasoline and kerosene, which it delivered to its customers, one of whom was Titlow. Two cans were kept on the premises of Titlow, a round red can for the reception of gasoline and a square white can for the reception of kerosene, and the deliveryman of the trading company, knowing the use to which the cans were respectively put, had filled them on at least one or two occasions before the one which now concerns us. However, at that time, the time now in question, he reversed the process, placing kerosene in the round can and gasoline in the square can, filling them both full. Titlow's wife then, not knowing of the deliveryman's mistake, filled a kerosene lamp from the gasoline content of the square can, supposing she was getting the kerosene which it was her custom to draw from that receptacle. Some time after filling the lamp, Mrs. Titlow lighted it, although it was in the afternoon, for the purpose of heating her curling iron. She was alone at the time. She says the lamp "exploded, but I can't tell what happened. It didn't act right, but I don't know what it did. I can't tell whether the flame shot up, or flickered, or what. I can't tell anything about whether it made a noise or not. I don't remember anything that happened. I grabbed the curtain and put it in front of me. I did not get any oil on me. I don't know where the lamp was." Later she testified that the lamp did "flicker, or spurted. I can't explain just what it was. I know it acted very peculiar." As soon as the lamp "exploded," to quote Mrs. Titlow, she ran to the front of the house

and called Mrs. Strause, a neighbor who lived near at hand. Mrs. Strause hurried to the Titlow residence, and, according to her, "went into the bedroom and picked up a rug and went into the bedroom and saw the lamp lit there and picked it up and ran out of doors with it. It was ablaze." This was on direct examination. On cross-examination Mrs. Strause said, "I found the lamp on the floor in the bedroom, laying on its side. It was blazing. I ran through the front door and threw the lamp on the ground, and I went back in the house." During these occurrences, and until after the lamp was carried out, Mrs. Titlow acted in a dazed manner. She nearly or quite lost consciousness at about the time Mrs. Strause returned from disposing of the lamp. The evidence also shows, from the testimony of experts and from tests made in the presence of the jury, that a lighted kerosene lamp, similar to the one in question here, filled with gasoline, or with a mixture of gasoline and kerosene, will not explode, within the ordinary meaning of that word, until it has burned from 2 to 12 minutes, and that, in the interim, it will burn with a hissing sound and with a sputtering flame eight or more inches high. From this chain of facts and circumstances it is manifest that the lamp did not explode up to the time Mrs. Titlow ran to call Mrs. Strause, although the former does use that word in describing the phenomenon to which she was witness. It could have done no more than burn with a high, sputtering flame and with a hissing sound.

[2] It is claimed by appellant that Mrs. Titlow should have acted with greater presence of mind, that she should have disposed of the lamp herself, and that, because she did not, appellant's negligence cannot be said to have been the proximate cause of the damage which resulted from the fire. This claim cannot be maintained. Whether Mrs. Titlow acted as an ordinarily prudent person would have acted, under all the circumstances, was a question for the jury and it may have well concluded that she, a woman, and unused to handling such affairs, could not have been expected to conduct herself differently, even if Mrs. Strause did do, when called, what Mrs. Titlow could have done as well without calling her. If the jury stopped to contrast the actions of the two women, it was entirely within its province in viewing the conduct of Mrs. Strause as arising from a rare presence of mind.

[3] In support of its claim that the verdict is not supported by the evidence, the trading company asserts that Mrs. Titlow was guilty of contributory negligence in precipitating the lamp to the floor, in some manner unknown. Of course, the query naturally arises as to how the lamp got on the floor in the position in which Mrs. Strause found it. On this question the jury may have indulged several assumptions. Mrs. Titlow may have held the lamp in her hand while lighting it, and may have incontinently dropped it when it began its misbehavior. If that was not the case, she may have knocked it from some table or stand with the curtain which she mentions in her testimony, as she fled. Other assumptions as to the occurrence may have struck the jury; but whatever the jury assumed as an immediate cause for the precipitation of the lamp to the floor, it was justified in taking the position, the negligence of the defendant having been shown, that such immediate cause was the natural and to be expected consequence of that negligence, and that, therefore, the negligence was the proximate cause of the damage, the cause which set all other causes in motion.

[4] The appellant contends that the trial court erred in refusing two certain instructions which were requested by it. The instructions were properly refused because, so far as they properly stated the law, they were covered by other instructions given.

The judgments and orders are affirmed.

We concur: CONREY, P. J.; JAMES, J.

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35 Cal. App. 467

PEOPLE v. DE LEON. (Cr. 695.)

(District Court of Appeal, First District, California. Dec. 5, 1917. Rehearing Denied by Supreme Court Jan. 31, 1918.)

1. INFANTS 🔑20—ACTS TENDING TO CAUSE DELINQUENCY OF INFANTS—INFORMATION.

An information alleging that defendant was manager of a café where drinks were sold, and that he was present when a girl of 17 years was served several gin fizzes, sets forth an offense under Juvenile Court Law (St. 1915, p. 1246) § 21, providing that any person who shall commit any act or omit the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of 21 years to come within the provisions of subdivisions 1 to 13 of section 1 of this act, or which act or omission contributes thereto shall be guilty of a misdemeanor; especially in view of Pen. Code, § 397B, providing that every person who sells, gives, or delivers to any minor under the age of 18 years any intoxicating drink, or who, as proprietor or manager of any saloon, or public house where intoxicating liquors are sold, permits any such minor child to visit such saloon or public house, shall be guilty of a misdemeanor.

2. INFANTS 🔑20—CONTRIBUTING TO DELINQUENCY—CRIMINAL OMISSIONS—SUFFICIENCY OF EVIDENCE.

The mere fact that defendant manager was present at a café when a minor entered, was served two gin fizzes, and danced half an hour, was sufficient to support a verdict of guilty of an omission tending to delinquency in violation of Juvenile Court Law, § 21, providing that any person who omits the performance of any duty, which causes or tends to cause or encourage any person under the age of 21 years to become a delinquent, shall be guilty of a misdemeanor; it not being necessary to prove that the minor became delinquent.

3. INFANTS ⚷12—OMISSIONS CAUSING DELINQUENCY—STATUTES—CONSTITUTIONALITY.

Juvenile Court Law, § 21, making any act or omission of duty which causes or tends to cause or encourage any minor to become delinquent a misdemeanor, is not unconstitutional, as being too vague and indefinite for enforcement, but the duty omitted must be a definite legal duty.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Maurice De Leon was convicted of a violation of the juvenile court law, and he appeals. Affirmed.

Harry J. Stafford, of San Francisco, for appellant. U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and E. E. Herrscher, Asst. Dist. Atty., of San Francisco, for the People.

RICHARDS, J. The defendant, Maurice De Leon, was convicted by a jury of a misdemeanor, consisting in the alleged violation of the provisions of section 21 of the juvenile court law (St. 1915, p. 1246), approved June 5, 1915, by the doing or omission of acts which tended to and did encourage, cause, and contribute to the delinquency of a minor.

The information charged and the proof showed that the said defendant was at the time of his alleged offense the manager of a café in the city and county of San Francisco known as the Paris-Louvre, where intoxicating liquors were sold and consumed; that among the duties of said defendant was that of keeping and preventing minors under the age of 18 years from visiting said place, and of preventing the sale or delivery of any intoxicating drink to such persons therein. The evidence showed that upon the evening of February 3, 1917, while the said defendant was the manager of said café and was present and engaged in the performance of his duties there a girl 17 years old visited the café with a male companion named Sawyer at about the hour of midnight, remaining about three-quarters of an hour, and that while there she ordered and was served with two gin fizzes by one of the waiters, which she drank upon the premises. The defendant admitted that he was present in the café at the time, but denied that he saw said minor there or knew of her presence; and he further offered evidence to show that there was a sign or notice at the entrance to the place stating that "No minors are allowed," and that there were also special officers employed and stationed at the entrance to the café for the express purpose of keeping minors and objectionable persons out; and that the employés of the place including the waiter had been instructed not to serve a minor with intoxicating liquor, and warned that if they or any of them did so they would be discharged.

The jury found the defendant guilty. His motion for a new trial was denied, and he was thereupon sentenced to serve a term of 60 days in the county jail; and from such verdict, order, and sentence he prosecutes this appeal.

The appellant urges three grounds for a reversal: First, that the information does not charge a public offense; second, that the evidence was and is insufficient to warrant his conviction; and, third, that the section of the juvenile court law under which the defendant was prosecuted and convicted is unconstitutional.

In support of the first of these asserted grounds for a reversal the main and material contention of the appellant aside from his attack upon the juvenile court law as unconstitutional is his claim that the information is fatally defective in its failure to charge that the said minor ever became a delinquent within the scope and terms of the juvenile court law as the result of any acts or omissions of the defendant at the time and place in question or at all. The language of section 21 of the juvenile court law under which the defendant was charged and convicted is as follows:

> "Any person who shall commit any act or omit the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of 21 years to come within the provisions of subdivisions 1 to 13 inclusive of section 1 of this act, or which act or omission contributes thereto * * * shall be guilty of a misdemeanor."

The subdivisions of section 1 of said law to which the foregoing section refers defined a delinquent minor to be one "who is leading, or from any cause is in danger of leading, an idle, dissolute, lewd or immoral life." Section 397B of the Penal Code reads in part as follows:

> "Every person who sells, gives or delivers to any minor child, male or female, under the age of 18 years, any intoxicating drink in any quantity whatsoever, or who, as proprietor or manager of any saloon, or public house where intoxicating liquors are sold, permits any such minor child under the age of 18 years, to visit said saloon or public house where intoxicating liquors are sold, shall be guilty of a misdemeanor."

[1] We are of the opinion that the information in the instant case when read in the light of the foregoing provisions of the Penal Code and of the juvenile court law sufficiently sets forth a public offense. It expressly charges the defendant with acts and omissions in violation of the legal duty imposed upon him by the express terms of section 397B of the Penal Code; and it then proceeds to expressly charge that this breach of duty on the part of the defendant, which was in itself a misdemeanor, did manifestly tend to and did encourage, cause, and contribute to the said minor girl becoming and remaining such a person as is described in section 1 of the juvenile court law, to wit, a person under the

age of 21 years who is leading or is in danger of leading an idle, dissolute, or immoral life.

We do not deem it necessary or proper to give to the foregoing clause of the information or the foregoing provisions of the juvenile court law the narrow and restricted construction for which the appellant herein contends. The evident object and main purpose of the juvenile court law was not so much punitive as it was preventive. Its intent was to put a barrier across the threshold of those entrances to downward ways which are open before the feet of youth. Section 397B of the Penal Code makes it a misdemeanor for any person in the position in which the defendant was to sell, give, or deliver any intoxicating drink to a minor under the age of 18 years, or even to permit such a minor to visit the saloon or public house where such intoxicating liquors are sold—this without regard to whether the minor is evilly affected by the breach of duty which this section of the Penal Code imposes, upon the theory apparently that to visit saloons or to drink intoxicants therein tends directly to draw them toward idle, dissolute, and immoral habits of life.

These sections of the juvenile court law were evidently drawn with this section of the Penal Code in view, and with the intent of preventing, if possible, the breach of duty which the Penal Code section aims to punish. To require the prosecution to allege and prove that the defendant's breach of duty had resulted in the minor's actual entry upon an idle, dissolute, or immoral life would be to practically nullify the beneficial objects of the law. We find no merit, therefore, in the contention of the appellant that the information fails to state a public offense.

With respect to the appellant's second point, that the evidence was insufficient to warrant a conviction, we are satisfied after a careful reading of the record that this contention is also devoid of merit.

[2] The defendant was the manager of the public drinking place in question. His duty under section 397B of the Penal Code as well as under the terms of his employment was not to permit this minor to either visit or drink intoxicating liquor in the café of which he was the manager. He was present there when this minor girl of the age of 17 years came with a male companion about midnight to the café, and when she not only was served with and drank intoxicating liquors, but remained there drinking and dancing for three-quarters of an hour. These admitted facts were amply sufficient to justify the jury in finding the defendant guilty of the specific breach of duty which both the Penal Code and the juvenile court law define and punish.

[3] Finally the appellant contends that section 21 of the juvenile court law under which the defendant was convicted is unconstitutional, for the reason, as his counsel assert, that said section is too vague and indefinite for enforcement, and is generally lacking in the precision which is required in penal statutes. We are not cited to any decision in this or any jurisdiction wherein this contention in respect of the unconstitutionality of juvenile court laws has been sustained, although such laws similar to that in question here have been frequently before courts of last resort during the past several years, in cases where their constitutionality has been assailed upon other grounds, and wherein such laws have been uniformly upheld. Lindsay v. Lindsay, 257 Ill. 328, 100 N. E. 892, 45 L. R. A. (N. S.) 908, Ann. Cas. 1914A, 1222; Commonwealth v. Fisher, 213 Pa. 48, 62 Atl. 198, 5 Ann. Cas. 92; Pugh v. Bowden, 54 Fla. 302, 45 South. 499, 14 Ann. Cas. 816; Mill v. Brown, 31 Utah, 473, 88 Pac. 609, 120 Am. St. Rep. 935; In re Sharp, 15 Idaho, 120, 96 Pac. 563, 18 L. R. A. (N. S.) 886; Travis v. State, 31 Ohio Cir. Ct. R. 492; State v. Dunn, 53 Or. 304, 99 Pac. 278, 100 Pac. 258. The juvenile court laws of 1909 and of 1911—which did not essentially differ from the present statute—were brought several times before the Supreme Court and appellate courts of this state for consideration as to their constitutionality, and by them upheld. Nicholl v. Koster, 157 Cal. 416, 108 Pac. 302; Matter of Maginnis, 162 Cal. 200, 121 Pac. 723; Moore v. Williams, 19 Cal. App. 600, 127 Pac. 509. In the case of People v. Bergotini, 172 Cal. 717, 158 Pac. 198, the question of the unconstitutionality of the juvenile court law while before the court for decision, and while argued upon all the grounds presented in the instant case, was not decided, the case being reversed upon other grounds; but the Chief Justice in his concurring opinion used some instructive language applicable to the case at bar. Referring to the intent of the Legislature in enacting the particular section of the statute under review in its application to the facts of that case he said:

> "To give this section such a construction as would support the information herein or sustain this conviction on the evidence introduced on the trial would necessarily attribute to the Legislature the intent thereby to make any act or omission that in fact causes or tends to cause, encourage or contribute, however remotely, to the dependency or delinquency of a minor a crime. * * * I am satisfied that the statute before us may not reasonably be construed as including any such case. It is entirely fair and permissible to construe it as referring exclusively to acts or omissions done or made directly with relation to the minor child. No case has been cited, and I am able to find none, involving any other kind of an act or omission. For instance, one who willfully commits lascivious acts in the presence of a child capable of comprehension or toward such child, or has immoral relations with a child, or does with relation to the child any of the very numerous things that may directly cause, tend to cause, or contribute to its dependency, such acts or omissions are clearly within the scope of the statute."

These views are directly applicable to the case and question before us in the light of the suggestions of appellant's counsel as to its possible application to supposititious cases wherein acts innocent in themselves might be held criminal according to the whim or prejudice of some judge or jury. It is not by such extreme or fanciful standards that the validity of the statute is to be determined, but rather by the reasonableness of its application to cases like the instant one wherein the act or omission of the defendant amounts to the breach of a definite legal duty, and is of such a nature and tendency as to affect directly the welfare of the minor. Such is the instant case; and we deem the law in question susceptible of such a reasonable construction as shall confine its application to cases of this character; and that so construed and applied it is not subject to the strictures as to its alleged unconstitutionality which are urged upon this appeal.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(35 Cal. App. 397)

RAFTIS v. McCLOUD RIVER LUMBER CO. et al. (Civ. 1727.)

(District Court of Appeal, Third District, California. Nov. 24, 1917.)

1. Evidence 🔑373(2) — Contracts — Execution by Agent—Authentication.

In an action for injuries to a sawmill employé, subsequently induced to work in a lath mill by a party who had a contract with the sawmill to manufacture lath, the contract between the sawmill and such party was properly admitted, though executed by the corporation by its "Assistant to the president," without the corporate seal, and without a resolution of the directors authorizing it; the signer testifying that he was the company's general manager, with authority to execute any contract pertaining to the business.

2. Master and Servant 🔑330(3) — Independent Contractor—Contract.

A contract by an individual with a lumber company to manufacture lath from material furnished by the company, which also furnished all belts, saws, oils, etc., under which the contractor furnished all labor and had charge of and was responsible for all machinery, and the employés were carried on the company's pay roll, and the wages paid were charged to the contractor, establishes the relation of employer and independent contractor.

3. Corporations 🔑399(2) — Authority of General Managing Agent.

If a corporation's business is transacted by a general managing agent, who is suffered to exercise general authority in respect to the business, the corporation is bound by his acts within the scope of the powers assumed by him, as if expressly granted; and in respect to the management of its business, a general managing agent and superintendent is the representative of the corporation, and in the transaction of its ordinary affairs may do what the corporation itself could do within the scope of its powers.

4. Principal and Agent 🔑21 — Testimony of Agent to Prove Agency.

The rule that the declarations of an agent as against his principal are inadmissible to prove the fact of agency does not apply to his testimony as a witness on the trial in which the fact of agency is in issue.

5. Master and Servant 🔑332(4)—Injuries to Servant—Instructions.

In an action for injuries to the employé of a sawmill, who left the mill to work in the lath mill operated by the sawmill's independent contractor to manufacture lath, the court properly refused to give plaintiff's instruction, intended to embody the position that, by allowing the servant to keep his badge and receive his time check as before the change in employment, and by not informing him of the sawmill's contract with the independent contractor, the sawmill caused the servant to regard the independent contractor as its agent or foreman, the instruction being uncertain and confusing, without support in the evidence.

6. Master and Servant 🔑315 — Duty of Master When Servant Left Employment for That of Independent Contractor.

Where, at the request of a sawmill's independent contractor to manufacture lath, on the promise of more money, the sawmill's employé voluntarily left the sawmill and went to work in the lath mill, no legal duty rested on the sawmill, when the employé changed from one mill to the other, to inform him of the situation that the operator of the lath mill was an independent contractor, and not a foreman; the contract having been made openly.

Appeal from Superior Court, Siskiyou County; J. F. Lodge, Judge.

Action by Stephen Raftis, by his guardian ad litem, Solon H. Williams, against the McCloud River Lumber Company and O. R. Benning. From a judgment for defendant company, plaintiff appeals. Affirmed.

W. H. Carlin, of Marysville, and L. F. Coburn, of Yreka, for appellant. Pillsbury, Madison & Sutro, of San Francisco, and Taylor & Tebbe, of Yreka, for respondent.

BURNETT, J. This is an action for damages for personal injuries received by plaintiff, who was 18 years of age at the time he was injured. The complaint is in the usual form, alleging among other things the employment of plaintiff by defendant corporation, and the negligent conduct of defendants, which conduct was the proximate cause of plaintiff's injury. O. R. Benning defaulted. The McCloud River Lumber Company filed an answer, denying any negligence on its part, and setting up that plaintiff was at the time of his injury in the employ of O. R. Benning, with whom it claims to have stood in the relation of independent contractor. The essential facts as presented to the jury, who found in favor of defendant, may be epitomized as follows:

The defendant corporation is the owner of a mill at McCloud, Siskiyou county, used to convert raw timber into finished lumber for the market. On its premises it had established a sawmill, sash and door factory, box factory, and lath mill, and in connection with these a hospital. It owned all the machinery in each building, and operated it all from a central power plant. However it carried on its business in other departments, as regards the lath mill, it contracted with

O. R. Benning, and had done so for several years, for the manufacture of the lath. By the terms of the contract the corporation was to furnish material to Benning at a certain price, Benning was to employ his own men, manufacture lath, and sell same back to the corporation at a contract price. Benning's men were paid by the corporation each month at its office, and the amount charged to Benning. In May, 1913, plaintiff was employed by the defendant company in its box factory. It appears that each man, upon being employed, was given a badge with a number on the front side and with the name of the defendant company on the back. Plaintiff received such a number. While working in the box factory, plaintiff was approached by Benning and asked to work in the lath mill, being offered a raise in salary. Plaintiff accordingly went into the lath mill. He kept his same number, drew his time at the defendant company's office, and received payment on its checks, just as he had done in the box factory. While working in the lath mill, plaintiff was injured, his left hand being caught in the saws of one of the machines.

The theory upon which plaintiff went to trial was that the defendant company was his employer and Benning its foreman, but that, even if Benning was an independent contractor, the company so conducted its operations as to cause plaintiff to believe he was still working for it under Benning as foreman, and therefore it is liable in either alternative. It is at once apparent that, if it be decided that an independent contractor relationship existed it becomes unnecessary to consider any question based upon the theory that the relation of master and servant existed between plaintiff and the lumber company. In this connection plaintiff urges that the evidence is insufficient to establish the relation of independent contractor; that the court erred in admitting in evidence a contract made by Benning and F. F. Spencer, as manager of the lumber company; and that it erred in refusing to give an instruction intended to embody plaintiff's theory that respondent's remissness in not disillusioning plaintiff of his belief that he was still working for them virtually estopped them from setting up that Benning was not their foreman.

[1-3] We are of the opinion that the contract was properly admitted, and therefore that, not only did the court commit no error, but the contract, even in the absence of other evidence to be found in the record, sufficiently establishes the independent contractor relationship. By said contract Benning bound himself to manufacture all the lath possible from the material furnished by respondent at a certain price, Benning to furnish all labor and have charge of and be responsible for all machinery, though defendant corporation furnished all belts, saws, oils, etc. All Benning's employés were to be carried on defendant's pay roll and the wages paid charged to Benning. On the part of the corporation the contract was signed "The McCloud River Lumber Company, by F. F. Spencer, Assistant to the President." The admissibility of the contract was objected to generally, and upon the ground that it had not been authenticated; there being neither a corporate seal from which authority might be presumed nor a resolution of the board of directors giving authority to Spencer to execute such contract. But the testimony of F. F. Spencer, both direct and on cross-examination, was to the effect that he stood in the position of general manager with full authority "to execute any contract pertaining to the operation of the company's business." And it is now well established in this state that if a corporation's business "is transacted by a general managing agent, who is suffered to exercise general authority in respect to the business, the corporation is bound by his acts within the scope of the powers assumed by him, in the same manner as if expressly granted. In respect to the management of its business, a general managing agent and superintendent is the representative of the corporation, and may do in the transaction of its ordinary affairs what the corporation itself could do within the scope of its powers." McKiernan v. Lenzen, 56 Cal. 61; Greig v. Riordan, 99 Cal. 316, 33 Pac. 913. The contract here clearly falls within the scope of the authority testified to by Spencer, and by such testimony it is fully authenticated.

[4] Counsel for plaintiff labors under some misapprehension as to the true rule of law when he declares that:

> "It is, of course, a well-established principle of law, needing the citation of no authority, that an agent cannot by his own testimony establish his authority to bind his principal."

> "The rule that the declarations of an agent are as against his principal inadmissible to prove the fact of his agency does not apply to his testimony as a witness on the trial in which such fact is in issue; and consequently the testimony of the agent, unless he is disqualified for some other reason, is competent to establish the fact of his agency and the existence of facts from which the agency may be inferred." 2 Corpus Juris, 933.

[5, 6] But, even admitting that the independent contractor relationship is established (so runs appellant's argument), the respondent may still be held, since by allowing plaintiff to keep his badge and receive his time check just as before, and not informing him of the contract with Benning, it caused plaintiff to regard Benning as its agent, and therefore the court's refusal to give plaintiff's instruction intended to embody this position was reversible error. The instruction in its material parts is:

> "If you find from the evidence in this case that * * * plaintiff was employed by the defendant corporation in its box factory, * * * and after working in said box factory * * * he was transferred to the lath mill owned by the said defendant company, where he

worked until the time he received the injuries complained of, and that no knowledge or intimation was at any time given him by any person which would cause, or tend to cause, him or any reasonable person in his position to believe or suspect that any change of master occurred in connection with his employment, and that * * * plaintiff in good faith believed that he was working for the defendant corporation," then if you further find that defendant corporation was negligent, and that said negligence proximately caused plaintiff's injury, you must find for the plaintiff.

The instruction was unwarranted on various grounds. It is uncertain and confusing, in that it does not appear therefrom by whom plaintiff was transferred to the lath mill; it of course being necessary that said transfer be made by the defendant company in order that it might be held. And even assuming that the instruction designated the defendant company, it is contrary to all evidence in the case, and, therefore without any support in the record. There is nothing whatever to indicate that the defendant company had anything to do with plaintiff's transfer to the lath mill. It appears, on the contrary, that at the request of Benning and on the promise of more money plaintiff voluntarily, and uninfluenced by any act of the defendant company, went to work in the lath mill. It cannot be claimed that Benning was respondent's agent nor that he was held out as such. The contract between the lumber company and Benning was made openly and does not appear to have been kept a secret. That plaintiff did not know of it is, perhaps, his own misfortune. The company did no act to create the belief in the minds of third parties that Benning was their agent, other than to allow him, under his contract, to supervise the operations in its lath mill. Benning, it is to be noticed, wore no badge such as the employés of the company wore. Surely no legal duty rested upon respondent, when plaintiff changed from one mill to the other, to inform him of the situation. Plaintiff was the master of his own acts, and it must be assumed acted with his eyes open. In this respect, therefore, in so far as the instruction intended to state that such a duty rested on the respondent, and that it must be held responsible for plaintiff's lack of knowledge, it failed to state the law. Smith v. Belshaw, 89 Cal. 427, 26 Pac. 834; Houghton v. Loma Prieta Lumber Co., 152 Cal. 574, 93 Pac. 377.

The case of Donnelly v. San Francisco Bridge Co., 117 Cal. 417, 49 Pac. 559, in no way militates against this conclusion. In that case the evidence shows a clear case of ostensible agency. The prior relations between the parties to the action created a duty upon the defendant therein to notify the plaintiff that their former foreman had become an independent contractor. In that case the plaintiff did nothing after the contract had been made that he had not done before, nor was there any change whatever in the circumstances surrounding him. In the present case it does not appear that Benning had ever been an agent of the respondent, nor had plaintiff ever worked under him as such. As already pointed out, nothing appears to have been done by respondent to cause plaintiff to believe that Benning was their foreman at the time of the accident, nor was his transfer to the lath mill directed by respondent, but was the voluntary act of plaintiff himself. The court committed no error in refusing to give the instruction.

The above determination of the issue of the independent contractor relationship really disposes of the case, and renders unnecessary any discussion of appellant's assignments of error based on the theory that a master and servant relationship existed between plaintiff and defendant corporation. However, it may be said that upon such theory no prejudicial error appears to have been committed, and the jury was justified in rejecting the contention of plaintiff that the accident was due to any negligence of respondent. The matter is presented quite fully and satisfactorily in the brief of respondent, to which no reply has been made by appellant. No doubt, if any plausible reply could be made, it would have been presented by the able counsel for appellant.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(177 Cal. 227)

In re BERGLAND'S ESTATE. (L. A. 5216.)

(Supreme Court of California. Jan. 15, 1918.)

1. Appeal and Error 🔑345(1) — Exceptions, Bill of 🔑36(3) — Time for Proceedings — Effect of Motion for New Trial—"Pending."

Code Civ. Proc. § 650, provides that a party desiring to have exceptions settled in a bill of exceptions may, at any time within ten days after the entry of judgment or, if proceedings on motion for new trial be pending within ten days after notice of the decision denying such motion, prepare the draft of a bill and serve it on the adverse party. Section 939 provides that an appeal may be taken within the time therein specified, and that if proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until 30 days after entry of the order determining such motion or other termination of the proceedings upon such motion. *Held*, that within the meaning of these sections a proceeding for a new trial was "pending" where notice of intention to move for a new trial was filed, though no further steps were taken for three months.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Pending.]

2. WILLS ⚷665 — CONDITION AGAINST CONTEST—PROBATE OF LATER WILL.

Under Code Civ. Proc. § 1298, requiring the custodian of a will on learning that the maker is dead to deliver it to the superior court or the executor, section 1299, authorizing any person interested to petition to have a will proved, and section 1301, providing that an executor failing to petition for the probate of a will may be held to have renounced his right to letters testamentary, the mere proposing for probate of a later and inconsistent will was not a violation of a provision against contests contained in an earlier will.

3. APPEAL AND ERROR ⚷1033(7)—HARMLESS ERROR—ERRORS FAVORABLE TO APPELLANT.

Parties contesting the validity of one of several wills filed for probate and not opposing or excepting to the dismissal of the petition for the probate of such will on the petitioner's motion, were not prejudiced by such dismissal.

4. WILLS ⚷384—PROBATE—APPEAL—SCOPE OF REVIEW.

Whether a beneficiary has forfeited her right under a will containing a provision against contests properly arises on distribution, and cannot be determined on appeal from an order admitting the will to probate.

Department 2. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Proceeding to probate wills of Andrew Bergland, deceased. From an order probating two wills of the decedent, the contestants appeal. Affirmed.

John H. Bowlby, of San Diego, for appellants. Luce & Luce, of San Diego, for respondent.

WILBUR, J. [1] This is an appeal from an order made November 7, 1916, probating two wills of Andrew Bergland, one will dated June 7, 1910, with two codicils; the other will dated August 29, 1915. Notice of this decision was served on appellants on November 10, 1916. Ten days thereafter appellants served their notice of intention to move for a new trial, but took no further steps thereon until February 10, 1917, three months thereafter, when they served notice to bring said motion on for hearing February 19, 1917, at which time the motion was dismissed for lack of jurisdiction. Respondent moves to dismiss on the ground that the notice of appeal, served and filed March 8, 1917, was too late, for the reason that no motion for new trial was pending within the meaning of section 939, Code of Civil Procedure, within 30 days of said notice of appeal. This position is not well taken. The filing of the notice of intention to move for new trial within time started a new proceeding, which remained pending until disposed of by the court or by operation of law, to wit, on February 10, 1917, and therefore the motion to dismiss should be denied.

On February 20th appellants obtained an order extending to March 1, 1917, the time to file a bill of exceptions to the decision of the court, and on that date the bill of exceptions was served on respondent. Respondent gave notice to dismiss the bill of exceptions for the reason that the same was not served within time. The motion to dismiss the bill of exceptions was denied by the court, and, exception thereto being reserved therein, the bill of exceptions was settled on March 14, 1917. Respondent's contention that the proposed bill of exceptions was not presented within time is based upon the same contention, viz. that proceedings for new trial were not pending, and, for the above reason, is not well taken. Section 650, Code Civ. Proc.

[2-4] The will of June 7, 1910, made respondent Kate J. Misner a residuary legatee and devisee as to one-fourth of decedent's property. The will of August 29, 1915, gave her all the money of decedent in bank; but it is claimed that respondent was not entitled to have said last-mentioned will probated because in the will of June 7, 1910, there is a proviso cutting off with $5 all contesting devisees and legatees, and that respondent was a contestant within the meaning of said proviso for the reason that she had proposed for probate another and later will, dated December 25, 1915, revoking all former wills. All said petitions and contests thereof were heard together.

The mere proposing for probate of a later and inconsistent will was not a violation of a provision against contest contained in an earlier will. It was her duty to file the will (Code Civ. Proc. § 1298) and her right to petition for its probate (Code Civ. Proc. §§ 1299, 1301). Appellants contested the validity of said will, and, although present, did not oppose or except to the court's order of dismissal on respondent's motion of her petition for its probate and were not prejudiced by such dismissal. In their argument appellants assume that the allegations of their contest that said will was forged and that the decedent was incompetent on December 25, 1915, are true, but no evidence thereon was offered. The question of whether or not respondent has forfeited her right properly arises on distribution (Estate of Hite, 155 Cal. 436, 101 Pac. 443, 21 L. R. A. [N. S.] 953, 17 Ann. Cas. 993), and cannot be determined on this appeal.

The motion to dismiss the appeal is denied, and the order appealed from is affirmed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

177 Cal. 211

In re GURNSEY'S ESTATE. (Sac. 2625.)

(Supreme Court of California. Jan. 15, 1918.)

1. EVIDENCE 🔑461(1)—PAROL EVIDENCE TO VARY WRITING — UNAMBIGUOUS INSTRUMENTS.

A written instrument executed by a husband and wife whereby they agreed that a deposit account opened with a savings bank and all deposits thereafter made to such account by either of them should be owned by them as joint tenants was not uncertain or ambiguous in its meaning, and its terms or legal effect could not be changed by evidence that the wife did not know she was a party to a joint account, and thought that the only effect of the agreement was to enable either party to draw the money from the bank by check.

2. HUSBAND AND WIFE 🔑266 — TITLE TO BANK DEPOSITS—"JOINT INTEREST"—"JOINT TENANCY."

Under Civ. Code, § 683, defining a "joint interest" as one owned by several persons in equal shares by a title created by a single will or transfer when expressly declared therein to be a joint tenancy, and Bank Act (St. 1909, p. 90) § 16, providing that, when a deposit with a bank shall be made in the names of the depositor and another person or persons and in form to be paid to either or the survivors such deposit, and any additions thereto shall become the property of such persons as joint tenants, such agreement created a "joint tenancy," and the title to community money deposited in such account passed out of the community at the time of the deposit, and became the joint property of the husband and wife, whether the wife understood its exact nature when she signed the agreement and accepted its benefits or not.

[Ed. Note.—For other definitions, see Words and Phases, First and Second Series, Joint Interest; Joint Tenancy.]

3. APPEAL AND ERROR 🔑909(1) — PRESUMPTIONS TO SUPPORT JUDGMENT — MATTERS NOT SHOWN BY RECORD.

In a proceeding to collect an inheritance tax, where it appeared from the record that a joint account was opened in a savings bank in 1911 by the deposit of $3,000, and that other deposits were made thereafter, but it did not appear whether the subsequent deposits were made before or after the taking effect of Inheritance Tax Act 1913 (St. 1913, p. 1066), it will be presumed on appeal, if necessary to sustain the court's decision, that they were made prior to the taking effect of such act, as all facts necessary to sustain the decision must be presumed in its favor unless the contrary appears in the record.

4. TAXATION 🔑861 — INHERITANCE TAX — LAW GOVERNING.

The question of liability to inheritance taxes must be determined by the law in force at the time the title vests in virtue of the transfer.

5. TAXATION 🔑879(1) — INHERITANCE TAXES —TRANSFERS IN CONTEMPLATION OF DEATH.

Under Inheritance Tax Act 1905 (St. 1905, p. 341), imposing inheritance taxes upon all property transferred by deed, grant, sale, or gift, made in contemplation of the death of the grantor, vendor, or bargainor, or intended to take effect in possession or enjoyment after such death, where a husband and wife deposited community funds in a bank under an agreement that the deposit should be owned by them as joint tenants, the right of survivorship accruing to the wife on the death of the husband was not taxable in the absence of anything other than the creation of the joint deposit showing any postponement or restriction of the enjoyment or use of the deposit by either party, since a joint tenancy is not a testamentary disposition, and does not of itself raise any inference or presumption that it was created in contemplation of death or intended to take effect at or after death.

6. JOINT TENANCY 🔑6—NATURE AND INCIDENTS OF ESTATE.

A transfer to joint tenants gives each of the tenants immediately the title and right of possession and enjoyment of the whole property, and the survivor succeeds to no new title or right on the death of his cotenant, but is merely relieved thereby from the cotenant's further interference.

In Bank. Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Proceeding for the collection of an inheritance tax on the estate of William H. Gurnsey, deceased. From an order refusing to allow the payment of the tax, the State Controller appeals. Affirmed.

Robert A. Waring, Inheritance Tax Atty., and J. Paul Miller, Asst. Inheritance Tax Atty., both of Sacramento, for appellant. W. A. Fish, of Red Bluff, for respondent John N. Gurnsey. W. P. Johnson, of Red Bluff, for respondent Harriet A. Gurnsey.

SHAW, J. The state controller has appealed from an order of the superior court refusing to allow the payment of inheritance tax upon the sum of $10,151.97, which he claims was subject to such tax.

On April 11, 1911, the decedent, W. H. Gurnsey, and his wife, Harriet A. Gurnsey, executed an instrument in writing whereby it was agreed between them that the deposit account that day opened with the People's Savings Bank in their joint names, and all deposits thereafter made to said account by either of them, should be held and owned by said husband and wife as joint tenants, in joint tenancy. The instrument contained other terms descriptive of the nature and legal effect of the joint tenancy, but they did not change the legal character of the joint estate thereby created, as defined at common law and as declared by section 683 of the Civil Code and section 16 of the Bank Act of 1909 (Stats. 1909, p. 87), then in force.

This agreement was left with the People's Savings Bank, and at the same time and in pursuance thereof W. H. Gurnsey, out of the community property, deposited in said bank to said account the sum of $3,000. Thereafter, from time to time, other money was deposited by said W. H. Gurnsey to said account, and at the date of his death, which occurred on February 9, 1915, the amount of said account was the sum of $10,151.97.

In pursuance of his claim that this money was subject to inheritance tax, the appellant introduced the oral testimony of the widow, Harriet A. Gurnsey, detailing the conversation at the time said agreement was executed. She stated, in substance, that the agreement was executed in the bank, and was delivered to the cashier at the time of the deposit; that her husband stated that he wanted to deposit the money so that either he or she could draw it out at any time; that she did not read the agreement, and did not understand the effect of it, except that she knew that either one of them could draw the money from the bank by check, and that she did not really know that she was a party to a joint account prior to her husband's death. It is clear, however, that she intended to take by the agreement whatever benefits it conferred upon her. Neither she nor her husband drew any money from the account during his lifetime.

[1, 2] The agreement above set forth is in no respects uncertain or ambiguous. Its meaning is entirely clear. No testimony by either party was admissible to change its terms or its legal effect, in the absence of fraud or mistake. It is doubtful if the state authorities could set up such fraud or mistake in order to establish the right to inheritance tax in such a case, but whether this be true or not, no such claim is made in this case. The effect of the agreement was to create a joint estate in the property to which it relates, and the evidence introduced could not, under these circumstances, be allowed in any way to change the terms or legal effect of the agreement. The title to the money deposited passed out of the community at the time of the deposit, and it then became the joint property of the husband and wife, invested with all the attributes of such property, whether the wife understood its exact nature when she signed the agreement and accepted its benefits or not.

The only question for determination, therefore, is whether, under this agreement, the property so deposited is subject to the payment of the inheritance tax.

[3, 4] The inheritance tax law in force at the time the joint account was created and the first $3,000 was deposited thereto in April, 1911, was the act of 1905 (Stats. 1905, p. 341). The transfer to the joint account was complete, and the title to the fund vested in the joint tenants as soon as the deposit was made. The title to each additional sum deposited thereafter would vest when such sum was deposited. The dates of such additional deposits do not appear. The record shows merely that they were made "thereafter"; that is, after the first deposit of $3,000 in April, 1911. It therefore follows that, if there are any provisions of the Inheritance Tax Law of 1913 which differ from those of the Act of 1905 with respect to the liability of this money to such tax, the act of 1913 must be disregarded, and the question decided wholly upon the provisions of the act of 1905. The decision of the court below was that the fund on deposit at the death of Gurnsey in 1915 was not taxable. All the facts necessary to sustain this decision must be presumed in favor thereof unless the contrary appears in the record. Hence, if necessary to sustain the decision, we must presume that all of the deposits were made prior to the taking effect of the act of 1913. The rule on the subject is that the question of liability to inheritance taxes must be determined by the law in force at the time the title vests in virtue of the transfer. Hunt v. Wicht, 162 Pac. 639, L. R. A. 1917C, 961.

[5] The act of 1905 imposes inheritance taxes upon all property "which shall be transferred by deed, grant, sale, or gift, made in contemplation of the death of the grantor, vendor or bargainor, or intended to take effect in possession or enjoyment after such death."

The decision of the court below has the effect of a finding that the said joint deposit was not created or made by either party thereto in contemplation of death, or with the intent that the donee should not have the possession or use thereof until after the donor's death. This finding is not contrary to the evidence. The creation of a joint tenancy is not a testamentary disposition. Of itself it raises no inference or presumption that it was done in contemplation of death. The evidence shows that the only purpose mentioned was to place the money so that each could draw it out at pleasure without the consent of the other, and that nothing was said between them concerning the death of either, or concerning the postponement of enjoyment by either, or restriction of the use of either. The court was justified in its conclusion that there was no expression by either party of the idea that the deposit was made to effect a transmission of the property at the death of William H. Gurnsey, or that he was to have the exclusive use thereof during his lifetime. The instrument itself, therefore, controls, and the case depends upon the nature of a joint estate. The argument of the controller is that the creation of a joint deposit by a husband and wife out of money which was previously community property is in legal effect a transfer of property to vest in the other upon the death of either; that the intent of the husband in the creation of this deposit is conclusively presumed to have been to transfer the property to his wife, to take effect in possession and enjoyment by her, at his death.

This question was under consideration by this court in McDougald v. Boyd, 172 Cal. 753, 159 Pac. 168, where a joint account was created by a husband and wife in a manner substantially the same as here. The court said:

> "Mrs. Boyd did not take any interest in the deposits as heir of or successor to her deceased husband. She took by virtue of her estate originating at the time of creation of the joint tenancies. The imposition of the tax cannot, therefore, be sustained upon the theory that the deposits formed a part of the estate of Colin M. Boyd, passing upon his death to his wife. * * * Boyd died on March 13, 1912. The inheritance tax statute then in force was the act approved April 7, 1911 (Stats. 1911, p. 713), and this act did not undertake to impose a tax

on the right accruing to a surviving joint tenant upon the death of his cotenant."

The act of 1911, so far as that subject is concerned, is similar to the act of 1905, upon which the present case depends. The joint tenancy referred to in the Civil Code (section 683), and here involved, is the estate known as such at common law. In Kennedy v. McMurray, 169 Cal. 287, 146 Pac. 647, Ann. Cas. 1916D, 515, we held that a joint deposit account made in the same manner as the account here involved created a joint tenancy, and that such deposit was no part of the estate of the party who first died. In Estate of Harris, 169 Cal. 725, 147 Pac. 967, the court decided that a joint tenancy in personal property could be created by parol, and that "upon the death of one of two joint tenants the survivor thereupon becomes the sole owner of the entirety, not by descent, but by survivorship and in virtue of the original grant creating the tenancy."

[6] In Hannon v. S. P. Co., 12 Cal. App. 355, 107 Pac. 335, the subject was treated at greater length. It was there shown that at common law the title to the joint property did not pass to and "vest in the survivor" upon the death of his cotenant, but that "each tenant was seised of the whole estate from the first, and no change occurred in his title on the death of his cotenant"; that "it simply 'remained' to him," and came to him "wholly from the original grant," so that after the death of one, the other, in pleading his title, could allege a conveyance by the original grantor to himself, without mention of the cotenant, citing Coke on Littleton, § 286, and 1 Washburn on Real Property, 646, and concluding with the following:

> "It is therefore a mistake to say of joint tenants that the title vests in the survivor upon the death of the cotenant, or that it descends to him from his cotenant; for it had already vested in him by, and at the time of, the original grant."

This is the legal effect of a joint tenancy at common law and under our Code, and it would, of course, prevail without regard to the actual intent of the donor who created it. The inheritance tax law, prior to 1915, imposed such tax upon transfers by gift, "intended to take effect in possession or enjoyment," by the donee, only at or after the death of the donor. A transfer to joint tenants, without other conditions, does not come within that description, for, as above shown, it gives to the donee immediately the title and the right of possession and enjoyment of the whole, and he succeeds to no new title or right upon the death of his cotenant, but is merely relieved thereby from the further interference of the cotenant. The Legislature of 1915 was evidently of the same opinion. The act of 1915 declares that deposits to joint account of the donor and donee in joint tenancy "shall be deemed to be a transfer intended to take effect in possession or enjoyment at or after the death" of the donor. Stats. 1915, p. 436. The statement in McDougald v. Boyd, supra, that the act of 1911 did not undertake to impose such tax upon the "right accruing to a surviving joint tenant upon the death of his cotenant" is, in our opinion, correct. Some restriction upon the possession and enjoyment of the donee, other than that arising from the law of joint tenancy, was necessary, under the previous acts, to bring the transfer within its definition.

The appellant refers to many cases where gifts and other transfers were made by the decedent in his lifetime, but the control of the property was retained by him, and where from the circumstances the court deduced the conclusion that the transfer was made in contemplation of death, or to take effect in possession and enjoyment after death. These cases have no application here. The finding of the court below, upon sufficient evidence to sustain it, that this transfer was not made in contemplation of death, or to take effect in possession or enjoyment at or after death, excludes the basis upon which these decisions were founded. The mere creation of a joint account and the addition to it of deposits made by way of gift from the community property to the joint estate, as we have shown, do not constitute conclusive evidence that the gifts were made in contemplation of death, or were intended to take effect at or after death. There is no force in the argument that the husband had entire control of the property from the time of the deposits until his death. It could be as truly said that the wife had such control. The agreement determined the persons who had the right of control of the property, and by its terms the wife had as full control as the husband. Upon the death of either the property remained, and all of it remained, the property of the survivor, as it was, in contemplation of law, from the time of its creation.

The order appealed from is affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SLOSS, J.; WILBUR, J.

177 Cal. 247

BRADFORD v. FIDELITY SAVINGS & LOAN SOCIETY et al. (L. A. 4071.)

(Supreme Court of California. Jan. 17, 1918.)

1. TENDER 🔑28—SUFFICIENCY—DETERMINATION.

While under Code Civ. Proc. § 2076, failure of vendor to object to amount of tender was a waiver of the objection that it was less than the option required, the insufficiency as to amount could be considered by the court in determining sufficiency of the tender.

2. TENDER 🔑16(4)—SUFFICIENCY—ESTOPPEL.

Where vendor objected to tender as being merely "conversation" money, estoppel would go only to sufficiency of tender, and would not affect the question of the amount to be actually paid.

3. TENDER 🔑13(2)—SUFFICIENCY.
Where the purchaser did not have the money at the time of the tender, but claimed to have borrowed $60,000, and the amount due under the option was $91,000, the court was justified in finding that there was no tender.

Department 2. Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by S. P. Bradford against the Fidelity Savings & Loan Society and others. Judgment for defendants, and plaintiff appeals. Affirmed.

William Schreider, of Los Angeles, for appellant. Tanner, Odell, Odell & Taft and S. W. Odell, all of Los Angeles, for respondents.

WILBUR, J. This is an appeal from the judgment. The defendant corporation gave an option to purchase certain land to Milton K. Young, who was the attorney and trustee for the plaintiff. The exact amount to be paid under the option was not stated therein, but was to be determined with reference to certain moneys thereafter to be paid out by the defendant for the purchase of said land, the completion of a building thereon, and for the clearing of the title thereof. Within the time fixed by the provisions of said option the plaintiff and said Young gave defendant a written acceptance of said option, and in general terms tendered the various amounts specified in the option in the same general terms as specified therein, and fixed the amount so tendered at $61,352.77. The court found that the amount actually due under the terms of said option at that time was over $91,000. Plaintiff did not have the money at the time of the written tender, but claims to have arranged to borrow $60,000 upon the land in question. The defendant declined to either accept or refuse said tender, but did object to considering merely "conversation" money. It is evident that plaintiff could not pay an obligation of $91,000 from said fund of $60,000. He, however, claims that, as no objection was made to the tender on the ground that the amount was insufficient, that question cannot now be raised, and that he was not required to produce the money unless the tender was accepted. The evidence was sufficient to justify the finding that at the time said offer in writing was delivered to the defendant's agent "he demanded that the plaintiff produce and exhibit the money in cash." The court was justified in its further finding that:

> "It is not true that the plaintiff is ready or willing or able to pay the defendant the sum of $61,352.77 or to comply with the terms of his said agreement."

[1-3] It is, no doubt, true that a failure to object to the amount of the tender was a waiver of the objection that it was less than the option required (section 2076, Code Civ. Proc.), but in considering the sufficiency of the tender, the court was justified in considering that fact. The estoppel only goes to the question of the sufficiency of the tender, and does not at all affect the question of the amount to be actually paid. Latimer v. Capay Valley Co., 137 Cal. 286, 70 Pac. 82; Colton v. Oakland Bank of Savings, 137 Cal. 376, 383, 70 Pac. 225. Under the circumstances the trial court was justified in finding that no tender was made (Doak v. Bruson, 152 Cal. 17, 21, 91 Pac. 1001; Allen v. Chatfield, 172 Cal. 60, 68, 156 Pac. 47; Civ. Code, § 1495), and that the amount actually due was over $91,000.

Judgment affirmed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

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177 Cal. 199

MORRILL v. STONE & WEBSTER CONST. CO. (L. A. 4104.)

(Supreme Court of California. Jan. 14, 1918. Rehearing Denied Feb. 11, 1918.)

1. MASTER AND SERVANT 🔑278(3)—FAILURE TO FURNISH SAFE PLACE TO WORK—EVIDENCE.
In an action for injuries sustained by plaintiff while constructing a derrick to be used for hoisting materials for building, evidence *held* sufficient to justify a finding that the master was negligent in failing to provide for plaintiff a safe walk upon which he could pass along a wall as he was directed to do by the foreman.

2. MASTER AND SERVANT 🔑204(1)—ASSUMPTION OF RISK—STATUTE.
As the Roseberry Act (St. 1911, p. 796), declaring that assumption of risk is no defense where the danger is caused by the negligence of the master, was in force at the time of the injury, it could not be claimed that plaintiff servant in walking over ship-laps, knowing that they had been laid temporarily for a different purpose, assumed the risk.

3. NEGLIGENCE 🔑135 — SLIGHT CONTRIBUTORY NEGLIGENCE—EVIDENCE.
In an action for injuries sustained by plaintiff while engaged in constructing a derrick to be used for hoisting materials for a reinforced concrete building, the finding that plaintiff's negligence was slight in comparison to defendant's negligence *held* sustained by the evidence.

Department 1. Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by J. H. Morrill against the Stone & Webster Construction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Haas & Dunnigan, of Los Angeles, for appellant. Porter, Morgan & Parrot, of Los Angeles, for respondent.

SHAW, J. Defendant appeals from the judgment. The action was to recover damages for personal injuries suffered by the plaintiff, alleged to have been caused by the negligence of the defendant. The answer averred that the plaintiff's own negligence contributed to the injury complained of. The court found that the injury was caused by the negligence of the defendant, and also that the negligence of the plaintiff contributed thereto, but that the negligence of the plaintiff was slight in comparison with that of the defendant, and of a nature which served only to reduce the damages to which the plaintiff was entitled. In this the court followed the provisions of the act of 1911, known as the Roseberry Act, which was in force at the time of the injury to the plaintiff. Stats. 1911, p. 796. The defendant concedes that the finding that the plaintiff was guilty of negligence which contributed to his injury is sustained by the evidence, but it earnestly contends that there was no substantial evidence to prove that the defendant's negligence caused the injury, either directly or indirectly.

The defendant was the general contractor for the erection of a reinforced concrete building. At the time of the injury the plaintiff was in the employ of the defendant, assisting in the construction of said building. The walls of the building were at that time in process of construction to a greater height. They were of concrete, and were made by pouring the concrete into a board form, so constructed as to hold the concrete, which was to constitute the wall, in place while it was setting or hardening. This form was made by setting upright pieces of wood proper distances apart, and nailing boards on the inside thereof so as to form a box, into which the concrete was poured. At the time of the injury the top of the form was about 12 feet above the level of the concrete which had then been poured into it. The boards of this form were from three to four inches wide and three-fourths of an inch thick, and were of an inferior quality of lumber, known in the trade as "ship-lap." The carpenters were engaged in nailing this ship-lap to the uprights, and the boards required for their use were temporarily laid along the top of the frame of the form on some wires stretched across the same to hold the uprights in their proper place. The plaintiff was what is called a rigger. His part of the work was to set up derricks and other apparatus required for the purpose of raising materials to the points where the workmen were engaged in construction. He and a fellow workman were ordered to take a guy rope and fasten it at a point designated by the foreman. In order to do this it was necessary for him to go to the top of the form on which the workmen were engaged in nailing the ship-lap, and walk over a part of it upon the ship-lap so laid on the top thereof ready for the carpenters below, and to carry with him a coil of rope weighing about 70 pounds. The fellow workman preceded him, and walked along the top of the form and upon these boards in safety. When the plaintiff stepped upon one of the boards it broke and the resulting fall threw him over against a projecting timber, whereby he received the injury complained of. The board on which he stepped was not strong enough to bear his weight and that of the rope he was carrying. The plaintiff did not look at the board, but walked right along after his fellow workman, supposing that the boards were of sufficient strength to hold his weight. The plaintiff was not instructed to examine the boards to see if they were of sufficient strength to bear his weight, nor was he warned concerning them. The allegation of the complaint is that plaintiff, while walking across said wall, was compelled to walk on said boards, and that they "were inadequate and insufficiently strong to bear his weight," and that the defendant had negligently failed to provide a safe and proper place to work for the plaintiff while so engaged. The boards in question had been placed along the wall by the men engaged in erecting the form to be used by them as required, and were not intended to be used as a platform or as a place upon which other workmen should walk.

[1, 2] These facts are not controverted, and they show that there was sufficient evidence to justify the finding of the court that the defendant was negligent in the performance of its duty to provide for the plaintiff a safe walk upon which he could pass along the wall as he was directed to do. Prior to the enactment of the act of 1911 aforesaid, it might have been claimed that the plaintiff, in going along the wall, knowing that the ship-lap was placed thereon temporarily for a different purpose, and not as a place upon which to walk, would have assumed the risk of the danger arising from the weakness of such lumber, and, consequently, that he could not recover. But that act declares that the fact that the servant assumed the risk of the danger by which he suffers injury is not a defense to an action for damages where the danger is caused by negligence of the defendant. The fact that the board broke with the plaintiff's weight demonstrates that it was not of sufficient strength for the purpose to which the defendant then devoted it. If two thicknesses of the boards had been laid, as could easily have been done, the two would doubtless have sustained the weight. It being the defendant's duty to exercise ordinary care to provide sufficiently strong supports for the plaintiff while passing along the wall, it cannot be disputed that its failure to do so under these circumstances was negligence. This establishes the truth of the aforesaid allegation of the complaint.

[3] The finding that the plaintiff's negligence was slight in comparison with that of the defendant is also sustained by the evidence. The question of negligence is usually a question of fact for the court or jury during the case. Upon the facts heretofore stated we cannot say as matter of law that the plaintiff's negligence was gross or was not slight in comparison with that of the defendant. These comprise all the points raised

upon the appeal that are worthy of consideration. As to excessive damages, see Aldrich v. Palmer, 24 Cal. 516.

The judgment is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

177 Cal. 217

FIRST NAT. BANK OF REDONDO v. SPALDING. (L. A. 4058.)

(Supreme Court of California. Jan. 15, 1918.)

1. EVIDENCE 🔑461(1)—GUARANTY 🔑27—WRITTEN INSTRUMENTS—CONSTRUCTION.

A separate instrument guaranteeing payment of notes must be construed with the notes, and the circumstances may be shown to learn the intent of the guarantor; the rule that a surety or guarantor may stand upon the strict terms of his contract meaning merely that his liability is not to be extended by implication beyond the express terms of the instrument in which his guaranty is contained.

2. GUARANTY 🔑9—NOTES—GROUNDS OF DISCHARGE.

A guarantor was fully bound, notwithstanding the failure of his separate written guaranty to specify an increased rate of interest after maturity, attorney fee for collection, and payment of notes in gold.

3. GUARANTY 🔑54—NOTES—ALTERATIONS—DISCHARGE OF GUARANTOR.

Where dates of notes were changed to postpone running of interest until the makers actually received the consideration for the notes, a guarantor under a written guaranty providing that any extension might be granted was not discharged.

Department 2. Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by the First National Bank of Redondo, a corporation, against A. G. Spalding. Judgment for plaintiff, and defendant appealed. Defendant dying pending the appeal, his executrix, Elizabeth Churchill Spalding, is substituted as defendant. Affirmed.

Riley & Heskett, of San Diego, for appellant. Allen & Weyl, of Los Angeles, and Sam Ferry Smith, of San Diego, for respondent.

MELVIN, J. A. G. Spalding appealed from a judgment whereby he was held liable upon a contract of guaranty regarding two of four certain notes therein specified. Pending appeal Mr. Spalding died, and the executrix of his last will, Elizabeth Churchill Spalding, has been substituted as appellant.

It appears from the evidence that C. L. Hyde and Jess Knight were the managing stockholders of a corporation known as Knight & Hyde Mining Company. They applied to the president of the respondent corporation for a loan. He refused to loan money upon the note of the corporation, but agreed to furnish credit up to $10,000 upon the execution and delivery of four notes for $2,500 each, signed respectively by C. L. Hyde, Jess Knight, Mary Hyde, and Lillie J. Knight (the two latter being the wives respectively of the men of like surnames), provided A. G. Spalding would guarantee the payment of these obligations. The consideration for these notes was not to pass to the makers but to the mining company. Mr. Spalding was interested in the success of the mining company, whether as a stockholder or a pledgee of stock as collateral for loans does not clearly appear. The cashier of respondent bank prepared four notes and a contract of guaranty. These were taken to San Diego from Redondo, and the last-named instrument was signed by Mr. Spalding. There is a conflict of testimony regarding the question whether or not he inspected copies of the notes before signing the said contract, but it is conceded by appellant that under our rule we must assume the court's decision upon this matter was an adoption of the testimony to the effect that he did examine the copies. The notes and guaranty all bore date of December 24, 1909. The guaranty was as follows:

> "Redondo, Cal., Dec. 24, 1909.
>
> "For value received, I hereby guarantee to First National Bank of Redondo, California, the payment of certain promissory notes amounting to ten thousand dollars ($10,000.00) in favor of the First National Bank of Redondo, California, signed by the following persons, to wit:
>
> | | |
> |---|---|
> | Jess Knight | $2,500.00 |
> | C. L. Hyde | 2,500.00 |
> | Lillie J. Knight | 2,500.00 |
> | Mary Hyde | 2,500.00 |
>
> "Due one day after date and bearing interest at the rate of eight (8) per cent. per annum, with all costs of collection, including reasonable attorney's fees, and authorize extensions of time to maker, and same shall not affect my liability.
>
> "Demand, notice of nonpayment, and protest waived. A. G. Spalding."

Each note was a duplicate of the other three, except the signature, and was a promise to pay one day after date the principal sum with interest at the rate of 8 per cent. per annum from date until maturity and from maturity at the rate of 1 per cent. per month. Each contained the following sentence:

> "Should suit be commenced, or an attorney employed, to enforce the payment of this note, I agree to pay 5 per cent. on amount unpaid as attorney's fees. Principal and interest payable in gold coin of the United States."

The court found that on December 24, 1909, and prior to the acceptance of the notes by plaintiff, Mr. Spalding guaranteed their payment, and that all of the notes except that executed by Mr. Knight were after the date thereof delivered to and accepted by plaintiff. New notes were subsequently executed by Mary E. Hyde and Jess Knight providing for 10 per cent. on the amount unpaid instead of 5 per cent., as in the originals for attorney's fees, but, as the judgment was in favor of defendant regarding the alleged guaranty of the payment of these two notes, we need not be greatly concerned with them on this appeal.

It was found that the notes were deposited with the Knight & Hyde Mining Company after December 24, 1909, to be delivered by it to plaintiff with request that their dates be changed to correspond with the times when the consideration should pass from plaintiff to the Knight & Hyde Mining Company, and that pursuant to said request plaintiff altered the dates, the two notes involved in this appeal being redated as follows: The note signed by Lillie J. Knight January 13, 1910, and that signed by C. L. Hyde February 16, 1910. The court further found that the only authority or right for said alterations, "so far as the defendant is concerned, was and is the provision in said contract of guaranty wherein said defendant authorized the plaintiff to give the makers of said notes extension of time, and that such extension should not affect his liability."

Appellant's first contention is that the notes described in the guaranty are not substantially the same as those actually executed. The guarantor specified notes bearing interest at 8 per cent., but those actually signed, being one day notes, bore interest at 8 per cent. for only a day, and thereafter at a higher rate. The notes specified a certain percentage of any unpaid balance as attorney's fee; the contract of guaranty a "reasonable" fee. The notes provide for payment in gold coin of the United States, while the guaranty does not so specify. Further, appellant interprets the contract as applying to the four notes as one obligation, and not to each individually. Appellant insists that all of these differences are substantial and exonerate the guarantor.

[1] None of these objections is valid. While it is true that contracts of this sort may not be varied by parol, it is always competent nevertheless to consider the circumstances of their execution in learning the intent of the guarantor. The fact that Mr. Spalding had copies of these very notes before him when he signed the contract of guaranty makes this just the sort of an agreement that we would have to interpret if the guaranty were indorsed upon the notes themselves. The contract referred in terms to the notes. It did not purport to set them out in all of their parts; the language clearly being not designed to limit the scope of the guaranty, but to describe the notes. The guaranty should not be construed separately from the notes but the instruments should be read together in the light of surrounding circumstances so that the true intention of the parties may be ascertained. Sections 1642 and 1647, Civ. Code; First National Bank of Redlands v. Bowers, 141 Cal. 253, 74 Pac. 856; Howland v. Aitch, 38 Cal. 133; Burnett v. Piercy, 149 Cal. 178–189, 86 Pac. 603; Otis v. Haseltine, 27 Cal. 81; Hazeltine v. Larco, 7 Cal. 32; Bagley v. Cohen, 121 Cal. 604, 53 Pac. 1117; and Gagan v. Stevens, 4 Utah, 348, 9 Pac. 706. In First National Bank v. Bowers, supra, the rule of interpretation was thus stated by Mr. Justice Lorigan, who wrote the opinion of the court:

> "Contracts of guaranty are not affected by rules different from those employed in construing other contracts, but, like all other contracts, should receive a fair and liberal interpretation, according to the true import of their language, and may be explained by reference to the circumstances under which they are made and the matter to which they relate. Civ. Code, § 1647. 'As guaranties are contracts of extensive use in the commercial world, upon the faith of which large credits and advances are made, care should be taken to hold the party bound to the full extent of what appears to be his engagement. Letters of guaranty are commercial instruments, generally drawn up by merchants, sometimes inartificial and often loose in their structure and form. They should not, therefore, be construed with nice and technical care, but according to the facts and circumstances accompanying the transaction, holding in view as the main object to ascertain and effectuate the intentions of the parties.' 2 Daniel on Negotiable Instruments, p. 791."

While it is true that a surety or guarantor may stand upon the strict terms of his contract, this means merely that his liability is not to be extended by implication beyond the express terms of the instrument in which his guaranty is contained. London & San Francisco Bank v. Parrott, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64.

[2] We are of the opinion that the guarantor was fully bound, notwithstanding the failure of the separate writing signed by him to specify the increased rate of interest, the proportion of the amount due which should be a "reasonable" fee, and the kind of money in which the notes should be paid. The remaining argument that the guarantor was released by the bank's failure to accept the first note executed by Mr. Knight has no force. Nothing in the contract indicates that he was to be entirely exonerated if his liability should be relieved to the extent of one-fourth thereof (as the court found it was), by the substitution of a new and unauthorized note containing a new obligation in place of the one originally signed by Mr. Knight.

[3] The only other question requiring decision is whether or not the change in the date of the two notes signed by Mrs. Knight and Mr. Hyde amounted to such material alteration as to excuse the guarantor from performance of his expressed obligation. The authorization given by Mr. Spalding for extensions of time to the maker of each note, such extensions not to affect his liability, was in the broadest and most unequivocal language. If under it new notes had been executed after the originals had been long in the possession of the plaintiff after delivery, he would have been in no position to complain, for it is well settled that the taking of a renewal note does not exempt the principal or the guarantor except upon agreement that

such will be the effect of the new writing. London & San Francisco Bank v. Parrott, supra; Brown v. Olmsted, 50 Cal. 162; Savings Bank v. Central Market Co., 122 Cal. 28, 54 Pac. 273; and Comptoir D'Escompte v. Dresbach, 78 Cal. 15, 20 Pac. 28. The change of the dates at the time of legal delivery had exactly the same effect as the making of renewal notes and the guarantor could not be injured by such act. There is no pretense that the alterations were fraudulent or made for any purpose other than postponing the running of interest on each note to the true date of the passing of the consideration. The alteration of an instrument to make it correspond to the intention of the parties does not vitiate it. A change in an instrument honestly made to effectuate the design of the parties by giving expression to it does not destroy the force of the writing. Daniel on Negotiable Instruments, § 1403; Sill v. Reese, 47 Cal. 294–348; Osborn v. Hall, 160 Ind. 153, 66 N. E. 457; and McRaven v. Crisler, 53 Miss. 542. It is contended that, because under the finding of the court the only authority for the change in the dates was that given by the terms of the contract of guaranty, we may not gather any implied consent to the alteration from the other parts of the transaction, from which it appears that the purpose of the guaranty was to secure credit at the bank for the mining company for the benefit of all the parties concerned, including Mr. Spalding. Conceding this point for the sake of argument, we are nevertheless of the opinion that the finding supports the judgment. The expressed consent to extensions of time did not specify when nor the manner in which those extensions were to be made and while the method adopted is not to be highly commended its use was no more injurious to the guarantor than a more orderly procedure would have been.

No other matters discussed in the briefs require analysis or comment.

The judgment is affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

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35 Cal. App. 293

CAMM v. JUSTICE'S COURT OF SANTA ROSA TP. et al. (S. F. 8613.)

(Supreme Court of California. Jan. 12, 1918.)

1. CERTIORARI 🔑1—SCOPE OF REVIEW.

Under Code Civ. Proc. § 1068, providing that a writ of error may be granted by any court, except a police or justice's court, when an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy, the sole office of the writ of certiorari is to test the question of jurisdiction.

2. JUSTICES OF THE PEACE 🔑194(1) — CERTIORARI—SCOPE OF REVIEW.

When the justice or police court has jurisdiction of the subject-matter, and has acquired jurisdiction of the person, the mode for correction of errors is appeal under Code Civ. Proc. § 974, providing therefor, and not by certiorari.

3. JUSTICES OF THE PEACE 🔑208(1) — CERTIORARI—SCOPE OF REVIEW.

On certiorari to review the judgment of a justice court, no facts de hors the record may be considered.

4. CLUBS 🔑12 — ACTIONS — PLEADING — SUFFICIENCY.

Complaint alleging that a club was an association doing business and had become indebted to plaintiff for goods sold was sufficient showing to authorize maintenance of action against the club; it being unnecessary to show the specific purposes of the association, or to show whether it was operated for pecuniary profit.

5. ASSOCIATIONS 🔑20(1) — ACTIONS — DISMISSAL.

Where plaintiff sued an association and its individual members, and dismissed as to the individuals, the court did not lose jurisdiction, since it was plaintiff's right to proceed either against the association or its members.

6. ASSOCIATIONS 🔑20(4)—PROCESS—SERVICE.

In view of Code Civ. Proc. § 388, as to associations, service of summons on one of the associates is a service on the association.

7. JUSTICES OF THE PEACE 🔑197(2) — CERTIORARI—JURISDICTION.

As affecting right to certiorari, the justice court acted within its jurisdiction in an action against an association in rendering judgment by default against the club, while demurrers to the complaint interposed by individual members were still pending and undisposed of, and thereafter when the time had expired within which the club might have appealed in dismissing as to the individuals.

8. CERTIORARI 🔑29—SCOPE.

An erroneous judgment rendered by a court having jurisdiction to render it cannot, merely because it is erroneous, operate as the basis for a writ of review.

In Bank. Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Petition by John L. Camm for review of proceedings of the Justice Court of Santa Rosa Township, County of Sonoma, in an action by H. S. Smith against the Sonoma County Good Roads Club and the petitioner. Judgment of dismissal, and petitioner appeals. Affirmed. Application for hearing in Supreme Court denied.

Following is the opinion of Hart, J., in the District Court of Appeal, concurred in by Chipman, P. J., and Burnett, J.:

Plaintiff filed, in the superior court of Sonoma county, a third amended petition asking for a review of the proceedings of the defendant, the justice's court, in an action in said justice's court, commenced on the 7th day of April, 1915, in which H. S. Smith, one of the defendants herein, was plaintiff and the Sonoma County Good Roads Club and some 30 individuals, including this plaintiff were defendants. A demurrer to said petition was sustained, without leave to amend, and judgment was entered dismissing the action. From this judgment plaintiff appeals.

It appears from the petition that, on April 13, 1915, a summons was issued in said action of Smith v. Sonoma County Good Roads Club et al., and was served on each of said individual defendants by delivering to each of them a copy of said summons attached to a copy of the complaint; that, on the 14th day of April, 1915, each of said individual defendants filed a demurrer to said complaint; that, while said demurrers were pending and undisposed of, a judgment by default was entered in said justice's court against the Sonoma County Good Roads Club, an association, in the sum of $264.25; that on "the 26th day of July, 1915, and after the time in which an appeal might have been taken from said judgment by default, and while the said demurrers of each of said individual defendants was pending and undisposed of," said cause of action against the individual defendants was dismissed; that on the 13th day of August, 1915, an execution was issued out of said justice's court directing the sheriff to levy upon the property of said Sonoma County Good Roads Club; that said execution was returned unsatisfied, and on August 14, an execution was issued against the individual property of this plaintiff.

It is then alleged in the petition that on the 16th of August, 1915, upon being advised of the issuance of said execution against his individual property, plaintiff instituted a suit in equity in the superior court, praying that said H. S. Smith and the sheriff be enjoined from levying said execution upon his individual property; that said superior court denied the prayer of plaintiff in said equity suit; that it was because plaintiff believed that his proper remedy was by suit in equity for an injunction that he did not immediately, on the 16th day of August, 1915, institute this action; "that at no time between the 21st of April, 1915, when said judgment by default was entered, and the 26th day of July, 1915, when said individual defendants were dismissed, did plaintiff believe, or have any reason to believe, or know that said defendant H. S. Smith claimed, or pretended to claim, that said default judgment was binding upon plaintiff and his property"; and that he believed he was absolved in toto from any judgment obtained in said action.

The petition then alleges: "That said plaintiff was during the times mentioned in said complaint, and is now, a member of said Sonoma County Good Roads Club, an association; that said association was not at any of the times mentioned in said complaint, or at any other time, and is not now an association composed of two or more persons associated in any business under a common name; that on the contrary said Sonoma County Good Roads Club was and is a nontrading, unincorporated association composed of voluntary members of the public generally, and was at all times mentioned in said complaint engaged in instilling, promoting, furthering, and advancing the interests of the public of the state of California in repairing, maintaining, and improving the streets, roads, highways, and byways of and in the county of Sonoma." It is also alleged that plaintiff moved, in said justice's court, to set aside and recall said execution, which said motion was denied.

Attached to the petition is a copy of the complaint of H. S. Smith, filed in the justice's court, against said club and this plaintiff and others as defendants. The allegations of said complaint are that, within four years last past, the Sonoma County Good Roads Club became indebted to plaintiff, upon an open book account, in the sum of $264.25, for goods, wares, and merchandise sold and delivered; "that the defendant the Sonoma County Good Roads Club is an association doing business at the city of Santa Rosa; * * * that the defendants above named other than the said Sonoma County Good Roads Club are each and all officers of said club or members of said club, and were members of said club at the time that said goods, wares, and merchandise were sold and delivered to said club, and said debt incurred."

[1] It is elementary that the sole office of the writ of certiorari is to test and determine a question of jurisdiction, and our Code so declares. Code Civ. Proc. § 1068. That section provides: "A writ of review may be granted by any court, except a police or justice's court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy."

[2] From a judgment rendered in a civil action in a justice's or a police court an appeal may be taken to the superior court (Code Civ. Proc. § 974), and thus a plain, speedy, and adequate remedy is afforded for the correction of errors occurring at the trial of such actions in said courts or for erroneous judgments rendered in actions triable and tried therein. When, therefore, such courts have under the law jurisdiction of the subject-matter of an action instituted therein and have regularly acquired jurisdiction of the person of the party proceeded against in such action, the mode for the correction of any errors which may have been made in the course of the trial of the action or for the correction of erroneous judgments rendered by such courts is by appeal and not through the instrumentality of a proceeding on certiorari or by means of any other jurisdictional writ.

If, then, the respondent, justice's court, has under the law jurisdiction of the subject-matter of the action complained of here and legally acquired jurisdiction of the alleged association, "Sonoma County Good Roads Club," it will follow that the writ petitioned for herein will not lie to correct any errors characterizing the said trial of the action in the justice's court or the judgment rendered in said action by the justice.

The amount sued for in the said action was the sum of $264.25, and, concededly, therefore, a justice's court has jurisdiction of such an action. Code Civ. Proc. § 112, subd. 1. The single question, then, remains: Did the respondent, court, acquire jurisdiction of the said alleged association? Against the contention that the said court did so obtain jurisdiction, several points are urged:

First, it is proper to state that the theory upon which the plaintiff in the action in the justice's court proceeded against the "Good Roads Club" was that it was an "association" within the meaning or contemplation of section 388 of the Code of Civil Procedure. Said section reads as follows: "When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability."

[3] The point first presented and discussed in their brief by counsel for the appellant is that the "Sonoma County Good Roads Club" is not an association within the meaning or contemplation of the above section, and, as supporting this proposition, counsel declare, in their opening brief, that said club, "as is disclosed by the record herein, is a nontrading, unincorporated association composed of voluntary members of the public generally, engaged in instilling, promoting, furthering, and advancing the interests of the public in the improvement and maintenance of the streets, roads, highways, and byways of the county of Sonoma, and never was an association composed of two or more persons associated in any business under a common name." But, even if it were true, as the argument of counsel seems to assume, that associates

in a "nontrading, unincorporated association" cannot in an action be proceeded against according to the provisions of section 388 of the Code of Civil Procedure, it is to be observed that the statement in the brief of appellant that it is such an association is not based upon anything appearing from the record in the action brought against the Good Roads Club, but is taken from the petition for the writ therein prayed for. Nowhere is it made to appear in the record, to the inspection of which this court must be confined in deciding the question submitted by this appeal, that the said club is "a nontrading, unincorporated association," etc. To the contrary, the complaint in the action in the justice's court alleged that it is "an association doing business," etc., from which we may justly infer that it is engaged in trade of some character. It is true that the judgment from which this appeal is prosecuted was rendered and entered against the appellant upon the motion to discharge the alternative writ and upon the demurrer to the petition for the writ, and it is also true that a demurrer necessarily admits all the material facts well pleaded; and perhaps it is upon the theory that a demurrer admits facts so pleaded that counsel for the appellant assume that the statement (above quoted) in the petition for the writ as to the character of the Good Roads Club is an admitted fact in the proceeding for the writ of review. But, if this be their position, it is wholly fallacious and the proposition sought to be deduced therefrom consequently untenable. As above stated, and as is obviously true, the sole question to be determined in a proceeding of the character of the one before us is whether, in a given case, the tribunal, in the application therein of the judicial powers cast upon it by law, has exceeded its lawful jurisdiction, and in determining this question the court must confine itself to the inspection of the record brought up for review. In other words, no facts de hors or extrinsic to the record so brought up may be considered. In re Grove, 61 Cal. 438, 453; Ex parte Sternes, 77 Cal. 156, 162, 19 Pac. 275, 11 Am. St. Rep. 251; De Pedrorena v. Superior Court, 80 Cal. 144, 146, 22 Pac. 71.

[4] But we do not think it was necessary, to authorize the maintenance of the action against the members of the club by their common name, to show by the complaint the specific purpose or purposes for which the members of the club had so associated themselves together, nor is it important whether it was a voluntary association and not organized and conducted for pecuniary profit to its projectors or members. Armstrong v. Superior Court, 173 Cal. 341, 342, 159 Pac. 1176. By this we mean to say that section 388 has reference to an association of two or more persons who thus band together for the purpose of transacting as a single body any kind of business, whether for profit to themselves or for charitable or philanthropic purposes, and that, where persons so associated, to effectuate the specific objects of their association and for the benefit thereof, create liabilities against themselves as such associates, such persons, as such associates, may be proceeded against by their common name in any action to enforce the liabilities so created.

The complaint in the action in the justice's court alleged, as we have seen, that said club is an association doing business at the city of Santa Rosa, etc., and that it had contracted an indebtedness with the plaintiff in the sum of $264.25 "for goods, wares and merchandise sold and delivered to said * * * Club." This constituted a showing sufficient to authorize the maintenance of the action against the club, or, perhaps it is more accurate to say, against the members of the club as associates in business under the common name of said club or association.

[5] Another point made by the appellant is that, "assuming, for the purposes of the argument only, the justice's court did acquire and have jurisdiction over said association and that process had been served upon it, * * * the dismissal of each and all of the individual defendants served with process constituted and was a dismissal of the case in toto, and by reason thereof the judgment complained of became a nullity," the justice's court having by said act of dismissal "lost jurisdiction of said cause and of each and all of the defendants." This point is obviously without merit.

It will not be disputed—indeed, counsel for the appellant expressly so admit in their brief—that the association herein concerned, as much so as a partnership, was and is, as regards its rights and obligations, a distinct legal entity. It was therefore proper for the plaintiff to proceed either against the association alone or against both the association and its members as individuals, and this would be the proper course if the members had bound themselves as individuals as well as associates in the association to the liability sought to be enforced. And where an action as against the members as individuals proved to be, in point of fact, groundless, the dismissal of the action as to them would involve an act no different from that in any other action in which several persons might be joined as defendants and the action dismissed as to one or more of the parties so joined. It is no uncommon practice or occurrence to join in an action at law the members of a partnership as individuals with the partnership itself, and as well might it be said that the dismissal of the action as against the members of the partnership as individuals would operate, per se, as a dismissal of the action against the partnership as such. No one would attempt to support such a proposition. See Redwood City Salt Co. v. Whitney, 153 Cal. 421, 423, 95 Pac. 885; Asbestos, etc., Co. v. Lennig-Rapple Co., 26 Cal. App. 177, 146 Pac. 188; Code Civ. Proc. § 578.

[6] It is next contended that the Good Roads Club was not served with summons. But the petition for the writ itself declares that the appellant was served with summons, and the complaint in the justice's court alleges that the appellant was one of the members of said club—an associate in said association. Under section 388 this constituted a service on the association or club.

[7, 8] There is considerable criticism in the briefs of the action of the justice's court in entering judgment by default against the Good Roads Club while the demurrers to the complaint, interposed by the individual members of the club who were proceeded against as defendants, were still pending and undisposed of, and thereafter, when the time had expired within which an appeal might have been taken from the judgment so entered against the club, ordering a dismissal of the action as against the individual members named as such as defendants. There is nothing in the action so complained of which affects the question of jurisdiction. It was clearly within the jurisdiction of the justice's court to adopt the course complained of. Why the association, whose members it may well be presumed knew of the entering of the judgment against it by default, did not appeal from said judgment when the opportunity was still open to it to do so—whether from willful neglect or inadvertence—we do not, of course, know; but it is about as plain and unquestionable a proposition as could be met with that the justice's court was acting within its jurisdiction when it rendered the judgment by default against the association. If the court for any reason committed error in doing so or the judgment for any reason was erroneous, the remedy provided for the correction of such error or such erroneous judgment is in an appeal to the superior court. An erroneous judgment rendered by a court having jurisdiction to render it cannot, merely because

it is erroneous, operate as the basis for a writ of review. Karry v. Superior Court, 162 Cal. 281, 284, 122 Pac. 475, 128 Pac. 760.

By the terms of section 388, execution may be issued against the individual property of the member or members of the association sued who have been served with process for the satisfaction of any judgment rendered against the association. The petition for the writ states that, on the 13th day of April, 1915, a summons was issued in said action and with a copy of the complaint was served upon each of the individual defendants on the 14th day of April, 1915. Thus it is admitted that the appellant, who was one of the "individual defendants," was served with process. His individual property was therefore subject to an execution to satisfy the judgment rendered against the association.

Some other specific questions are discussed in the briefs, but, having considered herein the more important points presented, we deem it unnecessary to notice others herein. We are satisfied after examining all the points and the very able arguments advanced in support thereof, that the justice's court was well within its jurisdiction in dismissing the action against the members of the association as individuals, in rendering judgment by default against the association, and in issuing execution in said action to satisfy the judgment so rendered against the individual property of the appellant.

The judgment appealed from is accordingly affirmed.

W. H. Early, of Petaluma (A. H. Crook, of San Francisco, of counsel), for appellant. E. J. Dole, of Petaluma, for respondents.

PER CURIAM. In denying the petition for a hearing in this court after decision of the District Court of Appeal of the Third Appellate District, we deem it proper to say that we do not consider what is said in the opinion on the question of the liability of the appellant's individual property to an execution to satisfy the judgment rendered against the association to be at all essential to the affirmance of the judgment appealed from.

Our denial of the petition for a hearing is not to be taken as an approval of what is said by the District Court of Appeal on this question. On the merits of that question we express no opinion.

The application for a hearing in this court is denied.

177 Cal. 238

Ex parte PHOEDOVIUS. (Cr. 2108.)

(Supreme Court of California. Jan. 17, 1918.)

1. STATUTES 🔑77(3) — GENERAL OR SPECIAL LAWS.

The provision of Pen. Code, § 627b, as amended by St. 1917, p. 651, making shipping by parcel post of wild birds or wild animals or fish a misdemeanor, does not violate Const. art. 1, § 11, requiring laws of a general nature to have uniform operation, for the impracticability of enforcing other provisions of the law for inspection, etc., as to game delivered to the postal service for transportation, furnishes a sufficient basis for excluding the parcel post from the means whereby game may be shipped.

2. CONSTITUTIONAL LAW 🔑278(6) — GAME 🔑4—DUE PROCESS.

Nor does such provision improperly interfere with property rights or deprive an owner of game of his right to use the parcel post without due process of law, since private ownership of game is but a qualified right subject to reasonable legislative regulations.

3. COMMERCE 🔑55—INTERFERENCE WITH.

Such provision is not invalid as an interference with interstate commerce, since its effect upon such commerce is remote and indirect, and, the ultimate ownership of game being in the state, the state has power to allow game to become an article of commerce only under restrictions imposed by the state.

4. POST OFFICE 🔑2 — INTERFERENCE WITH MAIL—CONSTITUTIONAL LAW.

Such provision is not invalid as an unlawful interference with the postal service; its effect thereon being indirect and remote.

In Bank. Application for habeas corpus by Frank Phoedovius. Writ discharged, and petitioner remanded.

Nathan Moran, of San Francisco, for petitioner. Carl Westerfeld, of San Francisco, for respondent. W. H. Lamar, of Washington, D. C., amicus curiæ.

ANGELLOTTI, C. J. The petitioner was convicted of a violation of the provision of section 627b of the Penal Code, which declares that "any person who ships any of the wild birds or wild animals or fish by parcel post is guilty of a misdemeanor," and adjudged to pay a fine of $25, and in default of such payment to be imprisoned. Held in the custody of the sheriff of San Mateo county by virtue of this judgment, he seeks his discharge on habeas corpus, claiming that this provision of law is invalid.

Said section 627b, as amended July 27, 1917 (Stats. 1917, p. 651), contains various provisions as to the conduct of common carriers and individuals in the matter of the shipment and the receiving for shipment of wild birds, wild animals, and fish, and the transportation thereof, violation of any of which provisions is declared to be a misdemeanor. These provisions, which prohibit the receipt by a common carrier from, or the transportation for, any one person of more than the legal limit of game allowed to be taken or killed by one person, or the shipping or offer for shipment by an individual of any such excess, and which also require every common carrier to keep all shipments of game in open view, labeled with the name and residence of the shipper and of the consignee, and the exact contents of the package, were designed, of course, to prevent shipment of wild game illegally taken and to enable the authorities to more easily discover violations of the game laws, all with a view to the proper preservation of the wild game of the state for the people of the state. The section, as so amended, contains the provision involved in this proceeding, one entirely new in this state, but obviously having the same purpose as the other provisions. It is urged on his behalf in this proceeding that the provision of the statute is void as being both an unlawful interference with a federal instrumentality, viz. the postal service of the United States, and an attempt to regulate interstate commerce. Petitioner also claims that it constitutes an unlawful interference with the property right of citizens to use the United States mail, and that it is in violation of section 11 of article 1 of our own Constitution, which requires that all laws of a general nature shall have a uniform operation.

[1] Of course, no one disputes the proposition that the postal service is a federal instrumentality under the exclusive jurisdiction of Congress, and that a state may in no way regulate or burden the operation thereof. It is this very fact which furnishes the basis for the discrimination against the use of that service by our citizens in the shipment of "wild game" (included in which is fish, People v. Truckee Lumber Co., 116 Cal. 397, 48 Pac. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183), and in favor of other methods of shipment. When game is deposited in the parcel post it is at once subject to the exclusive control of the postal authorities under the statutes of the United States and regulations of the Post Office Department, and absolutely free from state inspection and control. For reasons which are obvious the federal government could not tolerate the slightest interference with its officers and employés in the handling and delivery of the mail. For the purpose of protecting the game of the state for the use of the people of the state, the Legislature has enacted many laws relative to the taking of game, some prohibiting the taking of certain kinds at any time, others prohibiting the taking of certain kinds except during a certain time known as the "open season" for such game, others limiting the number of certain kinds that may be taken by one person during a stated time, and so on. As a method of guarding against illegal taking of game it has been provided that the fish and game commissioners of the state shall see that the game laws are strictly enforced, and "shall inspect all buildings, other than dwellings, and all receptacles, other than the clothing actually worn by a person at the time of inspection, where game or fish may be stored or placed, and all boxes and packages containing fish or game that are held for transportation by any transportation company or common carrier; * * * to inspect regularly * * * all boxes and packages, containing fish or game that are held for transportation by any transportation company or common carrier." Also to "seize and take possession of all game or fish," which has been illegally taken, killed, or had in possession, or has been shipped or offered for shipment contrary to any of the laws of the state. It is necessarily conceded that these provisions as to inspection and seizure by the state officers of game shipped or offered for shipment cannot be enforced as to shipments by mail. Any attempt to so enforce them would indeed be an attempted unlawful invasion of the exclusive federal jurisdiction. If these provisions for inspection and seizure of game found to be illegally taken are valid enactments of state law, the fact that they cannot be enforced as to game delivered to the postal service for transportation furnishes a sufficient basis for excluding the parcel post from the means by which game may be shipped, in so far as any objection of special legislation or want of uniformity in operation under our state Constitution is concerned.

[2] The argument of learned counsel for petitioner in support of the proposition that the provisions as to inspection, etc., are invalid as improperly interfering with property rights, and that the provision here involved which precludes petitioner from using the United States mail for the shipment of game is in effect a deprival of his property right to use the United States mail without due process of law, to our minds fails to give due effect to the well-settled doctrine as to the nature and extent of one's property right in wild game. That doctrine was stated by this court through Mr. Justice Van Fleet in Ex parte Maier, 103 Cal. 476, 483, 37 Pac. 402, 42 Am. St. Rep. 129, in language subsequently approvingly quoted by the Supreme Court of the United States in Geer v. Connecticut, 161 U. S. 519, 529, 16 Sup. Ct. 600, 40 L. Ed. 793, as follows:

> "The wild game within a state belongs to the people in their collective, sovereign capacity; it is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good."

The offense there charged was that of selling deer meat in violation of a state statute which prohibited any such sale in California. The meat sold was cut by the defendant from the carcass of an entire deer theretofore brought by him from the state of Texas, in which state it had been lawfully killed. It was contended that the statute did not and could not prohibit the sale of meat lawfully taken in another state. It was held that the statute both did and lawfully could prohibit such a sale, and that while the law was of course intended only for the protection of the game of this state, the intention was to accomplish that very end by prohibiting the sale wherever game was in fact obtained, and that such a law was reasonably adapted to that end. All state laws reasonably looking to this end have consistently been maintained by the courts, the theory being that the ownership of the sovereign authority being in trust for all the people of the state, it is the duty of the Legislature to enact such laws as will best preserve the subject of the trust and leave the beneficial use in future to the people of the state. In Geer v. State of Connecticut, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793, the Supreme Court of the United States upheld a statute of Connecticut which forbade the transportation without the state of game lawfully killed or taken within the state, or the having of such game in one's possession with the intent to procure its transportation beyond the state. In Ex parte Kenneke, 136 Cal. 527, 69 Pac. 261, 89 Am. St. Rep. 177, a statute prohibiting the buying or selling of quail was upheld by this court. The court, through Mr. Justice McFarland, said:

> "Wild game belongs to the whole people, and the Legislature may dispose of it as may seem to it best, subject only to constitutional limitations against discriminations. Within those limitations the Legislature, for the purpose of protecting game, may pass such laws as to it seem most wise; and 'the measures best adapted to that end are for the Legislature to determine, and courts cannot review its discretion.'"

It was held that the law did not destroy a right of property, the court approvingly quoting from American Express Co. v. State, 133 Ill. 649, 24 N. E. 758, 9 L. R. A. 138, 23 Am. St. Rep. 641, as follows:

> "The fallacy of the position consists in the supposition that the person who may kill quail has an absolute property in the dead animals. * * * The Legislature had the right to permit persons to kill or take game upon such terms and conditions as its wisdom might dictate, and that the person killing game might have such property interest in it, and such only, as the Legislature might confer. * * * The person killing quail under this statute has but a qualified property in the birds after they are killed. * * * But the law which authorized him to kill the quail has withheld the right to sell or the right to ship for the purpose of sale, and when such person undertakes to ship for sale, he is undertaking to assert a right not conferred by law. The act, therefore, does not destroy a right of property, because no such right exists."

In State v. Rodman, 58 Minn. 393, 59 N. W. 1098, it was said that the Legislature may adopt reasonable regulations not only as to the time and manner in which game may be taken and killed, "but also imposing limitations upon the right of property in such game after it has been reduced to possession." It was further said that such legislation deprives no person of his property, because the person reduces game to possession "subject to such conditions and limitations as the Legislature has seen fit to impose." See, also, Silz v. Hesterberg, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75. Such has been the uniform course of decision. We are, of course, speaking of regulations which may reasonably be held by the Legislature to look to the preservation of the game of the state for the beneficial use of the people of the state. The person taking or killing game takes or kills subject to the limitations of any such reasonable regulation by the state, and his right of property therein is qualified thereby. We can see no good ground for a claim that regulations subjecting such game to inspection by state officers when offered for shipment or when in course of transportation under shipment for the purpose of enabling illegal takings to be detected, or to seizure by such officers when found by them to be illegally taken, are in any way an unreasonable exercise of the power of the Legislature in this behalf. Whatever rights the shipper has in game shipped by him are subject to these regulations, as are necessarily the rights of the transportation company and the consignee. And the same thing is necessarily true of the law here involved prohibiting the shipping of game by parcel post. It is a reasonable complement of the regulations as to inspection, without which the inspection in course of transportation could be had only as to such game as is shipped by some other means than the United States mail. The person having game in his possession which he desires to ship acquires and holds it subject to the condition that he will not ship it by parcel post, and no property right in such game is violated by a law which makes it a crime for him to do so. We are entirely at a loss to see how a person's property right to use the United States mail for all lawful purposes is violated by a law which prohibits his use thereof for the purpose of transmitting property which he has acquired and holds subject to the condition that he shall not so transmit it.

The case of Ex parte Knapp, 127 Cal. 101, 59 Pac. 315 (involving the question of the validity of a county ordinance), relied on by learned counsel for petitioner in this connection, is sufficiently distinguished as to such a case as this by what was said by the court in Ex parte Kenneke, supra, as follows:

> "There is no question in the case at bar as to the reasonableness of an ordinance as in Ex parte Knapp, 127 Cal. 101 [59 Pac. 315], and other cases cited; the provision attacked here is a law of the state passed by the Legislature."

[3] The claim that the state law here involved is an unauthorized regulation of interstate commerce is, we think, fully answered by decisions of the United States Supreme Court, the final arbiter on this question. A similar claim was made in Geer v. State of Connecticut, supra, and held to be without foundation. The court, through its present Chief Justice, after exhaustively discussing the question of property in wild game, said:

> "The right to preserve game flows from the undoubted existence in the state of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected. * * * The exercise by the state of such power therefore comes directly within the principle of Plumley v. Massachusetts, 155 U. S. 461, 473 [15 Sup. Ct. 154, 39 L. Ed. 223]. The power of the state to protect by adequate police regulations its people against the adulteration of articles of food (which was in that case maintained), although in doing so commerce might be remotely affected, necessarily carries with it the existence of a like power to preserve a food supply which belongs to all the people of the state, which can only become the subject of ownership in a qualified way, *and which can never be the object of commerce except with the consent of the state and*

subject to the conditions which it may deem best to impose for the public good." (The italics are ours.)

In another portion of the opinion the court speaks of the "consequent power of the state to follow such property into whatever hands it might pass with the conditions and restrictions deemed necessary for the public interest." In the later case of Silz v. Hesterberg, supra, a similar claim was made, and the court held that the law (one prohibiting the possession of wild game during the close season, whether killed within or without the state) was not directed against commerce or any of its regulations, but only indirectly and remotely affected the operations of commerce, and was of obligatory force upon citizens within the territorial jurisdiction of the state. The court said:

> "That a state may not pass laws directly regulating foreign or interstate commerce has frequently been held in the decisions of this court. But while this is true, it has also been held in repeated instances that laws passed by the states in the exertion of their police power, not in conflict with laws of Congress upon the same subject, and indirectly or remotely affecting interstate commerce, are nevertheless valid laws."

It is sought to draw a distinction between these cases and the statute here involved, in that our laws permit the shipment beyond the borders of the state of game killed within the state, thus making game, it is said, "articles of interstate commerce." We do not consider the distinction material. The difficulty with the argument is that we have not made wild game an article of interstate commerce in the full and unrestricted sense. For so long as it remains within this state, at least, it remains burdened with the conditions imposed for the purpose of protecting the game of the state, to the effect that it may be shipped only in certain ways. As to this the language of Mr. Chief Justice White in Geer v. Connecticut, supra, that such game "can never be the object of commerce except with the consent of the state *and subject to the conditions which it may deem best to impose for the public good*" is specially pertinent. Our own case of Ex parte Maier, supra, is also in point to the effect that there is in our law no unwarranted interference with interstate commerce.

[4] The principles controlling the determination of the question just discussed are equally applicable to the claim that the state law here involved is an unlawful interference with the postal service of the United States. As said by respondent, there is no attempt here to regulate the postal establishment or in any way or degree to affect its operations. Looking to the proper protection of the game of the state for its people, the Legislature has prohibited any person within the state from shipping it by parcel post. It must be assumed here that such provision is reasonably necessary to such proper protection. The sole purpose of the enactment is the protection of game for the people of the state. The most that can be said in this connection is that the law may indirectly and remotely affect the postal department by depriving it of this patronage and the consequent revenue which would be paid as postage. But this, we think, in view of the decisions we have referred to, cannot be held to make the law invalid as unlawfully interfering with the postal service. In a well-considered opinion, the court of common pleas of Northampton county, Pa., reached a similar conclusion as to a recent statute of that state which prohibited shipments of game by parcel post. See Commonwealth v. Reimel, 44 Pa. Co. C. R. 557.

We see no good ground upon which the statutory provision attacked may be held invalid.

The writ is discharged, and the petitioner remanded to the custody of the sheriff of San Mateo county.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; VICTOR E. SHAW, Judge pro tem.; WILBUR, J.

177 Cal. 206

BERRY et al. v. BANK OF BAKERSFIELD.
(L. A. 4113.)

(Supreme Court of California. Jan. 15, 1918.)

1. TENDER 🔑14(4) — COUPLING WITH DEMAND FOR RETURN OF PROPERTY.

The validity of the tender was not impaired by coupling with it a demand for return of property pledged as security, in view of Civ. Code, §§ 1498, 1504, providing that, where a debtor is entitled to performance of a condition precedent to or concurrent with performance on his part, he may make his offer depend upon due performance of such condition, and that an offer of payment has the same effect as performance.

2. APPEAL AND ERROR 🔑1011(1)—FINDINGS ON CONFLICTING EVIDENCE—REVIEW.

Finding of trial court that defendant had no right to hold certificates pledged except as security for one of two notes, based on the court's interpretation of plaintiff's testimony as a positive denial of the testimony of defendant's president that the parties agreed that the pledge should cover both notes, *held* a conclusion from conflicting evidence controlling on appeal.

3. PLEDGES 🔑22—EXTENT OF LIEN—SUBSEQUENT OBLIGATIONS.

Civ. Code, § 3054, giving a banker a general lien upon all property in his hands belonging to a customer for a balance due from such customer in the course of business, does not change the rule that, where a security is pledged for a certain note, the bank is not entitled to a lien for the payment of another note.

4. PLEDGES 🔑36—PLEADING—ANTICIPATORY DAMAGES—"SPECIAL DAMAGES."

In replevin under Code Civ. Proc. § 667, the depreciation in value of pledged property unlawfully detained was an element of damage naturally to be contemplated, and therefore covered by plaintiff's averment of general damage; "special damages" being such as do not ordinarily arise from the breach complained of, but depend upon the peculiar circumstances of the case.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Special Damages.]

5. Pleading 🔑279(2)—Damages—Accrual after Commencement of Action.

No supplemental pleading was required to warrant recovery of damages resulting after the commencement of the action in view of Civ. Code, § 3283, providing that damages may be awarded in a judicial proceeding for detriment resulting after commencement thereof.

In Bank. Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by H. F. Berry and others against the Bank of Bakersfield. From a judgment against it and from an order denying a motion for new trial, defendant appeals. Affirmed.

J. W. Wiley, R. B. Lambert, and Wiley & Lambert, all of Bakersfield, for appellant. E. L. Foster and Chas. A. Barnhart, both of Bakersfield (Everts & Ewing, of Fresno, of counsel), for respondents.

SLOSS, J. The defendant, Bank of Bakersfield, appeals from a judgment against it, and from an order denying its motion for a new trial.

The complaint alleges that on February 1, 1911, the plaintiff H. F. Berry deposited with the defendant bank, as security for the payment of a $14,000 note executed by him to the bank, a certificate for 82,144 shares of the capital stock of the Black Jack Oil Company. Said shares were held by H. F. Berry as trustee for himself and the other plaintiffs; the certificate being in the name of H. F. Berry, trustee. It is alleged, further, that the defendant was informed at the time of the transaction that the plaintiffs were the owners of the shares. On July 11, 1912, shortly before the commencement of the action, the plaintiffs tendered to the defendant the sum of $1,015.28, the balance due on the note, together with interest, and demanded the return of the stock, but the defendant refused to deliver, and still unlawfully withholds and detains, the same. The complaint contains an allegation that the value of the property is $82,144 (i. e., $1 per share), and that plaintiffs have been damaged by the withholding and detention of the property in the sum of $10,000. The complaint prays for the recovery of the possession of the property, or its value in case delivery cannot be had, and for $10,000 damages, and costs.

By its answer the defendant denied certain allegations of the complaint, and pleaded affirmatively that on March 20, 1912, the plaintiffs H. F. Berry and F. O. Brock executed to the defendant their promissory note for $3,810, and that at the same time the plaintiff, H. F. Berry, pledged the shares of stock here involved to the defendant, as security for such note, upon which $2,310 is still due.

At the trial it was stipulated that transfers of their interests had been made by certain of the plaintiffs, and appropriate substitutions were made. The court found, in accordance with the allegations of the complaint, that when H. F. Berry made the $14,000 note and deposited the stock as security therefor, the defendant bank was informed that the plaintiffs were the owners of said stock. It found, further, that said plaintiffs were, in fact, the owners of such stock; that the tender and demand were made as alleged by the plaintiffs; that H. F. Berry did not pledge the stock to the defendant as security for the $3,810 note described in the answer; and that said shares were not held by the defendant as security for this note. It is further found that the value of the stock at the time of the commencement of the action was 50 cents per share, but that, pending the action, such value had decreased, until at the time of the trial the stock was worth no more than 10 cents per share Plaintiff H. F. Berry, finds the court, was damaged by the withholding of the property in the sum of $10,952.40, the difference between the value of the shares at the time of the commencement of the action and at the time of the trial, less $1,015.28, the balance due on the promissory note, or a net damage of $9,937.12. The further findings are not, we think, material to the points calling for decision on this appeal. Judgment was given that the plaintiffs recover from the defendant the certificate for 82,144 shares, and, in case delivery cannot be made, that they recover $8,214.40, the value thereof, and that plaintiff Berry recover from the defendant the sum of $9,937.12 damages.

[1] If the pledged property was held by the bank as security for the payment of the first note only, the plaintiffs unquestionably were entitled to a return of their property upon the tender of the balance due upon such note. The validity of the tender was not impaired by the fact that it was coupled with a demand for the return of the property. The pledgor had a right to make his offer of payment conditional upon a redelivery of the property pledged, and such offer extinguished the lien of the pledgee. Civ. Code §§ 1498, 1504; Loughborough v. McNevin, 74 Cal. 250, 253, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435; Haile v. Smith, 113 Cal. 656, 662, 45 Pac. 872; Wolff v. Canadian Pac. Ry. Co., 123 Cal. 535, 543, 56 Pac. 453.

[2] The appellant, however, attacks the findings which declare that it had no right to hold the certificate except as security for the $14,000 note. It claims a right to retain the property as security for the note of March 20, 1912, for $3,810: First, because of an alleged agreement with H. F. Berry, one of the pledgors, that the property should be so held; and, second, by virtue of a banker's lien. On the question of the alleged agreement with H. F. Berry there was a specific finding against the defendant. The contention that this finding is against the evidence cannot be upheld. It is true that S. L. Mack, cashier of the Bank of Bakersfield, testified directly

that at the time the second note was made it was agreed between him and H. F. Berry that the stock should be retained by the bank as security for the new loan. But Berry testified to the contrary. The appellant seeks to interpret Berry's testimony as constituting a virtual admission that the fact was as stated by Mack. But this is not the necessary purport of Berry's version of the interview. What he said may fairly be interpreted as amounting to a positive denial of any agreement to make the stock security for the new loan. This was the view taken by the trial court, and we must accept its conclusion as a finding on conflicting evidence, controlling in an appellate court.

[3] If, under the contract of the parties, the certificate was pledged as security, simply, for the $14,000 note, the defendant was not entitled to hold it, under its alleged banker's lien, to secure another obligation. The banker's lien referred to in section 3054 of the Civil Code was familiar, as a part of the law, long before the enactment of the Codes. Section 3054 does not extend its scope. It has always been the rule that a banker holding securities pledged for the payment of a particular debt has no lien upon them for the payment of other claims. 1 Jones on Liens (3d Ed.) § 251; 1 Morse on Banks and Banking, § 325; Bell v. Bank of Cal., 153 Cal. 234, 238, 94 Pac. 889; Smith v. Hall, 67 N. Y. 48; Masonic Savings Bank v. Bangs' Adm'r, 84 Ky. 135, 4 Am. St. Rep. 197; Armstrong v. Chemical Nat. Bank (C. C.) 41 Fed. 234, 6 L. R. A. 226.

[4] The action was one for the recovery of specific personal property, the Code equivalent of the common-law writ of replevin. Section 667 of the Code of Civil Procedure provides that in such an action judgment for the plaintiff "may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention." This was the relief sought by the complaint, and granted by the judgment. The court found that the value of the property at the time of the trial was 10 cents per share, and the judgment provided for the return of the certificate to the plaintiffs, or, in case delivery could not be had, for the sum of $8,214.40, being the value of the shares at the rate of 10 cents each. The further provision of the judgment that the plaintiff H. F. Berry recover $9,937.12 damages gave to said plaintiff "damages for the detention," as provided in section 667. This part of the recovery was based upon the findings of the court that H. F. Berry was the owner of 27,381 of the shares described in the certificate, and that he had been damaged by the withholding of the certificate in a sum measured by the depreciation in the value of the stock (40 cents per share) between the commencement of the action and the date of trial. The appellant contends that such depreciation constitutes special damage, which cannot be recovered unless specifically pleaded. But we cannot give our assent to this claim. Special damages, which must be pleaded, are such as do not ordinarily arise from the breach complained of, but depend upon the peculiar circumstances of the case. In Stevenson v. Smith, 28 Cal. 103, 87 Am. Dec. 107, the plaintiff in an action for the recovery of a mare and colt sought, under a general allegation of damage, to recover for the loss arising from the act of the defendants in giving the animals poor pasturage, and the further circumstance that the mare was a brood mare, and that, by the detention, the breeding season was lost. It was very properly held that the first of these items did not result from the detention itself, but from the improper conduct of the defendants in keeping the animals, while the second item depended upon the extraordinary value of the animal for a particular purpose. These items, therefore, were not embraced within an allegation of general damage. But the situation here is very different. The depreciation in the value of property unlawfully detained by a defendant is an element of damage naturally to be anticipated, and therefore covered by an averment of general damage. Wells on Replevin (2d Ed.) § 535; Clow v. Yount, 93 Ill. App. 112; 34 Cyc. 1564, note 49. It has so been held in this state with respect to an automobile (Morris v. Allen, 17 Cal. App. 684, 121 Pac. 690), and there is no reason for applying a different rule to the case of oil stocks, which are in their nature fluctuating and uncertain in value.

[5] No supplemental pleading was required to warrant the recovery of damages resulting after the commencement of the action. Civ. Code, § 3283; McLennan v. Ohmen, 75 Cal. 558, 17 Pac. 687; Hicks v. Drew, 117 Cal. 305, 49 Pac. 189. It was therefore proper to show the value of the stock at or about the time of the commencement of the action, and its value at the time of the trial. The testimony on these points was sufficient to sustain the court's findings.

What we have said sufficiently covers the material points raised.

The judgment and the order appealed from are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN J.; VICTOR E. SHAW, Judge pro tem.

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35 Cal. App. 288

McWHIRTER v. FULLER et ux.

(S. F. 8607.)

(Supreme Court of California. Jan. 12, 1918.)

MASTER AND SERVANT ⚿330(3) — AGENCY — DRIVING AUTOMOBILE.

That a wife is driving an automobile owned by her husband with his express consent and permission raises the presumption that she was

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes his agent, and makes a prima facie case against the husband in favor of one injured while she was driving the car.

In Bank. Appeal from Superior Court, City and County of San Francisco; Pat. R. Parker, Judge.

Action by Henry McWhirter against George P. Fuller and wife. Judgment for plaintiff, and defendant George P. Fuller appeals. Affirmed by the District Court of Appeal. On application for hearing by the Supreme Court in bank after the judgment. Application denied.

The following is the per curiam opinion in the District Court of Appeal:

This is an action for damages for personal injuries and damage to personal property arising out of a collision between an automobile owned and driven by plaintiff, and one owned by appellant, George P. Fuller, but driven by his wife, the defendant May A. L. Fuller.

Under the terms of section 171a of the Civil Code a husband is not liable for the torts of his wife "except in cases where he would be jointly liable with her if the marriage did not exist." It is not here claimed that the appellant kept this car for the use of his wife, and that at the time of the accident it was being used for the purpose for which it was purchased and kept, in which event, in every just sense and according to the weight of authority, she would be regarded as his agent, on the theory that it is as much the duty of the husband to furnish to his wife, within his means, recreation and pleasure, as it is to furnish her with food and clothing. Missell v. Hayes, 86 N. J. Law, 348, 91 Atl. 322; Birch v. Abercrombie, 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59; Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1091, 51 L. R. A. (N. S.) 970; Marshall v. Taylor, 168 Mo. App. 240, 153 S. W. 527. See, also, Berry, Automobiles, § 653 et seq. Nor is it claimed that the mere relationship of husband and wife tends to establish in a case of this kind arising in tort the relationship of principal and agent. But the plaintiff did prove that the car in question was owned by the appellant, and was being operated by his wife at the time of the accident with his express consent and permission. Under the weight of authority, this was sufficient to raise the presumption that the wife was the agent of the husband. In the majority of states it is held that where it is shown that the vehicle which caused the injury belonged to the defendant, a presumption arises that the driver was using the vehicle as the agent of the owner. This justifies a jury in inferring that such is the case, and authorizes it to find for the plaintiff under the rule of respondeat superior. A prima facie case is established. The question of agency or employment of the driver is a fact peculiarly within the knowledge of the owner—oftentimes unknown to the injured party; and the burden is upon the owner to overthrow this presumption by evidence, of which the law presumes he is in possession. He is called upon to rebut this evidence and presumption by showing that the fact is otherwise. In the case at bar no attempt was made to do so. The rule is well illustrated in the following cases: In Birch v. Abercrombie, 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59, a daughter, of age, was using her father's automobile for her own pleasure. Defendant was held responsible for damage occasioned by her. It was contended that the evidence failed to support the findings inasmuch as the evidence showed that the parent's consent was lacking; but the court said: "This contention ignores the admitted ownership of the automobile by the appellants W. R. Abercrombie and [his] wife. It is well established that, in cases of this kind, where the vehicle doing the damage belonged to the defendants at the time of the injury, that fact establishes prima facie that the vehicle was then in possession of the owner, and that whoever was driving it was doing so for the owner. We have repeatedly so held—citing cases. The burden was thus cast upon the appellants to overcome this presumption by competent evidence, and it was for the jury to say upon such evidence whether the burden had been sustained."

In the New York case of Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161, the same rule of evidence is recognized. There a father was held responsible for an automobile accident while the machine was being driven by his son, who was of age, the court saying: "The license number of the car, coupled with the evidence that the defendant held the license, was prima facie proof that the defendant was the owner. It was more than that; it was prima facie proof that the custodian of the car was then engaged in the owner's service. * * * The property being proved to belong to defendant, * * * a presumption arises that it was in use for his benefit, and on his own account."

The same rule is established in New Jersey. In Edgeworth v. Wood, 58 N. J. Law, 463, 33 Atl. 940, it was said: "Considering the great improbability that any other owner of a wagon would thus paint and mark it, a plain inference could be drawn from the evidence that the wagon in question was in the ownership of the company [defendant]. If that inference be drawn, it is sufficient to establish prima facie that the wagon being owned by the company was in its possession, and that whoever was driving it was doing so for the company."

In Gershel v. White's Express Co., 113 N. Y. Supp. 919, it is said: "The proof that the colliding wagon bore the name 'White's Express Company,' taken with the defendant corporation's failure to give any evidence tending to show that it did not operate the particular wagon, although it had admitted by its answer that it did operate and control wagons and vehicles in and about the streets of the city, sufficed for a prima facie case of ownership. * * * Damages, within the verdict, were proven by testimony as to the actual expense of making adequate repairs to the article injured. * * *"

And in Shearman & Redfield on Negligence (6th Ed.) vol. 1, § 158, the authors state the rule, as gleaned by them from the authorities, thus: "When the plaintiff has suffered injury from the negligent management of a vehicle, car or carriage, it is sufficient prima facie evidence that the negligence was imputable to the defendant, to show that he was the owner of the thing, without proving affirmatively that the person in charge was the defendant's servant. It lies with the defendant to show that the person in charge was not his servant, leaving him to show if he can that the property was not under his control at the time, and that the accident was occasioned by the fault of a stranger, an independent contractor, or other person, for whose negligence the owner would not be answerable."

It must be conceded that the complaint was defective; but we think the error in overruling the demurrer thereto must be regarded as harmless, the appellant having had a full opportunity at the trial to rebut the inferences arising from his ownership of the automobile the negligent driving of which was the cause of the plaintiff's damage, and to show fully, if he desired to do so, any facts and circumstances which would have absolved him from liability.

The judgment is affirmed.

J. R. Wilson, of San Francisco, and C. B. Morris, for appellant. Gus. L. Baraty, of San Francisco, for respondent.

PER CURIAM. In denying the application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District we deem it proper to say that, as we understand the opinion as to the effect of proof that the car in question was owned by the appellant and was being operated by his wife at the time of the accident with his express consent and permission, it is simply that a prima facie case was thereby established, authorizing an inference by court or jury, in the absence of substantial proof to the contrary, that the wife was using the car as the agent of the husband.

The application for a hearing in this court is denied.

177 Cal. 256

BLOCHMAN COMMERCIAL & SAVINGS BANK v. MORETTI et al. (L. A. 4120.)

(Supreme Court of California. Jan. 18, 1918.)

1. BILLS AND NOTES ⟹497(5)—FRAUD—BURDEN OF PROOF.

Where fraud in the inception of a note is shown, the burden of proof is on the indorsee to show that he is an innocent holder, but is discharged where he shows that he purchased for value in the usual course of his business, and he need not show that his assignor took without notice of defendant's equities.

2. APPEAL AND ERROR ⟹1027—SCOPE OF REVIEW.

Where the uncontradicted evidence warranted direction of verdict for plaintiff in action on note received by it in the usual course of banking business, errors in the admission or rejection of evidence touching the infirmities of the original transaction will not be considered on appeal.

Department 1. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by the Blochman Commercial & Savings Bank, a corporation, against Fiorenzo Moretti and another. From a judgment for plaintiff, defendants appeal. Affirmed.

George B. Watson and Riley & Heskett, all of San Diego, for appellants. Sam Ferry Smith, of San Diego, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment in favor of the plaintiff in an action upon a promissory note executed by the defendants and transferred to the plaintiff's assignor before maturity. The answer of the defendants admitted the execution of the note, but proceeded to set forth that in the making and delivery thereof to the persons by whom it was transferred to the assignor of plaintiff they were misled by certain false and fraudulent misrepresentations as to the present and prospective value of the stock of a certain corporation known as the Western Underwriting & Mortgage Company, in which stock they were thus induced to invest, giving the note in question as a portion of its purchase price. Upon the issues thus tendered the cause came on for trial before a jury. The plaintiff produced the note with evidence showing its transfer to plaintiff's assignor before maturity in the regular course of business at a discount amounting to 1 per cent. per annum upon the rate of interest specified in the note, and that the plaintiff's assignor issued in payment therefor its negotiable certificate of deposit for the full value of said note, payable six months after date, which said certificate of deposit, after passing through the hands of several indorsees, had been paid when due. The defendants, on their behalf, offered proof to sustain the alleged infirmities attending the execution and delivery of the note, and also as to the worthlessness of the stock for the purchase of which it had been given. At the conclusion of the trial the plaintiff moved the court for a directed verdict in its favor upon the ground that the uncontradicted evidence in the case showed that the plaintiff's assignor was an innocent purchaser of the note for value before maturity and without notice of any equities in favor of its makers. The court granted said motion, and the jury returned a verdict in plaintiff's favor in response to said direction, and from the judgment thereupon rendered and entered the defendants prosecute this appeal.

In the briefs of counsel for appellant much space is devoted to a review of the evidence presented at the trial in support of their conclusions as to the infirmities attending the making of the note in question, and as to certain alleged errors of the trial court in the admission or rejection of evidence touching these infirmities; but in view of the order of the trial court directing a verdict in plaintiff's favor upon the sole ground that according to the undisputed evidence it was the assignee of an innocent purchaser of said note before maturity for value and without notice of the defendants' equities, these alleged errors of the trial court became immaterial, unless it shall first be determined that its said order was erroneous, and this, therefore, is the only material issue before us upon this appeal.

[1] On behalf of the appellants it is contended that in addition to showing that the plaintiff's assignor had become the purchaser of said negotiable note in the usual course of business for value, the plaintiff was further bound to affirmatively show that its said assignor had taken said note without notice of the defendants' equities; or, in other words, that the defendants having offered evidence tending to prove that they had been induced to make and deliver said note through such fraudulent representations on the part of the original holders thereof as would have sufficed to have defeated the same in the hands of others than innocent holders thereof, they had by such proofs cast upon the plaintiff the burden of proving that its assignor took the

same without notice; and that the plaintiff had not tendered sufficient proofs to sustain the burden when at the conclusion of the evidence the court made its order directing a verdict in its favor. The chief authority upon which the appellant relies in support of this contention is the case of Union Collection Co. v. Buckman, 150 Cal. 159, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609. That was an action to recover upon two certain negotiable notes issued in renewal of certain other notes given during the course of a gambling game and against the collection of which the defense of an illegal consideration was urged. In the opinion of the court in that case the following language was used:

> "It is also well settled that even in the case of negotiable paper, where an action is brought by a subsequent holder, when it is shown that the same was obtained from the maker by fraud or duress, or that the consideration therefor was illegal, a prima facie case of notice to such holder is made out, and the burden of proving that he took without notice before maturity and for value is thrown upon him."

The appellants herein principally rely upon the foregoing statement of what they contend to be the correct rule of law governing the burden of proof in this class of cases. On behalf of respondent, however, it is urged that while the language used in the case above quoted does attempt to lay down the rule that when it has been shown by the maker of a negotiable instrument that its execution has been accomplished through fraud, the burden of proof is cast upon the holder to show that he took the note before maturity, for value and without notice, the court does not attempt in that case to declare what proof on the part of the holder shall suffice to sustain this burden; while, on the other hand, this court, in the case of Eames v. Crosier, 101 Cal. 260, 35 Pac. 873, does go to the extent of laying down the correct rule in this regard. That was an action for the recovery of judgment upon two negotiable notes claimed to have been purchased by the plaintiff in good faith and without notice. The court found that the defendants were induced to make and deliver said notes upon false representations, but also found that the plaintiff's assignor had purchased and paid for said notes before maturity in good faith and without notice. In dealing with the measure of proof required to sustain this latter finding, this court said:

> "Upon proof by the defendant of fraud or illegality in the inception of the note, the burden is cast upon the indorsee to show that he is an innocent holder. This the latter may do by showing that he purchased the note before maturity, or from an innocent indorsee for value, in the usual course of business. When this is done, unless the evidence shows that the note was taken by the plaintiff under circumstances creating the presumption that he knew the facts impeaching its validity, the burden is cast upon the defendant to show, if he would defeat the plaintiff in his action, that the latter took the instrument with notice of the defendant's equities."

In support of the rule thus declared the court cited the case of Jordan v. Grover, 99 Cal. 194, 33 Pac. 889, wherein the above rule is also stated. In the cases of Sinkler v. Siljan, 136 Cal. 356, 68 Pac. 1024; Bell v. Pleasant, 145 Cal. 410, 78 Pac. 957, 104 Am. St. Rep. 61; Meyer v. Lovdal, 6 Cal. App. 369, 92 Pac. 322, and Citizens Bank v. Stewart, 22 Cal. App. 91, 133 Pac. 337, the rule above quoted from Eames v. Crosier, supra, is restated and applied. It is to be noted that while the cases of Union Collection Co. v. Buckman and Eames v. Crosier both cite the case of Jordan v. Grover, the case of Eames v. Crosier and the later cases above cited which uphold its doctrine are neither cited nor referred to in the case of Union Collection Co. v. Buckman, and were evidently not called to the attention of the court in the discussion or decision of the latter case. In support of the rule above quoted in the case of Eames v. Crosier we are referred by respondent to a respectable volume of authority supporting said rule. In Daniel on Negotiable Instruments (4th Ed.) § 189, it is stated that:

> "When the holder responds by showing that he did acquire the instrument bona fide for value in the usual course of business while it was current and under circumstances which do not operate as constructive notice of the facts which impeach the original validity, the defendant must then prove that he had actual notice of such facts, otherwise the holder's right to a recovery against him is perfected."

The authorities cited by this learned commentator in support of this statement of the rule and which fully sustain it are these: First National Bank v. Dawson, 78 Ala. 71; Third National Bank v. Tinsley, 11 Mo. App. 498; Henry v. Sneed, 99 Mo. 422, 12 S. W. 663, 17 Am. St. Rep. 580; Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676; Battles v. Laudenslager, 84 Pa. 446; Johnson v. McMurry, 72 Mo. 282; Tod v. Wick, 36 Ohio St. 390; Kellogg v. Curtis, 69 Me. 214, 31 Am. Rep. 273; Hay v. Jaeckle, 90 Hun, 114, 35 N. Y. S. 650; American, etc., Bank v. N. Y. Belting Co., 74 Hun, 446, 26 N. Y. Supp. 822; Bank v. Burgwyn, 110 N. C. 267, 14 S. E. 623. From an examination of these authorities we are satisfied with the correctness of the rule stated in Eames v. Crosier as above set forth. We are further of the opinion that there is no real conflict between the cases of Eames v. Crosier and of Union Collection Co. v. Buckman. The rule requiring bona fides on the part of purchasers of negotiable paper subject to such infirmities as were shown to have existed in the making of the instrument herein sued upon is correctly stated in both of these cases. In the latter case the court contented itself with the general statement of the rule which, it may be noted, it was not required by the facts of that case to do; while in the former case the court went further to the extent of stating just what proof would suffice to sustain the holder's burden of showing his bona fides in the transaction and at what point the burden of proving that the plaintiff or his assignor had actual notice of the original infirmities of the note would be shifted to the defendant.

[2] We are satisfied from a careful examination of the record before us that the uncontradicted evidence before the trial court in this case at the time its order directing the jury to render a verdict in plaintiff's favor was made showed that the plaintiff's assignor had purchased the note in question in good faith, before maturity, in the usual course of business, for full value; and that there was no evidence showing or tending to show that the note was purchased by the plaintiff's assignor or taken under circumstances which would give rise to the presumption that plaintiff knew, or should have known, the facts impeaching its validity. Such being the state of the case we are constrained to hold the trial court committed no error in directing a verdict in plaintiff's favor herein. This view removes from our consideration the questions which the appellants present as to any errors which the trial court may or may not have made in the admission or rejection of evidence touching the infirmities of the original transaction.

No other questions being presented for our consideration, the judgment is affirmed.

We concur: SHAW, J; SLOSS, J.

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177 Cal. 230

GUINN v. McREYNOLDS et al. (Sac. 2457.)

(Supreme Court of California. Jan. 15, 1918.)

1. Agriculture 🔑9—Lien—Priorities.

While the burden imposed on the land by Pol. Code, § 2322a, giving a county a lien for eradicating insects, etc., found upon premises, orchards, etc., is analogous to a tax or special assessment, it is not entitled to priority over a pre-existing mortgage, unless the intent to postpone liens appears by reasonable inference from provisions of statute.

2. Agriculture 🔑9—Lien—Priority.

The lien given a county on premises by Pol. Code, § 2322a, for eradicating insects, where owner's neglect to do so is not superior to the lien of a prior mortgage, the section being silent as to priority and the purpose of the expenditures not being such as to justify a conclusion that the Legislature intended to give priority to such lien.

In Bank. Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by James P. Guinn against O. O. McReynolds and others. Judgment for plaintiff, and the County of Tulare appeals. Affirmed.

Frank Lemberson and James M. Burke, both of Visalia, and P. D. Nowell, of Tulare, for appellant. Murry & Knupp, of Porterville, for respondent.

SLOSS, J. The plaintiff brought this action to foreclose a mortgage of land in Tulare county. The county of Tulare, one of the defendants, set up a claim of lien under section 2322a of the Political Code. The county's lien arose after the recording of plaintiff's mortgage. The court below held that the mortgage was superior to the lien claimed by the county. The correctness of this conclusion presents the only question for decision.

Section 2322a, as it read at the time of the transactions here involved, provided that the county horticultural commissioner should, if he found premises, orchards, trees, plants, etc., in the county infected with infectious diseases, scale, insects, or other pests, notify the owner or person in charge or in possession of the premises to eradicate or destroy the said insects or pests within a given time. Any places, orchards, or nurseries thus infected were declared to be a public nuisance, and in the event that such nuisance was not abated within a specified time after such notice, it was made the duty of the county horticultural commissioner to cause the nuisance to be abated by eradicating or destroying such diseases, insects, or other pests. The section then proceeded as follows:

> "The expense thereof shall be a county charge, and the board of supervisors shall allow and pay the same out of the general fund of the county. Any and all sum or sums so paid shall be and become a lien on the property and premises from which said nuisance has been removed or abated in pursuance of this chapter. A notice of such lien shall be filed and recorded in the office of the county recorder of the county in which the said property and premises are situated, within thirty days after the right to the said lien has accrued. An action to foreclose such lien shall be commenced within ninety days after the filing and recording of said notice of lien, which action shall be brought in the proper court by the district attorney of the county in the name and for the benefit of the county making such payment or payments, and when the property is sold, enough of the proceeds shall be paid into the county treasury of such county to satisfy the lien and costs; and the overplus, if any there be, shall be paid to the owner of the property, if he be known, and if not, into the court for his use when ascertained."

The section, incorporated in the Political Code in 1907, and amended in 1909, was based upon prior acts of similar purport, Stats. 1881, p. 86; Stats. 1889, p. 413; Stats. 1891, p. 268. Its enactment was, as both parties are agreed, a valid exercise of legislative power. County of Los Angeles v. Spencer, 126 Cal. 670, 59 Pac. 202, 77 Am. St. Rep. 217; County of Riverside v. Butcher, 133 Cal. 324, 65 Pac. 745. It is also conceded that there would be no constitutional objection to a legislative provision making the county's lien superior to pre-existing mortgages or other liens created by private contract. See Provident Institution for Savings v. Jersey City, 113 U. S. 506, 5 Sup. Ct. 612, 28 L. Ed.

1102. The question is whether the statute in fact undertook to give such priority.

[1] The law was passed in the exercise of the police power. County of Los Angeles v. Spencer, supra. For the purposes of the present discussion, the burden imposed on the land bears a certain analogy to a tax or special assessment. A lien for unpaid taxes or assessments is generally held to be superior to all contract liens, whether prior or subsequent in time. But the authorities declare, virtually without dissent, that even a tax lien is not entitled to rank ahead of a pre-existing mortgage, or other contract lien, unless the legislative enactment creating the tax lien has given it priority. 37 Cyc. 1143. The priority need not be declared in express terms. It is enough if the intent to postpone contract liens appears by reasonable inference from the provisions of the act. But the authorization for displacing the earlier lien must, under all the decisions, be found in the statute. Even such cases as Carstens v. Seattle, 84 Wash. 88, 146 Pac. 381, Ann. Cas. 1917A, 1070, and Morey v. Duluth, 75 Minn. 221, 77 N. W. 829, relied on by the appellant, rest their holding that the mortgage lien was postponed upon the ground that the legislative acts in question, properly interpreted, disclosed an intention to make the tax or assessment lien superior.

The general rule for fixing the relative rank of liens is declared by section 2897 of the Civil Code, which declares that:

> "Other things being equal, different liens upon the same property have priority according to the time of their creation, except in cases of bottomry and respondentia."

This rule will govern unless, in any given case, the statute prescribes otherwise. See Mortgage Sec. Co. v. Pfaffmann, 169 Pac. 1033, decided December 31, 1917. In dealing with tax or assessment liens, as with others, our decisions have recognized that the question of priority is one of legislative intent. Where, accordingly, the tax or assessment lien is preferred to an earlier contract lien, the basis of priority is found in the statute. In California Loan & Trust Company v. Weis, 118 Cal. 489, 50 Pac. 697, it was held that the lien for personal property taxes, imposed by our law upon the real property of the person assessed, was superior to pre-existing incumbrances upon the land. The question, said the court, "depends for its determination entirely upon statutory enactment" and the expression of a legislative intent that the tax lien should have priority was found in sections 3716 and 3788 of the Political Code, the former declaring that the lien is not removed until the taxes are paid, or the property sold, and the latter that the tax deed conveys to the grantee the absolute title to the land, free of all incumbrances, excepting liens for subsequent taxes. Similarly, in German Savings & Loan Society v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067, where the lien of street improvement bonds (Stats. 1893, p. 33) was held to have priority, it was pointed out that the statute expressly provided that the lien should be "a first lien upon the property," and that it made the provisions of the Political Code for the collection of delinquent state and county taxes, including section 3788, applicable to sales under the bond act. The opinion, after referring to these features of the statute, declares that "the intention seems to be clearly manifested that the bond lien shall be prior to all liens." In the decisions holding that the liens of assessments levied by irrigation districts or reclamation districts rank ahead of mortgages earlier in time (Williams v. Cooper, 124 Cal. 666, 57 Pac. 577; Weinreich v. Hensley, 121 Cal. 647, 656, 54 Pac. 254), there is no specific reference to any statutory declaration of such priority. But, on examination of the acts involved, it will be seen that they plainly show the legislative intent. The irrigation district law provides that the deed of the collector conveys to the grantee absolute title, free of all incumbrances, except when the land is owned by the United States or this state. Stats. 1887, p. 41. The Political Code contains similar provisions with respect to reclamation districts. Pol. Code, § 3466.

[2] We find nothing in section 2322a which can be said to indicate an intent to make the county's lien superior to other liens earlier in time. The section is silent on the subject of priority. The purpose of the expenditure for which the lien is given would not, of itself, justify a conclusion that the Legislature must have intended to give it superiority over all other claims, if, indeed, such inference can ever arise from the mere nature of the charge. In the case of assessments for local improvements, it may be said that the improvement confers a benefit on the land itself, and thus enhances the security of the mortgagee. But this is not necessarily true of expenditures made under the law here in question. The destruction of infected or diseased trees may diminish the value of the land, for the benefit, primarily, of adjoining property.

It is provided by the section that when the property is sold on foreclosure of the county's lien, the surplus after satisfying the lien shall be paid to the owner of the property, or into court for his use. The owner of the property is the mortgagor or his successor. Under the law of this state, the mortgagee has no ownership or interest in the property. He has merely a lien, which is an incident of the secured debt. McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655; S. & L. Soc. v. McKoon, 120 Cal. 177, 52 Pac. 305. The result, then, of holding the county's lien superior would be to deprive the mortgagee of his lien, and, at the same time, to take from him any right to participate in the proceeds of the sale. This provision for the payment of the surplus therefore furnishes some ground, though perhaps not a controlling one, for saying that the legislative intent, so far as disclosed by the terms of the act, was that pre-existing mortgage liens should not be affected by the county lien, but that the latter should operate only against the interest of the owner. At any rate, we do not find in the act any provision indicating an intention to make the county lien superior to existing mortgages, and it must be held, as was held by the court below, that the mortgagee is not affected by the subsequently attaching lien of the county.

By amendment to section 2322a, adopted in 1917 (Stats. 1917, p. 631), the Legislature has removed all doubt on the question, for future cases, by adding an express provision declaring the superiority of the county's lien. But this amendment cannot, of course, affect the present litigation, the rights here involved having vested before the law was changed.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

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177 Cal. 235

WILLIAMS v. PACIFIC ELECTRIC RY. CO. (L. A. 4094.)

(Supreme Court of California. Jan. 17, 1918. Rehearing Denied Feb. 14, 1918.)

1. TRIAL ⟹191(10)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

An instruction, which took the question of fact from the jurors and informed them as a matter of law, if plaintiff, a servant, was forewarned of the accident and attempted with ordinary care to save his property, omitting possible measures for his own personal safety, he would not be guilty of contributory negligence and could recover for his personal injuries, is improper.

2. NEGLIGENCE ⟹136(26) — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

The question of contributory negligence is one of fact for the jury to solve under proper instructions, and not one of law, save in those cases in which, judged in the light of common knowledge and experience, there is a standard of prudence to which all persons similarly situated must conform.

Department 2. Appeal from Superior Court, Los Angeles County; James W. Bartlett, Judge.

Action by W. S. Williams against the Pacific Electric Railway Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Judgment and order reversed.

Frank Karr, R. C. Gortner, and A. W. Ashburn, Jr., all of Los Angeles (W. R. Millar, of Los Angeles, of counsel), for appellant. E. B. Drake, of Los Angeles, for respondent.

MELVIN, J. Plaintiff sued for and obtained a judgment against the corporation here appellant in the sum of $12,500 as damages for personal injuries. The defendant appeals from the judgment and from an order denying its motion for a new trial.

Plaintiff was a laborer engaged in shoveling gravel from a car on a side track connected with the main line of defendant's railroad. Two other men were working with him in the car which was of the kind known as a "gondola" being open at the top and having a floor sloping toward the sides in both directions from a central board which was 2 feet 2 inches from the upper edge of the car. At its deepest part the distance was 4 feet 3 inches from the floor to the upper edge of the car. Within the body of the car were a number of rods or braces connecting the sides with the sloping floor. The testimony regarding the amount of gravel in the car at the time of the accident given by Bowman, one of the men working with plaintiff, was that the gravel had been unloaded to a point about a foot and a half or two feet from the bottom of the car, and that Williams was standing on the gravel and "not on the V-shaped center of the car." Lopez, the other colaborer of plaintiff, corroborates this statement, adding that the braces were uncovered. When the freight cars were backed down the siding and the gondola was struck, plaintiff was thrown to the ground, and his left arm was so crushed by the car wheels passing over it that amputation was necessary.

Williams had eaten a part of his luncheon early in the day, and had left the remaining portion of it near a corner of that end of the car which was afterwards struck by the oncoming freight car. He had no recollection, as he testified, of the events immediately preceding the accident, but both of his companions agreed that a warning was shouted by Lopez before the collision, and it was the theory of the defendant's counsel that plaintiff had been guilty of contributory negligence by moving from a place of comparative safety to the end of the car for the purpose of preventing his luncheon from being knocked to the ground. Bowman had sufficient knowledge of the approaching cars to brace himself by holding on to the edge of the gondola. He escaped injury. Lopez grasped one of the braces in the car and received only trifling injury. Lopez insisted that he merely cried "Look out!" but Bowman, upon cross-examination, said that the warning may have been "Look out for your lunch!" and that version agreed with the signed statement given by him to defendant's agents immediately after plaintiff was injured. Bowman also stated that plaintiff was working just before the accident at a place where gravel could be thrown conveniently into a wagon which was beside the track near the middle of the gondola. The gondola was 34 feet long, and in his written statement Bowman had estimated that Williams was then 10 feet from the end of the car from which he subsequently

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

fell, and Frank Winton, a witness called by plaintiff (as were Bowman and Lopez) said he saw Williams about the time of the collision. The plaintiff, he said, just before the impact of the moving cars, raised up, turned around, and made a step or two toward the end of the car from which he was precipitated. "Before the collision," said this witness, "he was facing east with his back towards the train of cars."

[1] It will be seen from the foregoing that the question of the plaintiff's alleged contributory negligence was a very material one, and the court instructed the jury accordingly, but appellant earnestly insists that one of the instructions was so erroneous that the giving of it was serious error. The instruction assailed by defendant was as follows:

> "Although the jury may believe from the evidence that just at the time of the collision in controversy here the plaintiff may have started to get his lunch or other property which was on the end of the gondola in which he was working, and which he believed was in danger of destruction or harm, by reason of the impending collision, yet I charge you that, if you shall further believe that at that time under the circumstances then and there existing he believed his said property was in danger of destruction, then it was not contributory negligence on his part while in the use of ordinary care to attempt to save his property, and if in doing so the impact of the car caused him to fall out of said car, and he was thereby injured, then he would be entitled to recover herein, and you should find for the plaintiff."

[2] The jurors had been correctly instructed upon various phases of the subject of contributory negligence. For example, they had been told in substance that the existence or absence of contributory negligence is to be determined by a consideration of the surrounding facts and circumstances as they would then appear to an ordinarily prudent man in plaintiff's situation, and not by the facts which, as they may have developed subsequently, might show what would have been best for plaintiff. But the quoted instruction went far beyond this liberal and salutary rule and took the question of fact from the jurors, informing them that as matter of law, if plaintiff was forewarned of the accident and attempted with ordinary care to save his property, omitting possible measures for his own personal safety, he would not be guilty of contributory negligence. That is not the law. The question of contributory negligence is one of fact for the jury to solve under proper instructions, and not one of law save in those cases in which, judged in the light of common knowledge and experience, there is a standard of prudence to which all persons similarly situated must conform. In such cases failure to reach that standard is contributory negligence as matter of law. But this case is of course not of that type. The facts were such that the jury and not the court should have decided whether or not plaintiff was contributorily negligent.

It has been held by this court that in deciding whether or not a plaintiff acted prudently the jury may consider the fact that he attempted to escape from a train at the time of an accident, and was injured while those who made no such attempt were unhurt. Mitchell v. Southern Pacific R. R. Co., 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130. The question involved in this case was exactly of the same character, and should have been left, in like manner, to the jury.

There can be no doubt that the instruction as given was injurious to defendant.

The judgment and order are reversed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

177 Cal. 202

ROBERTSON v. BUCKLER et al.

(L. A. 4111.)

(Supreme Court of California. Jan. 15, 1918.)

1. TRIAL ⚷72—REOPENING CASE—AFFIDAVIT.

In an action against two vendees by an assignee of the vendor to recover the balance due on the price, only one of the defendants having recognized in writing the assignment, where plaintiff, after trial, but before judgment, moved to reopen the case for further proof of the assignment, and submitted an affidavit showing what affiant and other witnesses would testify to, it was error for the court to treat such affidavit as the testimony of the witnesses, and to render judgment against both defendants.

2. EVIDENCE ⚷461(1)—SHOWING INTENT OF PARTIES—ADMISSIBILITY.

Evidence of declarations as to the intention of the parties both as to an assignment and as to an alleged contract between the assignor and defendants, both of which instruments were in writing, is inadmissible on that question, but the intent of the parties must be established by showing what actually occurred at the time of the assignment and at the time of the contract.

3. EVIDENCE ⚷265(17) — ADMISSION — BY PARTY TO JOINT CONTRACT.

Where a contract showing that plaintiff's assignor had an interest in property was signed by only one of the two defendants, a letter of the other defendant, which was merely an admission that plaintiff's assignor then owned an interest in the property, is ineffective to show that the defendant who did not sign was bound by the contract.

Department 2. Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by M. S. Robertson against Julius A. Buckler and another. From a judgment for plaintiff, defendant Buckler appeals. Reversed.

Rufus V. Bowden, Olin Wellborn, Jr., and Alfred H. McAdoo, all of Los Angeles, for appellants. Robert L. Hubbard, B. Dean Clanton, and Hammack & Hammack, all of Los Angeles, for respondent.

WILBUR, J. Plaintiff sues herein as assignee of Anna E. Steele for the sum of

$2,000, balance alleged to be due from defendants upon an oral contract for the purchase price of lot 77 of the Westview tract, sold by plaintiff's assignor to the defendants. Judgment went against both defendants, and defendant Buckler appeals. The assignment under which plaintiff claims is as follows:

Exhibit 6.

"July 9, 1912.

"This is to certify that Mrs. Anna Steele holds a $3,000.00 interest in the house being built in Westview tract and that said money is payable as follows:

"$1,500.00 on or before July 15, 1912.

"$1,500.00 30 days after completion of the house. [Signed] Carlin G. Smith."

Exhibit 2.

"Los Angeles, Cal. Aug. 28, 1912.

"For value received I hereby assign the unpaid balance of the above, amounting to the sum of two thousand dollars, to M. S. Robertson, of Los Angeles, Cal.

"[Signed] Mrs. Anna Steele."

Two questions are presented by the appeal: First, did the foregoing assignment, under the circumstances, transfer to plaintiff the rights of plaintiff's assignor against the said Buckler, if any? and, second, is the evidence sufficient to justify the finding that the defendants jointly purchased said lot and agreed to pay therefor?

[1] When the case was submitted plaintiff agreed to produce the above written assignment, the court stating:

"When that paper comes in it may be deemed submitted. Of course, if that paper does not come in, you have no case."

The assignment was filed, and thereafter plaintiff moved to reopen the case "for the purpose of introducing additional evidence relating to the assignment of the cause of action herein." The notice of motion was accompanied by an affidavit of W. M. Melton "that he has knowledge of the assignment from Anna E. Steele to the plaintiff herein of the cause of action, and knows of the consideration given therefor; that it was the intention of said assignor to assign to plaintiff herein her claim and demand in the sum of $2,000 against J. A. Buckler and Carlin G. Smith, defendants herein." Affiant also avers that the foregoing documents were delivered to him at that time by Mrs. Steele, together with a letter which was already in evidence, dated August 28, 1912, signed J. A. Buckler, and stating:

"The proposition I made you yesterday still stands; that is, I will let you trade the house over at $8,000.00, or I will execute a note for $2,000.00 at seven per cent., secured by a trust deed on the house and give it to you to cover the interest you still have in the property."

[2] Affiant avers that said documents "were delivered to the plaintiff with the intention to pass and assign to the plaintiff the claim for $2,000 against both defendants, Buckler and Smith, but by mistake and inadvertence it was not noted that said Exhibit 2 did not specifically refer to the demand against both defendants, other than the general reference of assignment. Said facts can be proven by this affiant and by the assignor, Anna E. Steele, and by one G. W. Hoge, who wrote said Exhibit 6, and will also be shown by all of said witnesses that said Exhibit 2 did not embody, and was not the contract between the parties, but was simply a reference to the transfer of said claim." At the time of the hearing of said motion "said affidavit was taken by the court as if testified to by the said Melton, Anna Steele, and G. W. Hoge. The introduction or acceptance or consideration of the said affidavit or its contents was objected to on the ground that the same was incompetent, irrelevant, and immaterial." The objection was well taken. The affidavit was incompetent. The court apparently accepted the allegation of the affidavit that the facts could be proven by the affiant, by Anna E. Steele, and by G. W. Hoge, as equivalent to their testimony to the facts as to which it was alleged in the affidavit they would testify. Not only was the affidavit incompetent, but also the intent of the parties, both as to the assignment and as to the alleged contract between Mrs. Steele and the defendants, was not to be proved by mere declaration of what the parties intended, but by showing what actually occurred at the time of the assignment and at the time of the contract.

[3] The only additional proof in said affidavit was the statement that Mrs. Steele intended to assign her claim against Buckler by an instrument which, by reason of mistake and inadvertence, referred only to a claim against Smith, and the fact that Buckler's letter accompanied said assignment. This letter was merely an unaccepted offer, being an admission that Mrs. Steele still owned an interest in the property, which was entirely contrary to her theory that she had parted with all interest in it. Buckler claims that he did not agree to purchase the property; that Smith made the agreement for deeding the property to him as a trustee for all interested in a controversy, which need not be fully stated, concerning the completion of a double house on said lot by a corporation of which Buckler was an officer and in which both Smith and Buckler were stockholders. It is evident that the question of whether the writing, Exhibit 2, was the only agreement for payment, or whether there was some other agreement binding Buckler, is the vital question in the case. Incompetent evidence that "Exhibit 2 did not embody and was not the contract between the parties, but was simply a reference to the transfer of said claim," was clearly erroneous and prejudicial. In view of the necessity of a new trial, additional evidence may be presented both on the question of the original contract and assignment thereof. It is therefore unnecessary to determine whether the evidence in the record sufficiently supports

the finding that Mr. Buckler was a party to the agreement to pay for said lot.

Judgment reversed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge, pro tem.

177 Cal. 249

VALLEJO & N. R. CO. v. REED ORCHARD CO. (Sac. 2509.)

(Supreme Court of California. Jan. 17, 1918.)

1. Statutes 🔑225¾—Statute by Adoption—Construction.

Where a statute by adoption refers, not to a particular statute or provision thereof, but to the law generally which governs the particular subject, the reference is to be construed as applying, not only to the law as it existed at the time of enacting the adopting statute, but to the law as changed from time to time and as it exists when invoked in an action or proceeding.

2. Statutes 🔑225¾—Statute by Adoption—Construction.

When a statute designates and adopts an entire provision contained in a section of the Code by reference to its descriptive number, the statute so adopted by reference is the same as though the provision adopted had been bodily incorporated in the adopting statute.

3. Eminent Domain 🔑247(4)—Interest on Award.

Pol. Code, § 325, provides that where a statute is amended, it is not to be considered as repealed and re-enacted, but the portions not altered are to be deemed as having been the law from the time when first enacted. Code Civ. Proc. § 1249, as to condemnation proceedings, as enacted in 1872, provided, among other things, that if an order be made letting plaintiff into possession "as provided in section twelve hundred and fifty-four" the compensation and damages awarded shall draw lawful interest from the date of such order. In amending section 1249 in 1911 (St. 1911, p. 842) the above provision was not changed, but copied into the section as amended. Section 1254, as enacted with section 1249 in 1872, was declared unconstitutional, and was in 1877 (St. 1877–78, p. 108) repealed and enacted in a different form. *Held*, that the 1911 amendment of section 1249, in retaining the reference to section 1254, referred to section 1254, not as amended, but as originally enacted, and the provision making such reference was of no force, since the original section 1254 was void, so that, in view of Civ. Code, § 1504, declaring that an offer of payment, duly made, stops the running of interest on the obligation, a condemnor, after judgment of condemnation, paying into court for the landowner the full amount of compensation awarded, and receiving, upon order of court, possession of the property condemned, need not thereafter pay interest on the money so paid pending an unsuccessful appeal from the judgment by the landowner refusing to accept the award.

In Bank. Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Condemnation proceedings by the Vallejo & Northern Railroad Company against the Reed Orchard Company. From orders for plaintiff, defendant appeals. Affirmed.

See, also, 169 Cal. 545, 147 Pac. 238; 32 Cal. App. 347, 162 Pac. 914.

C. P. McLaughlin, of San Francisco, C. E. McLaughlin, of Sacramento, Arthur C. Huston, of Woodland, and White, Miller, Needham & Harber, of Sacramento, for appellant. Garret W. McEnerney and Walter Rothchild, both of San Francisco, for respondent. Harrison & Harrison, Wm. B. Bosley and Goodfellow, Eells, Moore & Orrick, all of San Francisco, and Paul C. Morf, City Atty., of Oakland (Charles A. Beardsley and De Lancey C. Smith, both of Oakland, of counsel), U. S. Webb, Atty. Gen., and Raymond Benjamin, Chief Deputy Atty. Gen., Daniel A. Ryan, of San Francisco, and George Lull, City Atty., of San Francisco, amici curiæ.

VICTOR E. SHAW, Judge pro tem. The question involved in this appeal arises out of a proceeding in eminent domain wherein the plaintiff, Vallejo & Northern Railroad Company (whose successors in interest are the Northern Electric Railway Company and John P. Coghlan, receiver thereof), sought to condemn lands of defendant Reed Orchard Company for railroad purposes. Upon trial of the issues a judgment was entered in favor of plaintiff, condemning the land as prayed for, and awarding defendant damages and costs in the sum of $105,735.60, the full amount of which plaintiff, within 30 days thereafter, paid into court for the defendant, whereupon the court, after requiring plaintiff to deposit the sum of $25,000 to cover further damages and costs which might be recovered in the proceeding, duly made its order, authorizing the plaintiff to take possession of and use the property until the final determination of the litigation, all as provided in section 1254, Code of Civil Procedure. Defendant refused to accept the award, but, upon the ground that the same was inadequate, and further that the land should not be condemned at all, prosecuted an appeal upon the hearing of which the judgment was affirmed. 169 Cal. 545, 147 Pac. 238. Thereupon, on going down of the remittitur, defendant applied to the court for an order that the amount of said award so deposited in court by plaintiff for defendant, together with interest thereon from the date of the order letting plaintiff into possession of the property to the date of the filing of the remittitur in the trial court, be delivered and paid to it. Upon this application the court directed that the sum of $105,735.60, deposited by plaintiff, being the amount of the judgment made and entered in said proceeding, be paid to defendant Reed Orchard Company upon filing a satisfaction of said judgment, but denied the application of said defendant Reed Orchard Company for the payment of interest on said sum, and ordered the clerk of the court to pay said sum of $25,000, so deposited to cover further damages, to John P. Coghlan as receiver of the Northern Electric Railway Company, successor in interest to plaintiff. From the order denying the payment of interest to defendant in accordance with its application therefor, and the order directing the payment of said sum of $25,000, so deposited by plaintiff to cover damages and costs, to John P. Coghlan as receiver, defendant appeals.

As stated by respondent, the sole question thus squarely presented is whether a condemnor who, after judgment of condemnation and after paying into court for the landowner the full amount of the compensation awarded, and who upon an order of court receives possession of the property condemned, must thereafter pay interest on the money so paid pending an unsuccessful appeal from the judgment prosecuted by the landowner who refuses to accept the award. In such proceedings the award constitutes a judgment in favor of defendant and against the plaintiff for the amount thereof, payment of which, unless the proceeding within the time be abandoned by plaintiff as provided in section 1255a, Code of Civil Procedure, shall be made within 30 days after final judgment (section 1251, Code Civ. Proc.), and in the absence of such payment of the money awarded or deposit thereof made in court, defendant may have execution to enforce the judgment as in civil cases (section 1252, Code Civ. Proc.). In this respect the rights of defendant are substantially identical with those of a plaintiff recovering a money judgment against a defendant in a civil action. In the instant case the money was paid into court for the benefit of defendant as a judgment creditor, pursuant to the provisions of section 1254, Code of Civil Procedure. A deposit so made for the benefit of one entitled thereto pursuant to a statute is at least equivalent to a tender thereof. Lewis on Eminent Domain, 579, and cases cited. By section 1504, Civil Code, the Legislature has declared that:

> "An offer of payment * * * duly made * * * stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof."

The deposit made constituted a tender of payment, acceptance of which, however, under the provisions of section 1254, did not bar an appeal based upon the ground of inadequacy of compensation. In the absence of some special statute applicable to the case, the effect of the tender was, as declared in Ferrea v. Tubbs, 125 Cal. 687, 58 Pac. 308, and Hancock v. Hunt, 168 Pac. 142, to "stop the running of interest on the obligation," pending the unsuccessful appeal.

[1-3] Counsel for appellant, while not disputing this general rule which governs the obligation to pay interest, insist that it is not applicable to a proceeding in condemnation. They assert that sections 1249 and 1254, Code of Civil Procedure, provide a special rule under which a defendant in such proceedings may refuse to accept the tender of an award made by deposit thereof in court for his benefit, appeal from the whole judgment, and, upon an affirmance thereof, rightfully insist upon the payment of interest pending such appeal. In our opinion, the contention is without merit. As originally enacted on March 11, 1872, section 1249 was as follows:

> "For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value, at that date, shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in section twelve hundred and forty-eight. If an order be made letting the plaintiff into possession, as provided in section twelve hundred and fifty-four, the compensation and damages awarded shall draw lawful interest from the date of such order. No improvements put upon the property, subsequent to the date of the service of summons, shall be included in the assessment of compensation or damages."

In 1911 (St. 1911, p. 842) the Legislature amended the section by inserting, immediately following the first sentence, the following:

> "Provided, that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. Nothing in this section contained shall be construed or held to affect pending litigation."

Other than as so amended, the section reads now as originally enacted in 1872. Not so, however, as to section 1254, which appears to have been subjected to many changes. As originally enacted on March 11, 1872, with section 1249, it provided that:

> "At any time after service of summons, the court may authorize the plaintiff, * * * to take possession of and use the property during the pendency and until the final conclusion of such proceedings, * * * but the plaintiff must give security, to be approved by such court or judge, to pay as well the compensation in that behalf, when ascertained, as all damages which may be sustained by the defendant, if for any cause the property shall not be finally taken for public use."

It was the provision then contained in section 1254 to which the Legislature had reference when, in section 1249, it said:

> "If an order be made letting the plaintiff into possession, as provided in section twelve hundred and fifty-four, the compensation and damages awarded shall draw lawful interest from the date of such order."

Otherwise and in the absence of such or a similar provision, since the measure of damage was the value of the property at the date of the issuance of summons, no recovery could be had for the use and occupation of the property prior to the rendition of judgment condemning the same. Hence it was eminently just and proper that the owner of land so taken, prior to the establishment of the right of the condemnor, should, as one element of the damage suffered, receive interest upon the compensation awarded for the deprivation of the use and occupation of the land pending a judgment condemning it, without which plaintiff could have no rights therein. As decided by this court in San Mateo Waterworks v. Sharpstein, 50 Cal. 284, Sanborn v. Belden, 51 Cal. 266, and Vilhac v.

Stockton, etc., R. R. Co., 53 Cal. 208, this provision was void, in that it was obnoxious to the Constitution which, as a condition of the taking, prescribed that just compensation must be simultaneously made with the taking of possession. Thereupon the Legislature, in 1877 (St. 1877–78, p. 108) amended the section. In its present form, which contains no vestige of the original provision, section 1254 was adopted in 1903 (St. 1903, p. 109), and was the law during the proceedings had in the case at bar. As therein provided, possession of the property sought to be condemned cannot be taken until after the rendition of judgment establishing plaintiff's right thereto, and then only upon an order of court upon the payment into court by plaintiff for defendant of the amount of the judgment, together with such further sum as may be required by the court as a fund to pay further damages and costs that may be recovered in the proceeding. Where a statute by adoption refers, not to a particular statute or provision thereof, but to the law generally which governs the particular subject, the reference is to be construed as applying, not only to the law as it existed at the time of enacting the adopting statute, but to the law as changed from time to time, and as it exists when invoked in an action or proceeding. Gaston v. Lamkin, 115 Mo. 20, 21 S. W. 1100; Culver v. People, 161 Ill. 89, 43 N. E. 812. Not so, however, when, as here, it designates and adopts an entire provision contained in a section of the Code by reference to its descriptive number. In such case the statute so adopted by reference is the same as though the provision adopted had been bodily incorporated in the adopting statute. People v. Whipple, 47 Cal. 592; Ex parte Lemon, 143 Cal. 558, 77 Pac. 455, 65 L. R. A. 946. In the absence of express intent to the contrary, and none is apparent here, the reference made in section 1249 as originally enacted must be construed as referring to the provision contained in section 1254 as it existed at the time when section 1249 was passed; and it cannot be interpreted as adopting an entirely new provision designated as section 1254. 26 Am. & Eng. Ency. of Law, 714; Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920; Crane v. Cummings, 137 Cal. 203, 69 Pac. 984. Appellant seeks to avoid these well-recognized principles by reason of the fact that when the Legislature amended section 1249 in 1911, section 1254 contained the provision under which after judgment the court was empowered to make an order authorizing plaintiff to take possession, upon depositing the amount of the award in court, and argues that the amendment constitutes a new enactment which, since retaining the reference, should be construed as adopting the provision then contained in section 1254. A sufficient answer to this contention is that the proceeding was instituted in 1910, prior to the amendment of section 1249, which expressly exempted pending litigation from the operation of the statute. However, waiving this fact, which seems to be fatal to appellant's contention, the position, in our opinion, is not tenable. Section 325 of the Political Code provides that where a statute is amended it is not to be considered as repealed and re-enacted, but the portions which are not altered are to be deemed as having been the law from the time when first enacted, and the new provisions only considered as having been enacted by the amendment. In consonance with this rule, it is said in People v. Sutter St. Ry. Co., 117 Cal. 604, 49 Pac. 736:

> "The portions of the amended section which are copied without change are not to be considered as repealed and again re-enacted, but to have been the law all along."

To the same effect are Sacramento v. Pfund, 165 Cal. 84, 130 Pac. 1041, Ely v. Holton, 15 N. Y. 596, Santa Cruz Rock Pavement Co. v. Lyons, 133 Cal. 114, 65 Pac. 329, Allison v. Hatton, 46 Or. 370, 80 Pac. 101, and Central Pacific R. R. Co. v. Shackelford, 63 Cal. 261. The intent of the Legislature was to enact the change as indicated without in any wise affecting the portions of the statute merely copied; hence by such copying no new, greater, or different force attached to the reference provision of section 1249 other than that to which it was entitled when originally enacted in 1872, which, upon being held in contravention of the Constitution, was repealed, and a new and entirely different scheme substituted therefor. For that reason there was nothing upon which the language used could operate, and the mere retention of the reference in amending section 1249 in 1911 cannot be construed as referring to and adopting the provision of section 1254, as now existing, between which and the provision contained therein when section 1249 was enacted there is not the slightest analogy.

The orders from which the appeal is prosecuted are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.

177 Cal. 223

DENVER STOCKYARDS BANK v. MARTIN et al. (L. A. 4757.)

(Supreme Court of California. Jan. 15, 1918. Rehearing Denied Feb. 14, 1918.)

1. Pleading 🔑291(4)—Admissions—Effect.

By specific provisions of Code Civ. Proc. § 448, where answer, in action on note, averred due execution of mortgage, a purported copy of which was attached to the answer, and there was no affidavit denying the genuineness of the mortgage, the execution was admitted.

2. Executors and Administrators 🔑443(1)—Action on Note—Pleading—Attaching Mortgage.

Where a note given in Colorado was secured by mortgage of even date on Colorado land, it was not necessary to set out the mortgage in an action against decedent's estate on the note in

California, such a mortgage not being within contemplation of Code Civ. Proc. § 1497, forbidding a separate action on a note secured by a mortgage, and section 726, providing that a claim against an estate when founded on a note must be accompanied by a description of a recorded mortgage supporting it, such sections relating to mortgages on land in California.

Department 2. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the Denver Stockyards Bank, a corporation, against Mary Martin and another, as executrices of the estate of J. M. Martin, deceased. Judgment for defendants and order denying motion to vacate the judgment and enter judgment for plaintiff, and plaintiff appeals. Reversed.

Jas. W. Bell, of Los Angeles (Ponsford & Carnine, of Denver, Colo., of counsel), for appellant. A. Johnston, of Turlock, and Kendrick & Ardis, of Los Angeles, for respondents.

MELVIN, J. Plaintiff appeals from the judgment against it and from an order denying its motion to vacate the judgment and to enter judgment in favor of said plaintiff.

The suit was upon a rejected claim upon a promissory note for $4,000 and interest at 8 per cent. per annum executed by J. M. Martin, defendants' testator, in favor of George D. and Charles W. Woolley, or order, and transferred and delivered to plaintiff before maturity. The note is set out in the pleadings. It is dated Craig, Colo., August 23, 1911, and is made payable "on or before June 21, 1914," at a designated bank in Craig.

The court found the execution of the note; its due transfer to plaintiff before maturity; the presentation of a claim against the estate of J. M. Martin, deceased, based upon said note and the rejection of that claim by the executrices who are respondents herein. But it was found also that the note was secured by mortgage of even date upon certain described property in Moffat county, Colo.; that said mortgage had been duly recorded on the day of its execution; that neither the mortgage deed nor a copy thereof nor any reference thereto appeared as a part of plaintiff's claim as presented against the estate of Martin; and that the mortgage had not been satisfied or discharged. The court's conclusion of law that defendants properly rejected the demand against the estate of their testator was based upon the failure to describe or refer to the mortgage in the claim presented to them.

Appellant contends that defendants failed to prove the mortgage by competent evidence; that even if the existence of the mortgage was sufficiently established the court improperly excluded evidence tending to show that the security had become valueless and thus to excuse reference to the mortgage; that by basing its claim on the note alone plaintiff waived the security of the mortgage, and that the statute upon which respondents rely has no extraterritorial force.

[1] Appellant attacks the finding whereby the existence of the mortgage is declared. Certain oral testimony given and a copy of the alleged mortgage introduced in evidence are subject to appellant's objection, but even if the court's rulings with reference to these matters were erroneous (and we do not decide that they were), the fact remains that the answer averred the due execution of the mortgage and a purported copy was attached to the answer and made a part thereof. The record discloses no affidavit denying the genuineness of the mortgage and its due execution, and we must hold, therefore, that these things were admitted. Section 448, Code Civ. Proc.; Rosenthal v. Merced Bank, 110 Cal. 198, 42 Pac. 640; Moore v. Copp, 119 Cal. 429, 51 Pac. 630; Knight v. Whitmore, 125 Cal. 198, 57 Pac. 891; Cordano v. Wright, 159 Cal. 610, 115 Pac. 227, Ann. Cas. 1912C, 1044; McKenzie v. Ray, 168 Cal. 618, 143 Pac. 1018.

[2] Respondent's case rests upon the provisions of sections 726 and 1497, Code of Civil Procedure, the first forbidding a separate action upon a note secured by a mortgage, and the second providing that a claim against an estate when founded on a note must be accompanied by a copy thereof, together with a description of a recorded mortgage or the lien supporting the claim or any part thereof. It is true that in Barbieri v. Ramelli, 84 Cal. 154, 23 Pac. 1086, it was held that a plaintiff may not waive his security and declare on the indebtedness, but must bring his action of foreclosure and the same rule has been stated in Gnarini v. Swiss American Bank, 162 Cal. 181, 121 Pac. 726, National Hardware Co. v. Sherwood, 165 Cal. 1, 6, 130 Pac. 881, and Crescent Lumber Co. v. Larson, 166 Cal. 168, 135 Pac. 502. Respondents cite many authorities to the effect that failure to present the mortgage to the executrices in the manner required by the statute now prevents recovery. Among these are Estate of Turner, 128 Cal. 388, 60 Pac. 967, Pitte v. Shipley, 46 Cal. 154, Bank of Sonoma County v. Charles, 86 Cal. 322, 24 Pac. 1019, and Evans v. Johnston, 115 Cal. 180, 46 Pac. 906. But all of these authorities refer to claims secured by liens on property in California. In Felton v. West, 102 Cal. 266, 36 Pac. 676, the note in suit was secured by a mortgage on property in Oregon. Foreclosure was accomplished in that state in a suit in which substituted service on the defendants had been obtained, and the property was sold for a sum less than the indebtedness. No deficiency judgment was entered. The holder of the note credited upon it the amount of the judgment obtained in Oregon and then sued upon the note in this state. Section 726, Code of Civil Procedure, was invoked

by the defendants, but the court held that section inapplicable to cases in which the mortgage security was in another state. Any other construction, it was declared, would result in the gravest injustice to the payee or his representative. In McGue v. Rommel, 148 Cal. 539, 83 Pac. 1000, it was again held that the provision of section 726, Code of Civil Procedure, that there can be but one action for the recovery of a debt secured by mortgage, namely, a suit to foreclose, refers solely to debts secured by mortgages in the state of California. Under the analogy of these authorities it is apparent that the claim founded on the note was not "secured by a mortgage," in contemplation of section 1497, Code of Civil Procedure, and therefore it was unnecessary to attach a copy of the mortgage to the said claim. Such a procedure would be useless because there could be no foreclosure of the mortgage by suit in California, and consequently no necessity for presenting it to the executrices or the probate court.

Our conclusion upon this branch of the case makes it unnecessary to consider the other interesting questions presented by the briefs.

The judgment and order are reversed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

35 Cal. App. 484

CITY OF OAKLAND v. INDUSTRIAL ACC. COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 2348.)

(District Court of Appeal, First District, California. Dec. 6, 1917.)

MASTER AND SERVANT ⚷375(1)—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—SCOPE OF EMPLOYMENT.

An indigent applicant, employed as teamster in a municipal woodyard, was, when proceeding to remove household goods of an indigent family, as directed by the superintendent of the yard, whose duties were to administer the woodyard for the "relief of indigent persons," within the scope of his employment, so that the city would be liable for resulting injuries.

Petition before the Industrial Accident Commission of State of California by H. F. Norton against the City of Oakland. Award for petitioner, and the city makes application for a writ of review. Application denied.

Paul C. Morf, City Atty., of Oakland, for petitioner. Chris. M. Bradley, of San Francisco, for respondents.

PER CURIAM. The application of the city of Oakland, a municipal corporation, for a writ of review herein sets forth that one H. F. Norton had heretofore presented a petition before the Industrial Accident Commission for the adjustment of his claim against the petitioner herein arising out of an accident alleged to have occurred while in the employ of the petitioner on the 14th day of August, 1916. Upon the hearing before the said Commission the evidence showed that the city of Oakland has established and maintained a municipal woodyard under an ordinance of said city, the terms of which ordinance, however, were not presented in evidence; that the nature of the applicant's employment was that of a teamster, whose general duties were those of delivering wood, hauling garbage, and performing such other services as might lawfully be required of him by the superintendent thereof within the scope and purposes and object of the institution. That on the 18th day of August, 1916, the said applicant, as such teamster, was instructed by the superintendent to deliver a load of wood to a certain address, and, after so doing to proceed with his team to the dwelling of an indigent family for the purpose of moving its household goods. While so proceeding to the fulfilment of this latter instruction the applicant's team and wagon came in collision with an electric car on the streets of the city of Oakland, whereby he was thrown from his wagon and injured.

The Industrial Accident Commission made an award in his favor and against the petitioner herein, and upon this proceeding the petitioner contends that said award was beyond the authority and jurisdiction of the Commission, for the reason that the evidence and findings of the Commission showed affirmatively that at the time said applicant received his said injuries he was not engaged in the performance of any service growing out of or incidental to his employment as a teamster for the said municipal woodyard of this petitioner, nor was he acting within the scope of the purposes for which said woodyard was created.

In support of this contention the petitioner herein urged upon the hearing that upon the face of the findings of fact made by said Commission it was entitled to the issuance of this writ for the reason that the findings affirmatively show that the purpose for which said municipal woodyard was established and maintained was that of giving indigent unemployed persons board and lodging in return for labor in said woodyard, and that it was beyond the scope of the purposes of said institution and of the powers of its superintendent to direct the applicant to move an indigent family not in any way connected with said woodyard, and hence that in the performance of such service the said applicant was outside the scope of his employment.

It is true, as contended by said petitioner, that there are certain portions of the findings which are susceptible of such a construction, and that the findings of the Commission might have been made much more definite with references to the scope and purposes of the creation and maintenance of this municipal institution. But, on the other hand, taking the findings of the Commission as a whole, we think it sufficiently appears that the general purpose for which said institution was established and maintained was that of providing employment and relief for indigent persons and families within the city of Oakland, and that the powers and duties of its superintendent of such institution with reference to the particular uses which were to be made of the services of the applicant as a teamster were broader than that of merely directing the delivery of wood, and that, to use the language of sections 4 and 5 of the findings of said Commission:

> "(4) The administration of said woodyard was conducted by a superintendent whose duties and powers as such were to generally administer the same for the purposes of its establishment, namely, the relief of indigent persons. (5) That the duties of the said teamster were to perform all such services as were required of him by the said superintendent within the scope of the purposes and objects of said woodyard."

In view of these express findings we are unable to say that the direction given to the teamster to remove the household goods of an indigent family, in the course of performing which he was injured, was one outside of the powers of the superintendent of the institution and beyond the scope of the purposes of its creation. This being so, the evidence must be held to be sufficient to support the award of the Commission. An examination of the evidence taken on the hearing before the Commission also sufficiently shows that it was sufficient to justify the aforesaid finding.

For the foregoing reasons the petition herein is denied.

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35 Cal. App. 531

PHILLIPS v. HUFFAKER et ux. (Civ. 1788.)

(District Court of Appeal, First District, California. Dec. 11, 1917.)

1. BANKRUPTCY 🔑303(1)—FRAUDULENT CONVEYANCES—CONVEYANCE WITHOUT CONSIDERATION—PRESUMPTION.

That a husband transferred to his wife property recorded in his name within four months of bankruptcy made the transfer presumptively fraudulent as to existing creditors, in view of Civ. Code, § 3442, providing that any transfer of property without a valuable consideration in contemplation of insolvency shall be fraudulent and void as to existing creditors.

2. BANKRUPTCY 🔑303(1)—FRAUDULENT CONVEYANCE—EVIDENCE.

The presumption that a conveyance without consideration and in contemplation of insolvency is fraudulent as to creditors *held* not overcome by the uncontradicted testimony of evasive witnesses; the court not being bound by such testimony, in view of Code Civ. Proc. § 2061, subd. 2, providing that a decision need not be in conformity with declarations of any number of witnesses which do not produce conviction against a presumption or other evidence satisfying the mind.

Appeal from Superior Court, Alameda County; W. H. Thomas, Judge.

Action by Henry Phillips, as trustee of E. Huffaker, bankrupt, against E. Huffaker and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Rodolph Hatfield and E. Huffaker, both of Oakland, for appellants. John L. McVey, of Oakland, for respondent.

LENNON, P. J. Defendants appeal from a judgment entered in favor of the plaintiff, as trustee in bankruptcy of the defendant E. Huffaker, to set aside a deed made by said Huffaker to his wife, the defendant Jennie B. Huffaker, on the ground that it was made within four months of the adjudication decreeing the defendant E. Huffaker a bankrupt; that it was without consideration, and made for the purpose of hindering, delaying, and defrauding creditors.

Briefly, the facts are these: On January 12, 1915, one Gray secured a judgment against the defendant E. Huffaker in the sum of $1,105. After the rendition of that judgment, but before the entry thereof, the defendant E. Huffaker reconveyed a one-half interest in certain real property to his wife, the defendant Jennie B. Huffaker, which she had previously conveyed to him, and then filed a petition in bankruptcy and was adjudicated a bankrupt.

The Huffakers defended the present action upon the ground that the property in question was held by the husband in trust for the wife, and was therefore rightly reconveyed to her.

The only question raised upon this appeal is as to the sufficiency of the evidence to support the trial court's findings:

> That defendants "willfully testified falsely as to material facts in said cause," and "that the deed made, executed, and delivered by E. Huffaker, defendant herein, to Jennie B. Huffaker, * * * was given by said defendant E. Huffaker to said Jennie B. Huffaker, his wife, for the purpose of hindering, delaying, and defrauding the creditors of him, the said E. Huffaker."

The only witnesses produced in the case were the defendants, who were called by the plaintiff, and their testimony in terms supports the allegation of their answer that the property was held by E. Huffaker in trust for the benefit of his wife, and therefore it is contended that there is no evidence to support the findings in question, and that the trial court was not justified in rejecting the uncontradicted testimony of the defendants.

The general rule that the uncontradicted testimony of a witness may not be disregarded by the trial court of course has its limitations, and, as is pointed out in Davis v. Judson, 159 Cal. 121, 128, 113 Pac. 147, 150:

> "The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction, or there may be circumstances in evidence in connection with the matter which satisfy the court of its falsity; the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement and influence it to disregard his positive testimony as to a particular fact;

and as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy."

See, also, Clark v. Tulare Lake Dredging Co., 14 Cal. App. 414, 432, 112 Pac. 564.

[1, 2] The fact that the property in suit stood of record in the name of E. Huffaker raises a presumption that title thereto was vested in him, and the fact that he transferred it to his wife without a valuable consideration in contemplation of insolvency made the transaction presumptively fraudulent as to existing creditors. Civ. Code, § 3442. These presumptions, standing alone, are sufficient to support the judgment, for the court was not bound, as has been seen, to accept the uncontradicted statement of the defendants against presumptions satisfying the mind of the court. Code Civ. Proc. § 2061, subd. 2; Bellus v. Peters, 165 Cal. 112, 130 Pac. 1186; Prewett v. Dyer, 107 Cal. 154, 159, 40 Pac. 105; Sarraille v. Calmon, 142 Cal. 651, 76 Pac. 497; Clark v. Tulare, etc., Co., supra.

The circumstance that the trial court, having seen and observed the witnesses and their manner of testifying, had an advantage when judging of the character of the testimony not accorded to us, coupled with other significant circumstances shown in the record, readily explains why the court below disregarded their testimony.

First, the excuse given by the Huffakers that the conveyance of the undivided one-half interest in the property was made by Mrs. Huffaker to her husband to better enable him to handle it for her benefit does not commend itself to us as having much weight or credence. We are unable to see how any benefit would inure to the wife from such an arrangement. In one part of his testimony Huffaker avoided as long as possible making an explanation of why he had claimed the property in question as his own when he applied for a bond to a certain bonding company, and his explanation in that regard was unsatisfactory. During the examination of Mrs. Huffaker she was led to believe that, unless there had been an accounting between her and her husband, her case would likely be lost. Accordingly she testified that there had been accountings between her and her husband, but in this connection, while she had testified that at different times each had collected rents of the property and kept them, and that when her husband worked on the property, as he sometimes did, she allowed him for carpenter work the same wages per hour that she would pay an experienced carpenter, nevertheless she was compelled to admit that there had never been a settlement of accounts in writing, and that there never had been an understanding of how much was due from one to the other, nor had any money ever passed between them to square the account.

These witnesses were evasive, and their testimony was equivocal, and therefore we think the court was justified in rejecting their testimony as unworthy of belief.

Judgment affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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35 Cal. App. 534

In re ALAMEDA COUNTY BAR ASS'N.
(Civ. 2181.)

(District Court of Appeal, First District, California. Dec. 11, 1917.)

1. ATTORNEY AND CLIENT ⚷53(2)—DISBARMENT—MORAL TURPITUDE—SUFFICIENCY OF EVIDENCE.

Evidence *held* insufficient to show moral turpitude that would warrant disbarment of an attorney, although judgment was had against him in a civil action, and he attempted to avoid the judgment by going through bankruptcy.

2. ATTORNEY AND CLIENT ⚷53(2)—DISBARMENT—NATURE OF PROCEEDINGS—BURDEN OF PROOF.

An accusation against an attorney in disbarment proceedings is in the nature of a criminal charge, and all intendments are in favor of the accused, and he should be given the benefit of doubts arising from conflict of evidence.

In the matter of the application of the Alameda County Bar Association for the disbarment of E. Huffaker, an attorney. Application denied.

C. L. Colvin, Phil M. Carey, and Walter J. Burpee, all of Oakland, for Alameda County Bar Ass'n. Rodolph Hatfield and E. Huffaker, both of Oakland, for respondent.

PER CURIAM. This is a proceeding for the disbarment of E. Huffaker, an attorney at law, upon the application of the Alameda Bar Association. The charge upon which the accusation is founded recites that the accused, while acting as attorney for one John Gray, was guilty of unprofessional conduct involving moral turpitude and dishonesty. The facts as alleged in the accusation may be stated, in substance, as follows:

The accused was employed by Gray as an attorney to represent him in certain litigation in which Gray was involved, and during the course of the employment Gray deeded to the accused certain real property to be held in trust by him for the purpose of disposing of the same and turning the proceeds over to said Gray. Subsequently Gray was convicted of a felony and sentenced to the state penitentiary. That during the time he was serving his term Huffaker fraudulently and unlawfully, and without the knowledge or consent of Gray, mortgaged the property so conveyed to him in trust for the sum of $1,800, and converted the same to his own use.

That thereafter Gray commenced an action for the recovery of this amount, in which action it was determined that Gray was indebted to Huffaker for legal services rendered in the sum of $1,247.15, and that $284 had been paid thereon, leaving a balance due from Gray to Huffaker on account of such services in the sum of $963.15, and judgment was thereupon rendered in favor of Gray for a balance of $832. No motion for a new trial was ever made in this action, and no appeal taken from this judgment. Upon the rendition of the judgment Huffaker deeded all his property to his wife, and filed a petition in bankruptcy, and listed the said judgment in favor of Gray as his only debt, for the purpose, it is alleged, of defeating the same.

It further appears from the accusation that a portion of the sum of $1,800 so obtained by Huffaker was delivered to Jennie B. Huffaker, his wife, which portion was used by her to satisfy a mortgage existing against property owned by her.

Thereafter Gray brought a second action against both Huffaker and his wife, in which action the trial court found that Huffaker had wrongfully received the sum of $836.35 from Gray, and that said sum was used for liquidating an indebtedness upon property belonging to his wife, and rendered judgment against the Huffakers in said amount.

By reason of the above-enumerated facts it is prayed that the license of accused to practice law be revoked, and that he be disbarred as an attorney at law.

By his answer Huffaker admits the receipt of the sum of $1,800, but denies that he ever held the same as trustee for Gray, but, on the contrary, claims the same as attorney's fees due him from Gray.

At the hearing of this application Huffaker testified, in effect, that he had represented Gray in nine actions, criminal and civil, besides rendering him other services of a legal nature, and that after the conviction of Gray upon a felony charge, and during his incarceration in San Quentin, Gray had expressly agreed to pay the sum of $1,750 in full satisfaction of this claim, and had authorized Huffaker to mortgage the property held in trust by him for this amount, and to pay himself out of the funds so received, and to convey the property subject to the mortgage to one Anderson, which was done. On the other hand, Gray, while admitting the demand of Huffaker and of an indebtedness in some amount, denied that he ever agreed to pay the sum of $1,750, or that he had ever authorized an hypothecation of his property. He admitted, however, that he had authorized the conveyance to Anderson. This is the only oral testimony directly upon the subject.

[1] The dispute over the transactions between Gray and the accused has been the subject of extended litigation before the courts; and while it has finally been determined that the amount claimed by Huffaker was in excess of that to which he was entitled, still we cannot say from the evidence presented in the record before us in this particular proceeding that there was moral turpitude or dishonesty practiced on the part of Huffaker. True, the evidence of Gray supports the charge, but it is in direct conflict with that of the accused, and is impaired by reason of the fact that Gray has been convicted of a felony.

[2] An accusation against an attorney in disbarment proceedings is in the nature of a criminal charge, and all intendments are in favor of the accused (In re Haymond, 121 Cal. 385, 53 Pac. 899), and he should be given the benefit of doubts arising from conflict of evidence (In re Stephens, 84 Cal. 81, 24 Pac. 46).

The further act of the accused in deeding his property to his wife and filing his petition in bankruptcy for the purpose of attempting to defeat the original judgment is, in the absence of an explanation, subject to adverse criticism. This is conceded by the accused; but as an excuse for these acts on his part he testified that during the trial of the original action against him and at the time of the acts complained of he was physically and mentally ill, and that his judgment was thereby impaired. In this he is corroborated by his physician, and this evidence is not contradicted. Under these circumstances we are not prepared to say that the respondent should be disbarred.

For the reasons given, the application is denied, and the accusation dismissed.

35 Cal. App. 466

CRANE v. HEINE. (Civ. 2236.)

(District Court of Appeal, First District, California. Dec. 5, 1917.)

1. PLEADING 🔑214(1) — DEMURRER — ADMISSION.

Demurrer to the complaint admits the truth of its allegations.

2. ATTORNEY AND CLIENT 🔑27—UNAUTHORIZED USE OF ATTORNEY'S NAME—RIGHT OF ACTION—STATUTE.

Where defendant, without an attorney's permission, used the latter's name and well-known standing as attorney in an endeavor to effect collections of over 1,000 accounts by typewriting the attorney's name as signature to that number of collection letters, which he sent to debtors, there was a transgression of the attorney's rights, from which the law will at least presume nominal damages, which may be recovered under Civ. Code, § 3360, providing that, when a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages.

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by Arthur Crane against Gustav O. Heine. From a judgment for defendant on order sustaining demurrer to the complaint, plaintiff appeals. Judgment reversed.

Arthur Crane, of San Francisco, in pro. per. Charles F. Hanlon, of San Francisco, for respondent.

PER CURIAM. This is an appeal from a judgment entered after an order sustaining a demurrer to plaintiff's complaint on the ground that it failed to state sufficient facts and after the plaintiff had refused to amend.

The complaint alleges that the plaintiff at all the times therein mentioned was an attorney at law, duly licensed to practice in all the courts of the state of California, and so engaged, and that he was of excellent standing as a lawyer in California; that in the month of July, 1913, the defendant, without the consent or knowledge of plaintiff, caused to be sent out and mailed with plaintiff's name appended thereto as the sender in typewriting over 1,000 letters to defenseless women and others, which forged letters threatened the recipients thereof with legal proceedings unless within three days they called and settled their respective accounts with the Heine Piano Company. The complaint further alleges that as a result of this unauthorized conduct of the defendant the plaintiff's professional reputation and standing as a lawyer was seriously impaired, and that he was damaged in the sum of $125,000, for which sum he demanded judgment.

[1, 2] The complaint contains much immaterial matter, and it would certainly be obnoxious to a special demurrer, but, as against a general demurrer, we think was good; for, assuming, as we must on demurrer, that the allegations of the complaint are true, we learn that the defendant, without the plaintiff's rights, from which the law his alleged well-known standing as an attorney at law to endeavor to effect collections of over 1,000 tardy accounts. This, if true, was certainly a transgression or invasion of the plaintiff's rights, from which the law will at least presume nominal damages, which may be recovered. Civ. Code, § 3360; W. U. T. Co. v. Ferguson, 157 Ind. 64, 66, 60 N. E. 674, 1080, 54 L. R. A. 846; 1 Cooley on Torts, 39, 84, 93; Hearne v. De Young, 132 Cal. 357, 64 Pac. 576.

The judgment is reversed.

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35 Cal. App. 481

NORTHERN INS. CO. OF NEW YORK v. NATIONAL UNION FIRE INS. CO.

(Civ. 1961.)

(District Court of Appeal, Second District, California. Dec. 5, 1917.)

1. INSURANCE 🔑634(1) — COMPLAINT—CONSTRUING AGAINST PLEADER.

Where the complaint alleged that the fire policy sued on was in the California standard form, an allegation that the company disclaimed liability thereunder will be taken as an allegation that the disclaimer was in writing as required by such policy, in view of the rule that pleadings are to be construed most strongly against the pleader, and the rule that, where a thing is alleged to have been done, it will be presumed to have been done in writing if the law so requires.

2. INSURANCE 🔑629(1)—FIRE INSURANCE—PLEADINGS—LIMITATIONS.

A complaint filed September 23d, alleging that the fire policy sued on was the California standard form, that the fire occurred July 24th, that proofs of loss were made August 8th, and that insurer disclaims liability, was demurrable, as it showed that the clause of such policy, which postponed the time of commencing suit to 90 days, had been put in operation.

3. STATUTES 🔑279—PLEADING—MATTERS JUDICIALLY KNOWN.

An allegation that the policy was of the California standard form fire insurance policy made the form of the policy prescribed by St. 1909, p. 404, a part of the complaint; it not being necessary to plead public statutes or matters of which the court takes judicial notice.

4. EVIDENCE 🔑29—JUDICIAL NOTICE—STATUTES.

As the California standard fire insurance policy is prescribed by St. 1909, p. 404, the court will take judicial notice of its terms, in view of Code Civ. Proc. § 1875, subd. 2, providing that the court will take judicial notice of whatever is established by law.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by the Northern Insurance Company of New York against the National Union Fire Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

John R. Layng, of Los Angeles, for appellant. Tyrrell, Abrahams & Brown, A. L. Abrahams, and Chas. W. Fricke, all of Los Angeles, for respondent.

WORKS, Judge pro tem. This is an action to recover upon an insurance policy for a loss by fire suffered by plaintiff's assignor. Judgment was rendered in favor of plaintiff, and it is from that judgment that the defendant appeals.

The amended complaint alleges that the policy was the California standard form fire insurance policy, that the fire occurred on July 26, 1914, and that proofs of loss were presented to the appellant on August 8th. It is then alleged, "That the defendant did disclaim any liability whatsoever under its said policy for and on account of the loss incurred" by respondent's assignor. It is also alleged that respondent's assignor demanded payment from appellant of the amount stated to be due from it, and that appellant failed and refused to pay. The action was commenced September 23, 1914.

The appellant objects that the amended complaint does not state facts sufficient to constitute a cause of action, for the reason that the litigation was prematurely commenced. The California standard fire policy provides (Stats. 1909, p. 408, Deering's Gen. Laws, Act 1670, p. 630):

> "This company shall be deemed to have assented to the amount of the loss claimed by the insured * * * unless within twenty days after the receipt thereof * * * the company shall notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him. * * *"

Then follow certain provisions for the appointment of appraisers to estimate and appraise the loss, under certain conditions, and also for the manner in which they shall perform their work and for their compensation. The form then proceeds:

> "If for any reason not attributable to the insured, or to the appraiser appointed by him, an appraisement is not had and completed within ninety days after said preliminary proof of loss is received by this company, the insured is not to be prejudiced by the failure to make an appraisement, and may prove the amount of his loss in an action brought without such appraisement."

[1-4] The allegation of the amended complaint to the effect that appellant disclaimed liability under the policy will be taken as an allegation that the disclaimer was in writing, as the terms of the policy above quoted require that it should have been in that form. Such a construction is required under the rule that pleadings are to be construed most strongly against the pleader, as well as under the rule that where a thing is alleged to have been done, it will be presumed to have been done in writing if the law requires it so to have been done. Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567, 112 Pac. 454. The principle last stated operates in favor of a pleader. It naturally operates with added force, under the principle first stated, against a pleader. It would seem, therefore, without the citation of authority, that the clause of the policy which in effect postpones the time for commencing suit to 90 days appears from the face of the amended complaint to have been put into operation, and that suit on the policy could not have been commenced, properly, until after November 6, 1914. However, questions kindred to the one here presented have already been before the courts. In Borger v. Connecticut Fire Insurance Co., 24 Cal. App. 696, 142 Pac. 115, a copy of the policy sued on was made part of the complaint, and the court said, after quoting from the instrument provisions similar to those above mentioned:

> "The foregoing conditions and provisions of the insurance policy upon which the plaintiff seeks to recover, having been expressly made a part of his complaint, it was incumbent upon the pleader to show upon the face of his complaint that the loss had ripened into a chose in action at the time the suit was begun."

It is true that in this case the policy is not set forth as a part of the pleading, but that can make no difference. As we have already stated, the amended complaint alleges that:

> "Said policy of insurance was what is known and denominated 'California Standard Form Fire Insurance Policy.'"

As that form is prescribed by the Legislature in a general statute (Stats. 1909, p. 404, Deering's Gen. Laws, Act 1670), the courts take judicial notice of its terms (Code Civ. Proc. § 1875, subds. 2, 3). The form of policy was a part of the amended complaint without being specifically pleaded, for two reasons. The first of these is that it is not necessary to plead public statutes. The second is that matters of which courts take judicial notice need not be pleaded. French v. Senate of California, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556, 2 Ann. Cas. 756.

The case of Borger v. Connecticut Fire Insurance Co., supra, was before the District Court of Appeal, First District, a second time. On that occasion it appeared that, on a retrial, the trial court had permitted an amendment of the complaint, which amendment set forth that the defendant, upon the filing with it by the plaintiff of his proofs of loss, had denied liability upon its policy for such loss. It will be observed that the amendment made the pleading like the amended complaint in the present action. The court again held the plaintiff's pleading insufficient. Borger v. Connecticut Fire Insurance Co., 29 Cal. App. 476, 156 Pac. 70.

The judgment is reversed, with directions to the trial court to sustain the demurrer.

We concur: CONREY, P. J.; JAMES, J.

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35 Cal. App. 487

MADSEN v. MADSEN et al. (Civ. 2237, 2267.)

(District Court of Appeal, First District, California. Dec. 7, 1917. Rehearing Denied by Supreme Court Feb. 5, 1918.)

1. TRUSTS ⟹86 — RESULTING TRUSTS — PRESUMPTIONS.

From the fact that plaintiff furnished money to defendant to buy and improve lots upon the assurance, belief, and understanding that he and defendant would occupy the premises jointly and the money would be applied as intended, and the money was not intended as a loan, gift, or advancement or compensation for support of plaintiff, and no consideration was given by defendant, the legal inference of a resulting trust arose, and warranted the legal conclusion without a separate finding of fact that there was a trust.

2. TRUSTS ⟹86 — RESULTING TRUSTS — PRESUMPTIONS.

In view of Civ. Code, § 853, providing that when a transfer of real property is made to one person and the consideration therefor is paid by another a trust is presumed to result in his favor, the presumption of a resulting trust is indulged, even when a transaction is one between parent and child.

Appeals from Superior Court, Marin County; Edgar T. Zook, Judge.

Suit by Mads C. Madsen against Martin Madsen and others. From the decree in part for plaintiff, defendants appeal; and from that portion of the decree favorable to defendants, plaintiff appeals. Affirmed upon both appeals.

H. L. Hagan, of Oakland, for plaintiff. **Martinelli & Greer**, of San Rafael, for defendants.

RICHARDS, J. These two appeals have been taken in the same case and from different parts of the same judgment, and it has been stipulated between the parties that the same transcript shall suffice for both appeals.

The facts of the case upon which both appeals depend for their determination are substantially these: The plaintiff, Mads C. Madsen, was a native of Denmark, where he lived until he was about 55 years old, when he came with his wife to California. Five grown children had preceded him to this state. Shortly after his arrival he and Hans Madsen, one of his sons, bought a ranch near Santa Rosa, where he lived with his said son for a while. In November, 1899, this ranch was sold, and the plaintiff herein received his share of the proceeds of such sale. Not long thereafter he received an invitation from the defendants herein to come and live with them at their home in San Rafael. The family of the defendants consisted of themselves and four children, and they were living in a small four-roomed cottage for which they were trying to pay. This was apparently inadequate for the two families. The defendant Martin Madsen had been for some time desirous of acquiring a larger lot and building another house, but was unable financially to do so. It was presently arranged that the plaintiff should furnish the sum of $1,200 which his said son Martin was to put into the purchase of two lots and the building of a house thereon large enough to accommodate both families. This was done; the lots were purchased for $750, the conveyance being taken in the name of the son, who contracted for a house to be erected thereon at a cost of $1,950. He borrowed the sum of $1,000 from a lumberman which went into the cost of the house, and when it was about completed he found that he still needed the sum of $500, which upon application his father supplied. The two families moved into the house upon its completion in the year 1900. The plaintiff's wife died the following year, and the plaintiff continued to live with the defendants until the year 1914, when, difficulties having arisen, the plaintiff was forced to leave the house and go and live at the home of one of his daughters in San Leandro. In the month of November, 1914, he commenced this action to have a resulting trust declared in the San Rafael property to the extent of the two sums of $1,200 and $500 which he claimed to have contributed to its purchase price.

Upon the trial the court found in plaintiff's favor as to the fact that a resulting trust had arisen in so far as the plaintiff's first contribution of the sum of $1,200 to the original purchase price of the property was concerned; but the court found in the defendants' favor as to the latter sum of $500 advanced by the plaintiff upon the theory that the advance of said later sum was in the nature of a loan to the defendants which they agreed to repay, and hence as to it no resulting trust in the property arose. From that portion of the judgment which declares a resulting trust to have been created as to the said sum of $1,200 invested in the purchase and improvement of the property in question the defendants have appealed; while as to the latter portion of the judgment declaring that as to the later advance of $500 no resulting trust arose the plaintiff has appealed, and both appeals have been transferred to this court for review.

The defendants upon the first of these appeals make two contentions: First, that the findings do not support the judgment; and second, that the evidence is insufficient to sustain the findings.

[1] As to the first of these points we find no merit in the defendants' contention. It is true that the court did not expressly find as a fact that a resulting trust arose from the payment by the plaintiff of the sum of $1,200 to his son, and by the latter's investment of this sum in the purchase price and improvement of the property in question. But, on the other hand, the court did find that the plaintiff furnished the said sum to his son with the understanding that he was to buy and improve the lots, and that he did so upon the assurance, belief, and understanding that the two families would occupy the premises jointly, and that the said money, when so received by his said son, would be so applied. The court further found "that the said sum of $1,200, or any part thereof, was not intended by the said parties, or either of them, to be a loan, gift, or advancement or compensation to the defendants Martin Madsen and Frieda Madsen, or either of them, for the support of said plaintiff or the family of said plaintiff, and that no consideration whatever was given by said defendants Martin Madsen and Frieda Madsen, or either of them, for the said sum of $1,200." From these findings the legal inference of a resulting trust arose, and accordingly the court found as a legal conclusion that the plaintiff was entitled to an equitable ownership in the said property amounting to $^{12}/_{27}$ thereof. We think these findings fully support that portion of the judgment which so decrees.

The second contention of the appellants upon their appeal is that the evidence does not sustain the findings of the court in the respect above stated. The testimony of the father and son is in sharp conflict as to the understanding between them at the time the father paid over the $1,200 to his son. The father did not understand or speak the English language, and testified through an interpreter. Doubtless his testimony lost something of its directness in the process of translation, but we think that it sufficiently shows, if believed by the court, that the plaintiff was led to understand and believe, and did so understand and believe, that he was to have an interest in the property and a home thereon as long as he lived, and that the payment by him of the sum of $1,200 to his son for investment in the property in question was made upon this understanding and belief, and that the same was not entitled to be a gift or advancement or loan.

[2] Some space is devoted in the briefs of counsel for the defendants upon this first appeal to the proposition that the presumption of a resulting trust will not be indulged in when the transaction in question is one between parent and child or husband and wife, or between members of the same family. But such is not the rule in this state under the broad terms of section 853 of the Civil Code and the decisions construing and applying the same. Faylor v. Faylor, 136 Cal. 95, 68 Pac. 482; Rothenbusch v. Hebel, 11 Cal. App. 692, 106 Pac. 119; Brison v. Brison, 75 Cal. 527, 17 Pac. 689, 7 Am. St. Rep. 189; Becker v. Schwerdtle, 141 Cal. 386, 74 Pac. 1029. Upon a review of the entire testimony in the case we are satisfied that it sufficiently sustains the findings and judgment of the trial court. This portion of the judgment appealed from by the defendants will therefore be affirmed.

The plaintiff herein has also prosecuted an appeal from that portion of the judgment which decrees that as to the subsequent payment of $500 made by the plaintiff to his son Martin Madsen no resulting trust arose. It is sufficient upon this appeal to say that in respect of this payment also the evidence is conflicting, and that the trial court was entitled to resolve such conflict in the defendants' favor, and, having done so, we shall not interfere with the discretion which it clearly has not abused.

As to the second appeal the judgment is also affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

35 Cal. App. 473

DAVIS v. SUPERIOR COURT IN AND FOR SAN JOAQUIN COUNTY et al.

(Civ. 1754.)

(District Court of Appeal, Third District, California. Dec. 5, 1917.)

1. MANDAMUS 🔑42—COMPELLING COURT TO DETERMINE MOTION ON MERITS.

Writ of mandate will issue to compel the superior court to hear and determine upon its merits a motion asking relief which the court has jurisdiction to grant.

2. EXECUTORS AND ADMINISTRATORS 🔑227(5) — ALLOWANCE OF CLAIMS — AMENDMENT — STATUTE—"PROCEEDING."

Code Civ. Proc. § 473, providing that the court in furtherance of justice on proper terms may allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, if the relief is sought within six months, applies to proceedings in probate, more particularly to presentation of a claim for allowance by the administrator or executor of a decedent's estate; since the word "proceeding" as used does not refer exclusively to an action at law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proceeding.]

Petition for writ of mandate by Ellis A. Davis against the Superior Court of the State of California in and for the County of San Joaquin and J. A. Plummer, Judge thereof. Writ ordered to issue.

Faulkner & Faulkner, for petitioner. John A. Wilson, of Stockton, for respondents.

CHIPMAN, P. J. This is a petition for a writ of mandate. It appears from the petition that on the 15th day of June, 1917, there was pending in the superior court of the county of San Joaquin the matter of the estate of Thomas E. Ketcham, deceased, on which date the petitioner presented to said court a duly verified petition praying for leave to amend a claim theretofore filed by petitioner in the matter of said estate; that a copy of said petition is attached to the petition here, made a part thereof, and designated Exhibit A; that the said superior court and the judge thereof refused to hear or entertain said petition and refused to grant the petitioner any relief in the matter on the ground, as alleged in the petition herein, "that the superior court, sitting in probate, is without authority or jurisdiction to grant leave to amend a claim in the matter of the estate of a deceased person, in any particular, after the expiration of the time fixed by law for the presentation of claims against such estate."

It appeared from the said petition, Exhibit A, hereinbefore referred to, that Thomas E. Ketcham died testate January 25, 1916, leaving an estate within the jurisdiction of said court; that after due proceedings Anna A. Israel was on February 14, 1916, duly appointed executrix of the last will of said Thomas E. Ketcham, deceased; that thereupon she duly qualified as such executrix and ever since has been and now is the duly appointed, qualified, and acting executrix of the last will of said decedent; that thereafter and pursuant to the order of court, the said executrix duly published notice to creditors to present their claims within 10 months from the date of the first publication of said notice, to wit, November 16, 1916; "that said executrix has not filed a final account in the matter of the said estate, nor any petition for the distribution thereof, but that the administration of said estate is at the present time and for some time to come will be pending in this court." It is then set forth that during his lifetime decedent entered into an agreement in writing whereby petitioner agreed to publish a biography of said decedent in the Davis Commercial Encyclopedia of the Pacific Southwest and to deliver to decedent twelve copies thereof; that your petitioner "inserted in said publication the biography of said decedent, published the same, delivered one copy thereof to the decedent, and offered to deliver to him the remaining eleven copies upon demand; that for and in consideration of the publication and delivery of said copies the said decedent agreed to pay to your petitioner the sum of $570 upon demand; that said sum was not paid by decedent during his lifetime."

It is then set forth:

"That within the time allowed by law for the presentation of claims against the said estate your petitioner prepared and presented to the executrix thereof a claim for the amount due under said agreement; that a true, full, and correct copy of said claim is hereunto attached, marked Exhibit A, and made part hereof; that prior to the preparation of said claim your petitioner delivered to Faulkner & Faulkner, Esqs., his attorneys, the original agreement in writing for the purpose of having a statement of said claim properly prepared and presented in the manner provided by law; that petitioner's said attorneys properly prepared a statement of said claim, duly verified, and instructed their stenographer to attach thereto a copy of said agreement in writing; that the said stenographer inadvertently neglected to attach to the said claim a true copy of the said agreement in writing, but inclosed the said copy in an envelope addressed to said executrix, which said envelope also contained a letter written by the said attorneys to the effect that the said claim had attached to it a copy of the said agreement; that the said envelope was thereafter mailed to the said executrix, and received by her; that the said executrix retained the said claim for a period of several months thereafter, to wit, until the 27th day of February, 1917, at which time the said executrix notified your petitioner that said claim had been wholly rejected by the executrix without indicating to your petitioner her reasons for or the grounds upon which such rejection was made; that on the said 27th day of February, 1917, the time for presentation of claims against the estate of said deceased had expired and your petitioner did not, therefore, have time within which to properly prepare his said claim and present the same to said executrix; that your petitioner did not discover the mistake until the said claim was returned to him rejected, as aforesaid; that by reason of the failure of petitioner to attach the said copy properly to the said claim, which was due to the mistake and inadvertence of the said stenographer, your petitioner will be unable to prosecute an action at law for the recovery of the money due under said agreement; that your petitioner has a good and just cause of action, based upon the said instrument in writing, and has exercised due and proper diligence in the preparation and presentation of his claim against said estate, except that he failed to attach thereto a copy of said agreement in writing, which said failure was due to the mistake and inadvertence of the stenographer of said attorneys. Wherefore, your petitioner prays that this court issue its order directing the said executrix to appear and show cause why an order by this court should not be made, granting leave to your petitioner to file in the matter of said estate an amendment to the said claim, said amendment to be effected by attaching to the said claim a true copy of said agreement in writing; that upon the hearing of said matter this court grant this petitioner the relief herein sought; and that such other and further relief be granted to your petitioner as may be meet and proper."

In the opinion rendered at the hearing by his honor, J. A. Plummer, the point in the case is thus stated:

"It is claimed in this case that under the provisions of section 473 of the Code of Civil Procedure the court has power to grant amendments to claims the same as in any ordinary case, but the question that immediately arises is: Supposing the court should exercise the power and grant permission to amend the claim that has already been acted upon by the executrix? When acted upon by the executrix, this claim was not presented in the manner provided by law; the time has gone by for the presentation of claims. If the court were to grant permission, it would simply, in effect, be amending a claim, which, when acted upon by the executrix, was not according to law, and allowing a claimant to present a claim after the time had expired as specified in the notice given by the executrix. There is no provision of the Code, so far as I have been able to ascertain, which gives the court any jurisdiction or authority. The provision of the Code in relation to the presentation of claims, and the allowance of presentation of claims by the court after the 10 months have expired, relates only to those who have not had notice by reason of absence. No other power is given to the court to make any change from the 10 months' notice. * * * Unless there is something in the Code which authorizes the court to set aside the action of the executrix, reopen the allowance, and direct her to do that which the law says must be done within 10 months, then the court would be acting beyond its jurisdiction. Being of the opinion that the court has no right or authority under the Code relating to the administration of estates, or under any of the equity powers given to the court sitting as a probate court to reach back and say to the executrix to do that which she has not done, and make a claim valid which was invalid, apparently, when presented, and especially after the time has expired when claims may be lawfully presented, the petition must be denied for want of jurisdiction."

[1] It is quite apparent that the learned trial judge did not consider the matter on its merits—that is, it did not consider nor decide the question whether or not petitioner was entitled to relief under section 473 of the Code of Civil Procedure, but held that it has no power or authority; in other words, had not jurisdiction to grant any relief and hence denied the petition. The situation was such as appeared in Estate of Simmons, 168 Cal. 390, 143 Pac. 697, wherein, on the authority of Cahill v. Superior Court, 145 Cal. 42, 78 Pac. 467, the court said: "The order denying the contestant's motion for relief must therefore be regarded as 'a dismissal of the motion for lack of jurisdiction'"—and, as was held in the Cahill Case, as a dismissal of the motion for lack of jurisdiction to act upon the motion. We understand the Cahill Case to have decided that the law especially enjoins upon the superior court the duty of hearing and determining all matters which are within its jurisdiction and which come properly before it; and the writ of mandate may issue to compel the court to hear and determine the motion upon its merits. We think petitioner entitled to the writ.

[2] The more important question is: Does section 473, Code of Civil Procedure, apply to proceedings in probate, and particularly to such a case or proceeding as is here presented? Upon the facts alleged, there would seem to be no good reason for withholding from petitioner the opportunity of having the judgment of the court upon the merits. He prepared his claim in due form and verified it as required by law; he stated in his claim that a copy of the contract on which his claim rested was attached thereon "marked Exhibit A"; the attorneys who prepared the claim directed their clerk to attach a copy of the contract to the claim and mail the claim to the executrix; the clerk, believing that he had complied with these directions, mailed the claim to the executrix and the envelope, with its contents, was received; through the mistake and inadvertence of the clerk, he failed to attach the said copy; the executrix retained the claim in her hands several months without acting upon it, and, after the time for the presentation of claims had elapsed, she returned it to the attorneys disallowed, and then for the first time the petitioner was made aware of the mistake; he promptly sought relief by application to the court, but was denied it for the reasons shown. There has been no final account rendered and no distribution, and the estate is still open and in process of settlement. Concededly, however, petitioner has no means of relief unless it can be afforded under section 473. This section provides that:

> "The court may in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; * * * and may, also, * * * relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect," if the relief is sought within six months.

In Levy v. Superior Court, 139 Cal. 590, 73 Pac. 417, a homestead had been set apart to the widow in the matter of the estate of Henry Levy, deceased. Motions were made to set aside the homestead order "on the grounds, among others, that the order was obtained through the 'inadvertence, surprise, and excusable neglect' of said moving parties." It was held that section 473 "is a statutory grant covering the matter here involved." Said the court:

> "In Estate of Hudson, 63 Cal. 454, it is assumed that a court could set aside a decree of distribution under section 473. In De Pedrorena v. Superior Court, 80 Cal. 144 [22 Pac. 71], it was expressly held that a court, at any time within six months, can set aside a decree of distribution on motion, upon proper showing. And in Estate of Hickey, 129 Cal. 14 [61 Pac. 475], it was expressly held that the probate court, under section 473, had power to set aside an order settling the final account of an administrator, and also an order setting apart the residue of an estate to minor heirs."

In the Estate of Simmons, 168 Cal. 390, 395, 143 Pac. 697, 699, it was said:

> "We think it must be held that the court has power, under section 473, to relieve a contestant, whose petition for revocation, duly filed, has not been dismissed, from the failure to have citation issued and served within the year."

In support of the statement that "the court has given a very liberal interpretation to the provisions of this section," a number of cases are cited. Section 473 was held applicable where a father has been deprived of the custody of his child by an order in an adoption proceeding, and that he could obtain relief under this section. Bell v. Krauss, 169 Cal. 387, 146 Pac. 874.

It seems to us that the presentation of a claim for allowance by the administrator or executor of the estate of a deceased person is a proceeding within the meaning of that term as used in section 473. The statute makes provision for the enforcement of claims against such an estate. The holder of the claim is required to prepare his claim in such form as will show a substantial cause of action; it must be verified, and, if founded on a written contract, a copy of the contract must be attached to the claim; it must be filed or presented within the time limited in the notice to creditors or it is barred; when a claim has been presented to the executor or administrator before filing (as was done here), the executor or administrator must indorse thereon his allowance or rejection, with the day and date thereof; "if he allow the claim so presented, it must be presented to the judge for his approval, who must in the same manner indorse upon it his allowance or rejection, and, if allowed, it must, within 30 days thereafter, be filed with the clerk." * * * "Every claim allowed by the executor or administrator and approved by the judge shall be ranked among the acknowledged debts of the estate, to be paid in due course of administration." Section 1496, Code Civ. Proc. If the claim is rejected, written notice must be given to the holder of the claim who must bring suit within a specified time "or the claim shall be forever barred." Section 1498. No holder of any claim shall maintain an action thereon unless the claim is first filed with the clerk, or presented to the executor or administrator, except in the case of a mortgage. Section 1500. When a judgment in favor of a claimant is obtained in an action on a rejected claim, such judgment operates precisely as does the approval of a claim by the judge. In both cases payment is to be made in due course of administration. There is no method provided for the collection of claims against estates of deceased persons except by these provisions, and it is essential that the claimant take the steps first above pointed out as a part of the method provided for his relief.

The presentation of the claim was not the initial step of an independent proceeding. There was already a pending proceeding entitled, "In the matter of the estate," etc., the object of which was to collect the assets of the estate, pay debts incurred by the deceased, and to do many other things as might be required in the settlement of the affairs of the decedent. Jurisdiction to do all these things had its origin in the letters testamentary granted on petition of the executrix. The presentation of the claim was but a step in the course of a pending proceeding, to which latter we have seen section 473 applies.

We do not think that the word "proceeding," as used in section 473, refers exclusively to an action at law. We have seen that the Supreme Court holds that it does not. A motion to set aside a homestead on which an order was made granting the petition does not constitute an action at law. It was, as we have seen, held in Levy v. Superior Court, supra, that the court had jurisdiction within six months to vacate an order setting apart a homestead, on motion of the executor and an heir, under section 473. See, also, Estate of Simmons, supra; Bell v. Krauss, 169 Cal. 387, 146 Pac. 874. We can see no embarrassment likely to arise should the learned trial judge decide that the showing is sufficient to justify his making an order allowing the amendment of the claim prayed for. The amendment should, if allowed, be made to take effect as of the date the claim was presented to the executrix. As thus amended, it may be allowed or rejected, at the discretion of the executrix, and the holder of the claim, if rejected, has his action as provided by the statute in which the merits of the claim may be fully passed upon. The statute does not limit the time within which the executrix must act upon the claim.

It need hardly to be stated that a different question would arise if the proposed amendment introduced a new or substantially different claim. Here, however, the facts constituting the claim as presented are fully and completely shown on its face, and reference is made to the particular contract which is identified. The contract is but the evidence by which the claim is to be established. Attaching a copy to the claim would in no sense change the substance of the claim.

It is ordered that a writ of mandate issue in said matter, directing the judge of the said superior court to hear and determine the petition, a copy of which is attached to the petition herein as Exhibit A, and to grant the petitioner therein such relief as the facts and the law may warrant.

We concur: HART, J.; BURNETT, J.

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35 Cal. App. 460

BAR ASS'N OF SAN FRANCISCO v. PHILBROOK. (Civ. 2286.)

(District Court of Appeal, First District, California. Dec. 4, 1917.)

ATTORNEY AND CLIENT ⊂⊃43—DISBARMENT—DISRESPECT.

The making and filing of an affidavit by an attorney in a pending action using in respect to the several judges the terms "criminal, corrupt, and wicked conspiracies," "criminal confederates," "colossal and confident insolence," "criminal prosecution," "calculated brutality," "a corrupt deadfall," and similar phrases, constituted a violation of Code Civ. Proc. § 282, relating to misconduct of an attorney, and the attorney will be disbarred, especially when neither justification, withdrawal, mitigation, or excuse for the making and filing of such document has been proffered.

In the matter of the accusation of the Bar Association of San Francisco against Horace W. Philbrook, an attorney. Disbarred.

Lloyd S. Ackerman, of San Francisco, for petitioner. Horace W. Philbrook, of San Francisco, in pro. per.

PER CURIAM. On September 24, 1917, an accusation in writing was filed in this court, verified by Lloyd S. Ackerman, Esq., acting on behalf of the Bar Association of San Francisco, wherein it was charged that Horace W. Philbrook had violated his duties as an attorney and counselor at law as defined by section 282 of the Code of Civil Procedure, by the making and filing of a certain affidavit in an action then pending in the superior court of the city and county of San Francisco, numbered 73516, and entitled "Florence E. Philbrook, Administratrix with the Will Annexed of the Estate of Humphrey A. Randall, Deceased, Plaintiff, v. William J. McGee, Defendant," wherein said Philbrook had specifically charged that several of the present judges of the superior court of the city and county of San Francisco and of several other counties of the state, together with certain specified members of the bar and other designated persons, had confederated in a wicked and criminal conspiracy against the plaintiff in said action, with the design and purpose of having rendered a false and corrupt judgment in said action against said plaintiff and in favor of the defendant therein, which said affidavit, as set forth in said accusation, was couched in language replete with offensive personalities, wherein and by the use of which the said Horace W. Philbrook is averred to have violated his duty to maintain the respect due to courts of justice and the judges thereof, and to abstain from offensive personalities toward the courts and the counsel for opposing parties, and to have been thereby guilty of unprofessional conduct, for which the said accusation prayed that he be disbarred or subjected to such other penalties as to the court should seem proper.

Upon the filing of said application and upon the date thereof this court made and entered an order requiring the said Horace W. Philbrook to appear and answer said accusation before it on Monday, October 22, 1917, at 10 o'clock a. m., or as soon thereafter as the matter could be heard, and that a copy of such accusation and order be served upon him at least five days before the time appointed for the hearing thereon. On October 22, 1917, and at the time appointed for the hearing upon said accusation, and upon the calling of said case for hearing, said Horace W. Philbrook was present in court, and thereupon made and tendered several successive special appearances in writing for the purpose of presenting and supporting several motions then made by him to strike said accusation from the files of this court and to dismiss the same, and also to quash the said order upon the several and specified grounds set forth in each of said motions, but each of his said motions, being presented and argued before the court and submitted to it for decision, was denied; whereupon the said Horace W. Philbrook was required by this court to then and there make such further appearance and present such other answer or defense to such accusation as he might be advised, whereupon said Horace W. Philbrook refused to make any further motion, answer, or defense to said accusation at that time; whereupon the matter was ordered submitted to this court for decision.

The affidavit of the respondent which the accusation herein charges to have been made and filed and to embrace matters in violation of section 282 of the Code of Civil Procedure was attached as an exhibit to the accusation herein and made a part thereof. It has been examined by us, and found to be couched in intemperate and abusive language directly and repeatedly applied to a number of the superior judges of the city and county of San Francisco and other counties in this state, and wherein these judicial officers, designated by name and with much of detail and circumstance, are charged with having entered into a criminal conspiracy among themselves and with other persons for the purpose of causing to be made and entered a false and corrupt judgment against the plaintiff in the action wherein said affidavit was filed.

The charges which the respondent thus makes and reiterates against the judicial officers named in his affidavit are of such a serious, and in fact criminal, character as to fully justify, if proven, the impeachment and removal from office of these persons. The law has provided a forum for the presentation, hearing, trial, and judgment of charges of this character when they are to be directed against judicial officers of this state. That forum is the court of impeachment provided for in article 4, § 18, of the state Constitution, wherein judges of the superior court are expressly made liable to impeachment for misdemeanors in office, and also in sections 33 to 39, inclusive, of the Code of Civil Procedure, and sections 737 to 753, inclusive, of the Penal Code, wherein a procedure is given for carrying into effect the aforesaid constitutional provision. It would be clearly the duty of any citizen, and particularly of any member of the legal profession, having knowledge of such matters as are adverted to in the affidavit of the respondent herein, to seek this forum for the purpose of removing from office by their impeachment those judicial officers whom this respondent assails; but it is equally clear that it would be against public policy and in the highest degree unprofessional and improper to permit assaults of the character of that indulged in by the respondent herein to be made upon the courts and judicial officers of the state in the ordinary course of the trial of causes, and by the means which this respondent has employed; for to do so would be to suffer the judicial respect, integrity, honor, and reputation of courts and judges to be attacked and overthrown with no opportunity for either defense, justification, or redress on the part of those assailed.

The case of In re Murray, 58 Hun, 604, 11 N. Y. Supp. 336, is instructive upon this phase of the present proceeding. The respondent in that case, in an affidavit made by him and filed in the surrogate court in a matter then pending before that court, charged the surrogate with corrupt practices, and also and in open court publicly repeated such charge, asserting such surrogate to be an infamous, foresworn, and corrupt judge. In a proceeding for his disbarment he reiterated the charges in an affidavit filed by him, in which he insisted upon the truth of his assertions.

> "This conduct," says the court, "is unprecedented and unprofessional. The charges are most serious in character, and would be attended with the gravest results if established. They should not therefore be entertained for a moment except upon the most impressive evidence at least, and then only in the manner provided by law for the investigation of kindred accusations against judicial officers. These results impose the greatest and most scrupulous care even in an attempted impeachment of a judicial officer; and if a counselor of this court, disregarding that mode of procedure, makes the charge of corruption against an officer in his own court while sitting in a cause which he is investigating, his conduct is in the highest degree unprofessional and improper. If such a course should be tolerated when every presumption of law is against the truth of the accusation, the honor of judicial officers would be exposed to the malice or rage of disappointed attorneys, whose evil inclinations, anger, or passion would thus seek gratification. It was said in Bradley v. Fisher, 13 Wall. 335, 20 L. Ed. 646, that the obligations which attorneys impliedly assume, if they do not by express declaration take them upon themselves, when they are admitted to the bar, are not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers."

In addition to the remedy suggested by the foregoing considerations, there was another and more immediate remedy at all times open to the respondent. He charges the existence of a criminal conspiracy in which the judicial officers he designates and other specified persons are involved. Section 182 of the Penal Code defines and provides for the punishment of criminal conspiracies; while section 753 of the Penal Code provides that a conviction on impeachment of any offense which is also the subject of indictment or information shall not be a bar to such indictment or information. These ordinary courses of the law have at all times been open to the respondent if he is in fact in possession of any information as to the actual existence of the criminal conspiracies which he charges in his affidavit; and it would be his clear duty to betake himself to one or other of the foregoing courses rather than to indulge in a manifest violation of section 282 of the Code of Civil Procedure in making a disrespectful assault upon the dignity of the courts and the integrity of the judicial officers in a manner which affords those who are thus assailed no opportunity for defense, vindication or protection.

But in addition to these considerations the language of the affidavit which forms the basis of the present proceeding is of the most disrespectful and intemperate character, abounding, as it does, in such phrases as "criminal, corrupt, and wicked conspiracies," "criminal confederates," "colossal and confident insolence," "criminal prosecution," "calculated brutality," and similar phrases ofttimes repeated and applied to the judicial officers in question, and containing also the reiterated characterization of certain proceedings in the courts over which such judicial officers presided as "a corrupt deadfall." The making and filing of such a document in which such expressions are repeatedly and offensively employed, and which is surcharged with other intemperate utterances and innuendoes, constitutes a clear violation of the spirit, intent, and terms of section 282 of the Code of Civil Procedure; and when such a document has been personally and willfully prepared, verified, and filed by an attorney and counselor at law in a cause pending in the courts, and before the judicial officers to which its intemperate, offensive, and highly disrespectful expressions directly refer, it affords ample ground for the permanent disbarment of such a person, especially when neither justification, withdrawal, mitigation, or excuse for the making and filing of such a document has been proffered by the respondent in the proceedings now pending before us.

It is therefore ordered, adjudged, and decreed that Horace W. Philbrook, an attorney and counselor at law of the state of California, is guilty of violating his duty as such attorney and counselor at law, in that he has failed to maintain the respect due to courts of justice and judicial officers, and has failed to abstain from offensive personalities, and that therefore the name of Horace W. Philbrook shall be stricken from the roll of attorneys and counselors at law, and that he be, and he is hereby, permanently precluded from practicing as such attorney and counselor at law in all of the courts of this state.

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35 Cal. App. 492

In re SHEPARD. (Civ. 2324.)

(District Court of Appeal, Second District, California. Dec. 7, 1917.)

1. ATTORNEY AND CLIENT 🔑39 — DISBARMENT—OFFENSES INVOLVING "MORAL TURPITUDE."

The offense of conspiring to smuggle opium into the United States in violation of federal law is ground for disbarment as involving "moral turpitude" within Code Civ. Proc. § 287, subd. 1, providing for disbarment upon conviction of a felony involving moral turpitude.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Moral Turpitude.]

2. ATTORNEY AND CLIENT 🔑48 — DISBARMENT—NOTICE.

Under Code Civ. Proc. § 287, subd. 1, providing that, where an attorney is sought to be removed for conviction of a felony involving moral turpitude, the record of conviction shall be conclusive evidence, and section 289, providing that proceedings to remove an attorney must be taken by the court on receipt of a certified copy of the record of conviction, and in spite of section 292, providing that upon receiving the accusation the court shall make an order requiring accused to appear, and shall cause a copy thereof and of the accusation to be served upon the accused at least five days before the hearing, no notice is required to be given the attorney of a proceeding for disbarment for conviction of an offense involving moral turpitude.

3. ATTORNEY AND CLIENT 🔑61 — DISBARMENT—SCOPE OF REVIEW.

Where an attorney, having been disbarred, applied for reinstatement for alleged errors in the order for disbarment, the sole question was whether the order of disbarment was right in substance, and the objection that no hearing was granted was of no avail, where on the application for reinstatement there was a hearing, and the order was sustained.

4. ATTORNEY AND CLIENT 🔑39 — DISBARMENT—OFFENSES—PLACE OF COMMISSION.

Under Code Civ. Proc. § 287, subd. 1, providing for disbarment of attorneys for conviction of offenses involving moral turpitude, and in spite of section 288, which requires the clerk of court in which the conviction is had to transmit the record to the Supreme Court, an attorney may be disbarred for an offense against the federal laws for which he is convicted in the federal courts.

5. ATTORNEY AND CLIENT 🔑61 — DISBARMENT—REINSTATEMENT—WHEN PROPER.

An attorney, having been disbarred, could not be reinstated because of good moral character within three years of the commission of his crime, two years and a half after his sentence, one year after his conviction became final by decision of the United States Circuit Court of Appeals, seven months after his disbarment, six months after he began his imprisonment, and three months after he concluded it; the offense causing the disbarment being conspiracy to smuggle opium into the United States in violation of federal law.

6. ATTORNEY AND CLIENT ⚬39 — DISBARMENT—NATURE OF PENALTY.

Disbarment of an attorney for conviction of an offense involving moral turpitude is for the protection of the bar and the public, and not punitive in character.

Application by Frederic M. Shepard for reinstatement as a member of the bar of the state of California. Application denied.

D. M. Hammack, of Los Angeles, for petitioner. Frank C. Collier, of Los Angeles, for respondent Los Angeles Bar Ass'n.

WORKS, Judge pro tem. In July, 1914, petitioner and one A. C. Brown committed the crime of conspiracy to import into the United States from Mexico 80 cans of smoking opium, and to receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of such opium, in violation of the act of Congress of January 17, 1914. Shepard and Brown were indicted for the offense by the federal grand jury, were tried, and were convicted. By judgment and sentence entered April 28, 1915, they were each condemned, by the District Court of the United States in and for the Southern District of California, to imprisonment for a year and a day in the state penitentiary at San Quentin. Shepard sued out a writ of error to the United States Circuit Court, Ninth Circuit, but his conviction was affirmed by that tribunal on October 4, 1916. He then sought a pardon at the hands of the national executive, but it was refused, although the President, after granting Shepard a respite expiring April 11, 1917, did commute the sentence to imprisonment in the jail of Los Angeles county for 90 days. Shepard entered upon the service of the sentence at the conclusion of the respite, and was discharged July 9, 1917. Meanwhile, on March 5, 1917, a certified copy of the record of conviction was presented to this court in open session, and Shepard was, on that day and without notice to him, disbarred. His admission to the bar of California was on December 6, 1909. This proceeding was instituted October 15, 1917.

[1] The disbarment was ordered under the provisions of subdivison 1 of section 287 of the Code of Civil Procedure, to the effect that an attorney and counselor may be removed or suspended upon his "conviction of a felony or misdemeanor involving moral turpitude." It is contended that the disbarment was unjustified for the reason that the crime of which Shepard was convicted does not involve moral turpitude, and that therefore his reinstatement should follow. We shall make no attempt to define the term upon which this question hinges, leaving it to be understood that the phrase itself has, without the aid of specific definition, a sufficiently clear meaning to enable us to determine whether the offense of Shepard comes within it. Counsel for the bar association characterizes a smuggler as one who makes endeavor to defraud the government out of the revenue derivable from the entry into the country of dutiable goods, and contends that the commission of such a fraud, or the formation of a conspiracy to commit it, is immoral and wrong to the extent that it necessarily involves moral turpitude. Counsel for the petitioner responds that smoking opium is not a dutiable article, and that it is denied admission to the United States, duty or no duty (and so it is), as if that fact lessens or wipes out any immorality which may fasten to the smuggler of dutiable articles. This question we will discuss later, as we now deal with the question of smuggling in general, as respects the matter of its turpitude or the lack of it. We anticipate our later discussion, however, to the extent of remarking that we shall now assume that the smuggling of opium into the country for smoking purposes is on at least as low a moral plane as the smuggling of dutiable articles with intent to defraud the government out of the revenue which would otherwise arise from importation. Returning to the question as to how we shall regard the smuggler, we may appeal to the popular feeling on the subject; for whether any act involves moral turpitude may with a great degree of safety be left to the estimation of a healthy minded public concerning the act, unless, indeed, there be something like an equal division of opinion on the subject. Can there be any doubt as to the manner in which the smuggler is regarded by a vast majority of the public? It is not in fiction alone that smuggling is classed with piracy; for in the public mind the two are more or less closely associated. Certainly we may say with confidence that in the popular estimation, and in truth, smuggling is a highly immoral crime against society and government. There is, of course, no difference, favorable to the petitioner, at least, between one guilty of smuggling and one guilty of conspiracy to smuggle.

How, now, is the smuggling of smoking opium to be regarded? The effects of the opium habit on the human system are generally understood, certainly in their salient features, but let us attend to a graphic description of the thralldom under which the victim of the habit rests. We quote from the Americana, title "Opium":

> "Indispensable as opium is in certain affections, in the hands of the thoughtless and weak it is too often a curse. It is the most seductive of all the narcotics. 'By its soothing and exhilarating influences it gains such a hold on the moral and physical nature that the strongest will is unable to emancipate the victim from its enchantment, and moral degradation results.' * * * Victims of the opium habit frequently become so demoralized as to need care in an asylum. They lie, steal, lose self-respect and ambition, are forgetful, may be subject to delusion, fear, and superstition, and are

> careless as to clothing and necessary habits, while still thinking highly of themselves. The great nerve centers tolerate stimulation to a certain point. When the limit is reached, the time varying in different persons, the action of the various organs and tracts is disordered. The victim of opium suffers from imperfect digestion, faulty appetite and assimilation, and consequent malnutrition. * * * Primarily there is functional derangement of the brain, then permanent deterioration. He becomes a slave to his depraved appetite. When the time draws near for his alloted dose he is nervous, yawns, may have neuralgia, is weak, breaks out into a perspiration, and is miserable. He takes his dose, and is himself again; but after a time the dose has to be increased, and if relief from his craving is not obtained, he sinks lower and lower, and dies a wretched death."

What would be the popular opinion concerning Shepard if it became generally known that he had delivered opium to innocents whose lives, through his acts, might become such as are here depicted? And yet in the commission of the crime of which he stands convicted he evinced the possession of the will, and even of the intent, in effect, to do that very thing; for the result of the carrying out of such a conspiracy as that in which he engaged would make it possible for others directly to make distribution of the poison. Truly it seems a travesty to insist that acts such as these are to be differentiated, in a way favorable to the petitioner, from the mere maiming and stabbing of the body with deliberately formed purpose and intent to wreak harm and injury upon it. We conclude that among the elements of Shephard's crime was a high degree of moral turpitude.

[2] It is insisted that this court had no jurisdiction to remove Shepard's name from the roll of attorneys without notice. Section 287 of the Code of Civil Procedure provides that, where an attorney is sought to be removed for conviction of a felony or misdemeanor involving moral turpitude, "the record of conviction shall be conclusive evidence" upon the question before the court. This provision is contained in the first subdivision of the section; the other subdivisions referring to removals or suspensions for other causes. Section 289 provides that:

> "The proceedings to remove or suspend an attorney and counselor, under the first subdivision of section two hundred and eighty-seven, must be taken by the court on the receipt of a certified copy of the record of conviction."

It is also to the effect:

> That proceedings under some of the other subdivisions, naming them, "may be taken by the court for the matters within its knowledge, or may be taken upon the information of another."

Section 290 provides:

> "If the proceedings are upon the information of another, the accusation must be in writing."

Section 292 is, in part:

> "Upon receiving the accusation, the court shall make an order requiring the accused to appear and answer it at a specified time, and shall cause a copy of the order and of the accusation to be served upon the accused at least five days before the day appointed in the order."

Under these sections proceedings for removal or suspension are divided into two classes. The first of these includes, alone, proceedings based upon convictions of felonies or misdemeanors, involving moral turpitude. The second class includes two subclasses: First, those proceedings to be taken for matters within the knowledge of the court; and, second, those which may be taken upon the information of another. Certainly it appears to us, whether notice is required in proceedings under both subclasses of the second class, or whether it is not, it is clear that no notice is required in proceedings of the first class. The provision as to proceedings of that class, to the effect that the record of conviction shall be conclusive evidence, is strongly persuasive of the question alone; and when we look to section 292, which provides with particularity for notice in certain cases, all doubt vanishes. That section does not require notice in a case such as we now have before us. In every case, under section 292, a copy of the accusation must be served on the accused, and there can be no copy of an accusation not in writing. There is nothing in any of the sections which calls for a written accusation where an attorney is sought to be removed for conviction of a felony or misdemeanor involving moral turpitude; and neither written accusation nor notice would seem to be necessary, looking at the question in the abstract, because of the proviso that the record of conviction is conclusive evidence in such cases. In a proceeding of that class there is but one question to be determined by the court: Was moral turpitude involved in the crime as to which the conviction resulted? That is purely a legal question, one which the Legislature evidently determined to leave to the courts without the aid of argument, and one which it might very properly, so far as we can perceive, leave to be settled in that manner.

[3] There is another reason why the objection that petitioner had no notice of his impending disbarment is without weight here. He concedes that the only point as to which notice would have availed him anything, or as to which he could have been heard, was the question whether the crime he committed involves moral turpitude. He has now had a hearing upon that question and we have resolved it against him. Therefore our determination, arrived at when the order for disbarment was made, was correct. It would be idle now to set that action aside, even if our view upon the question of the necessity for notice were different from that which we have above set forth. This proceeding, to the extent that it is an assault upon the validity of the order for disbarment, calls for a review of that order, it is true; but it is not a review of, or an appeal from, an order of a lower tribunal, for technical error in the making of which a reversal will result. We are passing upon an order of our own, and

our only duty, so far as this branch of the present proceeding is concerned, is to determine whether that order was right in substance.

[4] The next objection made to the validity of the disbarment order is that petitioner could not have been removed legally upon a conviction in the United States court. To state it more broadly, the position of petitioner is that a removal or suspension under subdivision 1 of section 287 of the Code can only result where the conviction mentioned in the subdivision arises from a prosecution in a California court. This contention is based upon the language of section 288, which is as follows:

> "In case of the conviction of an attorney or counselor of a felony or misdemeanor involving moral turpitude, the clerk of the court in which such conviction is had shall, within thirty days thereafter, transmit to the Supreme Court a certified copy of the record of conviction."

It is asserted that the record mentioned in this section is the only record which can be used in a proceeding under subdivision 1 of section 287; and in stating his argument on the point counsel for petitioner says that the California Legislature has no power to order a record of conviction to be sent to the Supreme Court except from a California court. This latter statement is perfectly sound, and its truth is a conclusive reason for the Legislature not having attempted to order records of conviction from federal courts or from the courts of other states. But the fact that the Legislature could not compel the production of such records from other jurisdictions has no bearing upon the right, the power, the duty, of the lawmaking body to authorize the courts to consider outside records of conviction if produced in any other way than through obedience to legislative enactment. Subdivision 1 of section 287 is general in its terms, and that would seem to be sufficient. It makes "records of conviction," without limitation as to the place of their origin, conclusive evidence of the question before the court, and it provides for disbarment or suspension for conviction of a felony or misdemeanor involving moral turpitude in the most general terms and without any limitation whatever as to the jurisdiction in which the conviction is secured. Not only is the section apparently all-inclusive in the respects mentioned, but there is convincing reason behind its existence in that form. A crime committed by a California lawyer in Nevada or Massachusetts is just as bad, involves as high a degree of moral turpitude, affects as greatly the desirability of his retention in the legal profession, as if the same crime were committed in California. Imaginery lines on the surface of the globe do not affect the character of acts done to the north or south or to the east or west of them. We have not considered the question whether subdivision 1 of section 287 would be unconstitutional if we were forced to construe it as petitioner insists we should, for such a labor is unnecessary, and the question is not argued; but there is something essentially unequal, unfair, and unjust in the idea that a California lawyer committing a crime within the state may be put beyond the pale of the profession by summary proceeding, while one of his brethren committing the same or a worse crime immediately beyond the Nevada border or on a vessel at sea immediately outside the three-mile limit, on the California coast, may not be removed in like manner. These considerations throw light upon the intention of the Legislature, although its intention, indeed, seems to be shown plainly by the very language of subdivision 1. By the adoption of section 288 the Legislature evinced its purpose to aid in the enforcement of subdivision 1 of section 287 to the extent that its authority permitted, leaving the production of records of conviction from other jurisdictions to be procured in some other manner. In announcing this position we are not overlooking the fact that section 288 has been slightly changed in phraseology since its original adoption in 1872. There has been no alteration in the section which aids the question of construction here presented.

We have now made disposition of all questions involving the validity of the order of disbarment. There is but one other point left to us. Petitioner asks for a reinstatement in the profession because of his good moral character, and affidavits and petitions from lawyers and judges are presented in that behalf. It will be noted that the petition was filed a little over three years after the commission of Shepard's crime, two years and a half after his sentence, one year after his conviction became final by decision of the United States Circuit Court of Appeals, seven months after his disbarment, six months after he began his imprisonment, and three months after he concluded it. The affidavits presented in support of the application for reinstatement cover generally, in the main, his conduct since the commission of the crime. There is in them no particular attempt to make a segregation of the question as between times before and times since his disbarment.

In considering this question it may be well to state more fully the nature of Shepard's offense, as the facts naturally do not appear upon the record of conviction. We quote from the opinion of the United States Circuit Court of Appeals, rendered in disposing of his writ of error to that tribunal (Shepard v. United States, 236 Feb. 73, 75, 149 C. C. A. 283, 285):

> "In July, 1914, plaintiff in error was retained as attorney at law to represent and to obtain bail for certain persons who were lodged in the county jail in Los Angeles, charged with the crime of conspiracy to import opium into the United States from Mexico in violation of the laws of the United States. One A. C. Brown was also employed by the same persons for the purpose of obtaining such bail. In con-

nection with their efforts to secure bail, and at the instance of their clients, plaintiff in error and Brown proceeded to Tia Juana, just over the boundary line in the republic of Mexico, where they found 40 five-tael cans of smoking opium which had been concealed by their clients. This opium Brown proceeded to dispose of in Tia Juana for either $32 or $34 per can, making a total sum of either $1,280 or $1,360, and, after deducting his proportion of the proceeds in accordance with a previous understanding with their clients, Brown delivered the balance of $1,000 to plaintiff in error. A second lot of 53 or 54 cans, concealed in the same vicinity, was searched for, but not found by the plaintiff in error. It appears, however, that a quantity of opium was found in that neighborhood by the defendant Brown and sold. A third lot was found by the plaintiff in error and the defendant Brown, concealed near Jacumba, in Mexico, about 76 miles east of San Diego, near the boundary line. The defendant Brown subsequently brought this lot to or near Los Angeles, in California, where it was concealed for a time."

[5] It will be noted from this quotation that the petitioner's offense was committed in connection with opium which his clients had concealed near the Mexican border, and that those clients were at the time in jail, charged with the very offense which Shepard also committed in and about their affairs. We cite these circumstances to show the petitioner's familiarity with the nature of his acts and with the danger he incurred in performing them. It is also to be noted that his offense was committed in connection with the practice of his profession, and did not relate to matters distinct from his work as a lawyer. What reputable member of the profession can see himself going from Los Angeles to the Mexican border upon the quest on which Shepard went and doing what he did? Under such circumstances as these, Shepard should not be restored to the right to practice law until he has lived, for some considerable time, a life of exemplary conduct in all that pertains to his relations with his fellow men. It is too early for his request for reinstatement to be favorably considered, even assuming that at some time it might be so considered.

[6] In one or two of the affidavits in the record the statement is made that the petitioner has been punished enough, as if a disbarment were punitive in character. It is not. The removal of an attorney's name from the rolls of the profession is a measure protective in character, in a certain sense protective of the profession, but in a higher sense protective of the public which finds it necessary to resort to the services of lawyers. No one not a lawyer can fully realize the opportunities for undiscovered peculation, graft, and embezzlement which are afforded the practitioner at the bar. No one not a lawyer can so well understand the degree to which the public is entitled to protection from dishonesty in the profession. When a member of the profession has been found lacking in the requisites which go to make him a helper to his clients and has been discovered to possess aims, views, and purposes which indicate a moral obliquity in him, and which might make his clients his victims, it is well that he were removed from the possibility of doing them harm. When he has been once disbarred, a mistaken charity should not restore him to his position. That restoration should only come when he has lived long enough after his disbarment in honorable intercourse with his fellow citizens to demonstrate that he is both tried and true.

The petitioner's application for a reinstatement is denied.

We concur: CONREY, P. J.; JAMES, J.

35 Cal. App. 439

CARR v. SACRAMENTO CLAY PRODUCTS CO. (Civ. 1723.)

(District Court of Appeal, Third District, California. Dec. 3, 1917. Rehearing Denied Jan. 2, 1918. Denied by Supreme Court Jan. 31, 1918.)

1. Contracts 🔑92—Persons Not Adjudged Insane—Statutes.

Under Civ. Code, § 39, providing that a conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity had been judicially determined, is subject to rescission as provided in the chapter on rescission, to rescind a contract, it is not necessary for a person to be incompetent to make any kind of a contract or to transact any business, however simple, but the test is: Was the party mentally competent to deal with the subject before him with a full understanding of his rights? Did he actually understand the nature, purpose, and effect of the contract?

2. Appeal and Error 🔑1009(2)—Review—Weight of Evidence.

In determining whether a trial court was justified in finding that a servant seeking to rescind a release for injuries was mentally incompetent under Civ. Code, § 39, the evidence must be regarded in the light most favorable to such conclusion.

3. Release 🔑57(1)—Rescission — Mental Capacity.

Evidence *held* to sustain a finding that a servant executing a release for injuries was not mentally competent under Civ. Code, § 39, and that the release should be canceled.

4. Release 🔑17(2)—"Actual Fraud."

An agent obtaining a release from a servant by figuring the amount under the Employers' Liability Act (St. 1911, p. 796) when the master had elected not to accept the act, and telling him that the amount he so figured was all he could get, and the servant believed him, there was actual fraud, defined by Civ. Code, § 1572, warranting rescission.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Actual Fraud.]

5. Appeal and Error 🔑1009(2)—Review of Evidence—Weight—Fraud.

The rule that the evidence to warrant impeachment of a release of damages for personal injuries should be clear and convincing is for the guidance of the trial court and jury, and not for an appellate court, which only considers the sufficiency of the evidence as in other cases.

6. RELEASE 🔑17(2)—FRAUD—STATEMENT OF FACT—OPINION OF LAW.

A statement by a master that under the Employers' Liability Act the servant was entitled only to a certain amount was in effect a statement that the master had accepted the compensatory provision, and, if false, was fraud based on statement of fact, and not opinion of law.

7. RELEASE 🔑16—VALIDITY — "MISTAKE OF LAW."

Where a master obtaining a release from an injured servant knew the law, and knew that a servant erroneously believed he was only entitled to a certain amount under the Employers' Liability Act, there was a mistake of law entitling the servant to rescission of the release, under Civ. Code, § 1578, providing that where there is a misapprehension of the law by one party of which the others are aware, which they do not rectify, there may be ground for setting aside a contract; especially where the servant was mentally weak.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mistake of Law.]

8. RELEASE 🔑19—VALIDITY—UNDUE INFLUENCE.

Where a servant is rendered mentally weak by injury, and is deeply in debt, has no credit, and cannot work, and is notified to move his family from his dwelling, a release obtained from him at an inadequate amount, there being withholding of facts and misrepresentation, will not be regarded with favor in equity, and it is immaterial whether the master knew of the mental condition, under Civ. Code, § 1575, relating to undue influence.

9. CANCELLATION OF INSTRUMENTS 🔑34(3)—"LACHES"—ADVICE OF ATTORNEY.

A servant who delayed bringing action to rescind a release of damages for some months by reason of advice of a reputable attorney that he had no case cannot be held guilty of laches, where the master's position was not changed, and action was brought within three weeks after advice by another attorney that he had a case; laches in legal significance not being mere delay, but delay that works a disadvantage to another, depending on the peculiar circumstances of each case.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Laches.]

10. APPEAL AND ERROR 🔑1009(1)—REVIEW—LACHES.

The question of laches in bringing an action is primarily a question of fact for the trial court.

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Action by E. G. Carr against the Sacramento Clay Products Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Myrick & Deering and James Walter Scott, all of San Francisco, for appellant. Downey, Pullen & Downey and Donald McKisick, all of Sacramento, for respondent.

BURNETT, J. The action was for damages resulting from an injury suffered by plaintiff through the negligence of defendant. The cause was tried before the court without a jury, and the plaintiff was awarded the sum of $7,500, and the appeal is from the judgment and order denying the motion for a new trial. It is not disputed that the evidence was sufficient to justify a finding that the defendant was negligent as charged in the complaint. In fact the court found that it was a case of gross negligence, and this finding is not attacked. There is no claim that plaintiff was chargeable with contributory negligence, nor is there any contention that the amount awarded is excessive. The only points insisted upon by appellant are that it has been released from all liability for the accident by virtue of the payment of a certain sum of money to plaintiff in accordance with an agreement executed by the parties hereto, and that plaintiff was guilty of laches in rescinding said release. It will be necessary, therefore, to set out the facts only in so far as they bear upon these defenses. As to the alleged release the court found:

"That plaintiff signed said alleged release on August 29, 1913, at the request of defendant; that said defendant at said time for the purpose of inducing plaintiff to execute said alleged release, and in order to obtain from plaintiff a release of all liability to plaintiff on account of injuries sustained by plaintiff through the negligence of defendant on or about the 19th day of July, 1913, willfully, falsely, and fraudulently represented to plaintiff that defendant's liability to plaintiff was limited by law to 65 per cent. of plaintiff's wages for a period of 12 weeks and $100 hospital, medical, and surgical bills, and that there was in existence in California a law limiting defendant's liability to plaintiff to $217. The court finds that plaintiff did rely upon said representations and each of them, and did believe said representations and each of them to be true, and by reason of believing and relying upon said representations and each of them did sign said alleged release; that said representations and each of them so made as aforesaid were false, fraudulent, and untrue, and were known to defendant to be false, fraudulent, and untrue when made; that the consideration, to wit, $217, paid to plaintiff by defendant for said alleged release, was grossly inadequate consideration; that on the date of the signing of said alleged release by plaintiff and for some time prior thereto, and continuously subsequent thereto, to wit, until about the 1st day of May, 1914, plaintiff was by reason of bodily injuries and because of surgical operations and of sickness, worries, and troubles, of great weakness of mind, and was so enfeebled and weakened mentally and physically that he did not have sufficient mental capacity or sufficient physical energy to transact the business of negotiating said alleged release, and he did not have sufficient mental capacity to understand the nature, purpose, and effect of said alleged contract of release or of the rights arising in his favor because of said personal injury by him sustained on July 19, 1913; that defendant well knew on said 29th day of August, 1913, of said weak mental and physical condition of plaintiff, but nevertheless induced plaintiff to sign said alleged release, and insisted that plaintiff sign said alleged release; that on or about the 1st of April, 1914, plaintiff first became aware of the facts which entitled him to rescind said alleged release, and first became aware of his right to rescind said alleged release."

Then follows a finding that within a reasonable time thereafter plaintiff rescinded said release and offered to return the $217, together with interest thereon. The foregoing constitute the only findings that are seriously contested herein by appellant. It is claimed by respondent, in the first place, that by reason of weakened mentality and of his inability to understand the nature, purpose, and effect of said release Carr, by virtue of the provisions of section 39 of the Civil Code and in harmony with the decisions construing said section, was authorized and permitted to rescind the release and to be restored to his former status. Said section provides:

> "A conveyance or other contract of a person of unsound mind but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, as provided in the chapter on rescission of this Code."

[1, 2] It is contended—and rightly so—that to avail himself of this statutory remedy, it is not necessary for a person to be incompetent to make any kind of a contract or to transact any business, however simple, but the test is: Was the party mentally competent to deal with the subject before him with a full understanding of his rights? U. P. Ry. Co. v. Harris, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. Ed. 1003. Did he actually understand the nature, purpose, and effect of the contract? Jacks v. Deering, 150 Cal. 272, 88 Pac. 909; Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 103 Pac. 190; Edmunds v. Southern Pacific Co., 18 Cal. App. 532, 123 Pac. 811. Such is the question to be determined by the court or jury, and if there is found in the evidence any rational ground for holding that the person executing the release was thus mentally deficient his contract may be avoided. In determining whether the court was justified in so finding as to Carr, we must, of course, regard the evidence in the light most favorable to such conclusion.

His physician, Dr. Charles B. McKee, testified that plaintiff was suffering from traumatic hysteria, bordering on melancholia; that he complained of disorders in digestion, did not sleep well, did not care for social intercourse with friends or relatives, was depressed, had financial worries, did not seem to carry on conversation to any extent, "on account of his injury which resulted in more or less depression—traumatic hysteria; for that reason I do not think that the man was in a position to judge the result of the form of this contract"; his nervous condition had some effect upon his will power; "his mental condition was certainly abnormal" from August 15, 1913, to May, 1914. An expert witness for the defendant, Dr. Dargitz, in answer to a hypothetical question based upon facts as testified to by plaintiff's witnesses, declared that such condition might result in traumatic neurosis, and that in his opinion "a person afflicted with traumatic neurosis would not be competent to transact business if the affliction was very well defined." Mrs. Carr, plaintiff's wife, testified that normally her husband was a jolly, healthy, sociable man, but predisposed to nervous disorder; "at times he was almost bordering on insanity"; just before the accident his mental condition was good; shortly after leaving the hospital the first time and before the release was given he became depressed and declined to converse with her. He would shun his neighbors, whom he had previously been glad to see; he took no interest in home matters, and neglected his personal appearance; "he was nervous, forgetful, stupid, and dull, and would hardly sleep. At the time the release was executed he was morbid and melancholy, and did not seem to be in a fit condition to transact business of any importance." She further testified that this condition continued until a short time before the trial. Carr himself testified to certain facts along the same line.

[3] It is true that certain circumstances were elicited by appellant tending strongly to a contrary conclusion, but we think the evidence is such that we are precluded from disturbing the finding of the trial court. No doubt the complexity of the situation involving serious legal propositions, such as the doctrine of actionable negligence and the interpretation of certain provisions of the Employers' Liability Act of 1911 (St. 1911, p. 796), was carefully considered by the trial judge in determining the competency of Carr's impaired intelligence to understand the nature and effect of the release.

[4] Again there is reason for the contention of respondent that the release was fraudulent under section 1572 of the Civil Code, as virtually found by the court. The plaintiff testified in reference to the transaction as follows:

> "Mr. Ayre went and figured out and said I was entitled to 12 weeks, 65 per cent. of my wages for 12 weeks, and wanted to know what I thought in regard to it. I told him that I was not satisfied. Mr. Walton spoke up; he says: 'Don't you think you will get well in that time?' I told him I hadn't any information of my being well; I had no authority on it; and he went to work and cited a case which was either his grandson or his own son that had a fracture of the forearm and went back to work in 12 weeks. Mr. Ayre said in addition to the 65 per cent. of my wages they would pay the hospital bill which was $96.40, and he says in no event do we allow more than $100 for hospital and medical fees, and said that I was getting all that I was entitled to under the act, which was 12 weeks; he said, 65 per cent. of my wages for 12 weeks was all I was entitled to under the act. He said—he took out his watch and looked at it, he said he would have to catch the train for San Francisco at 3:30; he says to hurry, 'Do you want to take that, or do you want to sue the company?' 'Now,' he says, 'if you sue the company, it will be a long drawn out proposition, aside from that we have a signed statement from the foreman that it was entirely your own fault you got hurt.' I did not see any use in my beginning suit against the company when I was only entitled to 12 weeks' pay at 65 per cent., so therefore I, under those conditions, why, I did not see where I had any advantage in bringing a suit, and settled. I certainly believed the statement Mr. Ayre made to me."

Mr. Ayre was familiar with said Employers' Liability Law, and he knew that appellant had not elected to accept the compensatory provision of that act, and that neither party was subject to that portion of the law. He knew that plaintiff was not restricted for his damages to 65 per cent. of his wages during a period of 12 weeks, and he was acquainted with the laws relating to personal injury and the right of plaintiff to damages as it existed in this state at that time. On the other hand, plaintiff testified that he was entirely ignorant of all these matters. We must therefore accept this as the situation: The representations, as found by the court, were made by appellant, as to the compensation to which respondent was entitled said representations were false and known by appellant to be false, and they were made for the purpose of deceiving respondent, plaintiff relied upon said representations, and he was induced thereby to execute the release in question. Thus is the case brought within the provisions of said section 1572.

[5] Against this conclusion the point is made that "a contract of settlement, like any other written contract, can only be impeached for fraud by clear and convincing evidence." No doubt such is the case, but the rule is for the guidance of the jury or trial judge, and it has no place in the consideration of an appellate court. Therein no difference between this class of cases and others is recognized as to the sufficiency of the evidence to support the finding. Mattson v. Eureka Cedar Lumber & Shingle Co., 79 Wash. 266, 140 Pac. 377.

[6] It is contended also that if any misrepresentation was made it merely related to a question of law, which cannot be regarded as fraudulent. But as pointed out by respondent, the representations may be considered as involving a matter of fact because they implied that defendant had accepted the optional compensatory features of said Employers' Liability Act, and therefore the statement that said law limited the liability of defendant—which under some circumstances might be the expression of a mere opinion not constituting the basis for an action—was herein a false and fraudulent statement of a condition that did not exist. The representations of appellant were in effect, therefore, the same as though it had positively stated to respondent that the former had accepted said compensatory provisions, and therefore its liability was limited as provided in said act, and hence it cannot be said that we are dealing with a mere matter of opinion or question of law. Neither can it be doubted that the representations were such that respondent was justified in relying upon them. The matter was peculiarly within the knowledge of appellant, and the circumstances surrounding the transaction did not exact of respondent the duty of making an independent investigation. In some cases, of course, a party relies upon false representations at his peril, but we are not confronted with that situation. Our attention has been called to a long number of cases supporting respondent's position, but it is sufficient probably to cite Brandt v. Krogh, 14 Cal. App. 39, 111 Pac. 275; Browne v. San Gabriel River Rock Co., 22 Cal. App. 682, 136 Pac. 542, 544; Henry v. Continental Bldg., etc., Ass'n, 156 Cal. 667, 105 Pac. 960; Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 126 Pac. 351, 42 L. R. A. (N. S.) 125; MacDonald v. De Fremery, 168 Cal. 189, 142 Pac. 73; Woods v. Wikstrom, 67 Or. 581, 135 Pac. 192.

In the Henry Case, supra, it is said:

> "A party inducing another to contract in reliance upon estimates or opinions professedly based upon alleged facts known to the party stating them to be nonexistent will not be permitted to escape responsibility by the plea that he was merely declaring his opinion."

In the Barron Estate Co. Case the following from Pomeroy's Equity Jurisprudence is quoted with approval:

> "Whenever a party states a matter which might otherwise be only an opinion, and does not state it as the mere expression of his own opinion, but offers it as an existing fact material to the transaction so that the other party may reasonably treat it as a fact and rely and act upon it as such, then the statement clearly becomes an affirmation of fact within the meaning of the general rule, and may be a fraudulent misrepresentation."

So it is true, as held in many cases, that the affirmation of belief is an affirmation of a fact, that is, of the fact of belief, and if it is "fraudulently made to mislead or cheat another to abuse his confidence, or to blind his judgment, it is in law and morals just as reprehensible as if any other fact were affirmed for the same purpose."

[7] Furthermore, under section 1578 of the Civil Code, "mistake of law" may be a ground for setting aside a contract. The right may exist where there is a "misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify." There was ground for the trial court to conclude that Carr was ignorant of the law as already indicated, and that appellant had the information furnished by the statute, and the latter made no effort to rectify the former's mistake and misapprehension. The situation was emphasized, furthermore, by the circumstance that Carr was of impaired mentality, and appellant not only failed to inform him of his rights, but intentionally deceived him as to the remedies available to him. As to this legal proposition, a host of witnesses might be summoned, but it can hardly be disputed. The matter is pretty fully covered by the quotation from Pomeroy's Equity Jurisprudence, vol. 2, § 847:

> "The scope and limitations of this doctrine may be summed up in the proposition that a misapprehension of the law by one party of which the others are aware at the time of the entering into the transaction, but which they

do not rectify, is a sufficient ground for equitable relief. A court of equity will not permit one party to take advantage and enjoy the benefit of an ignorance or mistake of a law by the other, which he knew of and did not correct. While equity interposes under such circumstances it follows a fortiori that when the mistake of law by one party is induced, aided or accompanied by conduct of the other more positively inequitable, and containing elements of wrongful intent, such as misrepresentation, imposition, concealment, undue influence, breach of confidence reposed, mental weakness, or surprise, a court of equity will lend its aid and relieve from the consequences of the error."

[8] Another consideration, suggested, indeed, by what has gone before, is sufficient to justify the court's action in setting aside said contract. It is embraced within the provisions of section 1575 of the Civil Code, and is denominated "undue influence." Such reason for relieving a party of his apparent contract may be found where one takes "an unfair advantage of another's weakness of mind" or "a grossly oppressive and unfair advantage of another's necessities or distress."

That plaintiff was enfeebled mentally and physically is a rational conclusion from the evidence. It further appears that he was in great financial distress. He was unable to work, and had no financial resources. His wife was trying to keep the family alive by baking bread for the neighbors. Notice had been given him that he would be ejected from his home. He had no credit, and on the day the release was executed he had less than a dollar in the house. It appears that his hospital bill was $96.40, and the physicians' charge was $447. These things and others show, indeed, beyond question, not only that he was financially embarrassed, but that he was in the "very depths of despair." And it may be said with equal propriety that there was ground for holding that appellant took an unfair advantage of his necessities. The method employed in securing the release, the misrepresentations that were made, the concealment of certain facts, the withholding of information as to the legal rights of plaintiff, and the inadequacy of the consideration are all circumstances, among others, pointing to the conclusion that the conduct of appellant was unconscionable, and it could not be regarded with favor by a court of equity.

It is true that the law does not discourage settlements of controversies by agreement, and is disposed as far as possible to uphold them, but it is equally ready to relieve parties from fraud and imposition through which they have been induced to barter away their rights. In cases like this especially, where the opportunity for overreaching is so great the law demands good faith on the part of the releasee and a full understanding on the part of the person injured as to his legal rights. Kansas City R. Co. v. Chiles, 86 Miss. 361, 38 South. 498; Mattson v. Shingle Co., 79 Wash. 266, 140 Pac. 377; McGrail v. Jersey Central Traction Co., 84 N. J. Eq. 261, 94 Atl. 81; Edmunds v. Southern Pacific Co., 18 Cal. App. 532, 123 Pac. 811; Russell v. Dayton Coal & Iron Co., 109 Tenn. 43, 70 S. W. 1. In passing from this consideration we may state that it is manifestly immaterial whether plaintiff was actually physically incapable of transacting said business as found by the court. The important inquiry was as to his mental condition. Nor to support the judgment is it necessary to hold that appellant had actual knowledge of respondent's mental condition when the release was executed.

[9] As to the defense of laches, neither can it be said that the court's finding is unsupported. Attention is called by respondent to these facts: Some time in November or December, 1913, Carr and his wife read a newspaper article concerning the Employers' Liability Act of 1911. This article stated that an employer was obliged to pay 65 per cent. of the average weekly wages of an injured employé for a period depending on the length of disability. Carr thereupon consulted with an attorney, one W. T. Phipps, and the deputy labor commissioner, Mr. Blair. Mr. Phipps investigated the situation, found out that appellant had not elected to become subject to the compensatory provisions of said act, and that respondent had executed the release, and he advised Carr that he had no case; that he had better not "throw good money after bad." Respondent in following the advice of an attorney of the standing of Mr. Phipps can hardly be said to be guilty of inexcusable neglect. In his condition of ignorance of the law, he was justified, therefore, in doing nothing further until at least he had reason to doubt the soundness of Mr. Phipps' opinion. But in the last of February, 1914, Mrs. Carr again read the clippings and consulted another attorney, Donald McKisick, who seems to have encouraged her in the matter, and after a consultation with Mr. Downey, the two attorneys reached the conclusion, and so advised Mr. Carr about the 1st of April, that he had a right to rescind the release. On the 3d of April following Mr. Downey wrote a letter to defendant repudiating on behalf of Mr. Carr the release, and asking that the matter be adjusted. On the 10th of April a letter containing a definite refusal to do anything further in the matter and an avowal to stand upon said release and to defend any action that might be brought by plaintiff was received from defendant. Notice of rescission was served on defendant April 23d following. Subsequently it developed that the full amount of the consideration for the release was not stated in the notice, and another notice stating the correct amount was served May 16, 1914, and suit was brought June 10, 1914.

[10] In view of the foregoing, it cannot be said that plaintiff's delay was unreasonable. He acted promptly after ascertaining that he had a right to rescind. According to the testimony of Mr. Downey it was about the 1st of

April when he informed Mr. Carr that he had a right to rescind, and there was, therefore, a delay of only about three weeks in giving the notice of rescission. This was certainly a case of acting with reasonable expedition after he was actually aware of his right to rescind. Hannah v. Steinman, 159 Cal. 142, 112 Pac. 1094. Whether or not a reasonable time has elapsed is a question of fact primarily to be determined by the trial court, and the solution of the question depends upon the particular circumstances of each case. Suhr v. Lauterbach, 164 Cal. 591, 130 Pac. 2. One important feature to be regarded is the consideration whether any damage has been suffered by reason of the delay. Cahill v. Superior Court, 145 Cal. 42, 78 Pac. 467. A delay of a short period may bar the right to rescind by reason of the prejudice caused thereby, but on the other hand relief may be granted after several years. 16 Cyc. 156. Laches in legal significance is not mere delay, but delay that works a disadvantage to another. Chase v. Chase, 20 R. I. 202, 37 Atl. 804. It is manifest that in the case at bar the defendant was not prejudiced in any manner by the delay. It did not change its status. Indeed, no circumstance was disclosed that would make it inequitable to set aside said release upon the grounds hereinbefore stated.

It would certainly be an unusual thing for this court to hold that under the circumstances as detailed by the witnesses for respondent his delay constituted such laches as to bar him from the right to bring an action or to rescind said release.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(177 Cal. 278)

SICKLES et al. v. MT. WHITNEY POWER & ELECTRIC CO. et al. (Sac. 2468.)

(Supreme Court of California. Jan. 23, 1918.)

1. ELECTRICITY 🔑16(4) — COMPLIANCE WITH STATUTE—NEGLIGENCE.

That an electric company operating a power line and a telephone line constructed them as far apart as required by St. 1911, p. 1037, does not necessarily render it free from negligence in maintaining them at such distance.

2. TRIAL 🔑260(2) — INSTRUCTIONS COVERED BY OTHER INSTRUCTIONS.

It was not error to refuse instructions as to an issue amply covered by instructions given.

3. ELECTRICITY 🔑16(4)—NEGLIGENCE—ACTS OF ANOTHER—NOTICE—CONSENT.

Where an electric company operating a telephone line and a power line knew of and consented to another company moving its telephone line to a position near its power line, it is liable for damage done by reason of their subsequently coming in contact with each other and burning a house.

4. TRIAL 🔑328—JOINT TORT-FEASORS—VERDICT FAVORING ONE.

Where two electric companies are equally liable for damages done by wires coming in contact, one cannot complain that verdict was returned against it alone, because each was independently liable and the jury can find for one defendant and against the other.

5. DAMAGES 🔑111—MEASURE OF DAMAGES—TORTS.

Where by reason of negligence of an electric company, plaintiff's house was burnt, the measure of damages under Civ. Code, § 3333, was the value of the property destroyed.

Department 2. Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Harry E. Sickles and others against the Mt. Whitney Power & Electric Company, a corporation, and the San Joaquin Light & Power Corporation, a corporation. Judgment for plaintiffs against the first defendant, and it appeals. Affirmed.

Farnsworth & McClure and Power & McFadzean, all of Visalia, for appellant. Murry & Knapp, of Porterville, Goodfellow, Eells, Moore & Orrick, of San Francisco, and Short & Sutherland, of Fresno, for respondents.

WILBUR, J. This is an appeal by the Mt. Whitney Power & Electric Company from a judgment, after verdict against it and in favor of the respondents, plaintiffs, and defendant San Joaquin Light & Power Corporation.

The appellant was operating a power line carrying an electrical current of 33,000 volts and also a telephone line using 100 volts. For some distance these lines were parallel. The high voltage electric line came in contact with the telephone line, the electricity passed along the telephone line and into a private line owned by the plaintiff Sickles, then to his house, causing it to catch fire and be destroyed. Plaintiffs claim that the appellant was negligent in maintaining its two lines so close together that they came in contact. The appellant claims that the plaintiff Sickles was guilty of contributory negligence in maintaining his private telephone wire so close to the appellant's telephone wire that they came into contact. The damages claimed are for the destruction of the house and its contents. The question of negligence and of contributory negligence were submitted to the jury under proper instructions.

[1, 2] The appellant contends that, inasmuch as the power line and the telephone line owned by it were constructed four feet apart, as required by statute (Stats. 1911, p. 1037), it was not guilty of negligence in the construction thereof, and that as they were maintained at the same distance apart there was no negligence in the maintenance thereof. This assumption is erroneous, for the reason that while it is true that a violation of a statute is negligence per se, it does not follow that one who has complied with the statute is therefore not guilty of negligence. The most familiar illustration of this rule is the matter of the violation of speed laws. It is held that, although one is driving at a speed less than the statutory limit, it does not follow that he is not guilty of negligence. The question is whether under all the circumstances the speed at which the person is traveling is negligence, and that is a question for the jury. Cook v. Miller, 166 Pac. 316. There was evidence justifying the finding of the jury that there was negligence, both on

the theory that the said statute was violated in the construction and maintenance of said lines nearer than four feet, and also in permitting the wires to be maintained sufficiently close together so that they came in contact. The question whether the injury was caused by an act of God, or was contributed to by the negligence of the plaintiff, was submitted to the jury, and the decision thereon was adverse to the defendant and is conclusive here. The subject of contributory negligence was amply covered by the instructions given. It was not error, therefore, to refuse appellant's instruction B on that subject.

[3, 4] It is claimed by appellant that the defendant San Joaquin Light & Power Company was equally responsible with the appellant, by reason of the fact that it moved the telephone line of the appellant from its location on the opposite side of the road to its position near and parallel to the power line of the appellant, but appellant had notice of its removal and consented thereto; and, even if the jury erroneously decided in favor of the San Joaquin Light & Power Company, or the court erred in refusing to grant its motion for nonsuit, appellant cannot complain of that fact, nor of instruction 18 favoring said defendant, for its liability was entirely independent. Fowden v. Pacific Coast Steamship Co., 149 Cal. 151, 86 Pac. 178; Fearon v. Fodera, 169 Cal. 370, 148 Pac. 200, Ann. Cas. 1916D, 312. It is proper for a jury to find for one defendant and against the other defendant. Section 578, Code Civ. Proc.; Fowden v. Pacific Coast Steamship Co., supra.

[5] It was not error for the court to instruct the jury that the measure of damages was the "value" of the property destroyed. Section 3333, Civ. Code; Sutherland, Damages (4th Ed.) par. 105.

For the foregoing reasons, the judgment is affirmed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

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177 Cal. 264

MOHR v. NORTH RAWHIDE MINING & DEVELOPMENT CO. et al. (Sac. 2469.)

(Supreme Court of California. Jan. 19, 1918.)

1. Appeal and Error 🔑704(2)—Failure to Make Finding—Reversible Error.

Upon an appeal on the judgment roll alone, the contention that the court erred in not making findings as to affirmative defense set up in defendants' answer cannot be sustained, in the absence of a showing that evidence was offered in support thereof.

2. Mines and Minerals 🔑38(24) — Findings—Sufficiency.

Although the court made a finding outside of the issues to the effect that plaintiff agreed to transfer his interest to defendant for a specified sum, where the court also found that there had been no payment or tender of such sum, or any part thereof, it cannot be said that the findings did not support a judgment declaring plaintiff to be the owner of an undivided interest in the mining claim.

Department 1. Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by A. C. Mohr against the North Rawhide Mining & Development Company and others. Judgment for plaintiff and certain defendants appeal. Affirmed.

E. W. Holland, of Sonora, for appellants. Wm. M. Sims, of San Francisco, and Rowan Hardin, of Sonora, for respondent.

SLOSS, J. The defendants the North Rawhide Mining & Development Company and Richard Chute appeal from a judgment declaring that the plaintiff is the owner of an undivided interest in a certain mining claim. The theory of the complaint was that the claim, which was originally owned by the Coast Development Company, was sold on execution; that the sheriff's deed was made to Chute, who took title in trust for the plaintiff and other execution creditors of said Coast Development Company; and that the appellant corporation took a conveyance of the claim from Chute with notice of plaintiff's equitable interest. The findings followed the averments of the complaint.

The appeal is on the judgment roll alone. The appellants seek a reversal on two grounds:

[1] 1. It is claimed that the court should have made findings with respect to an affirmative defense set up in the answer. This point cannot be raised on the record before us. In the absence of a showing that evidence was offered in support of an issue tendered by the defendant, failure to find thereon will not be held ground for reversing a judgment which is supported by the findings made. Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; Roberts v. Hall, 147 Cal. 434, 82 Pac. 66; Schoonover v. Birnbaum, 150 Cal. 734, 89 Pac. 1108; Coats v. Coats, 160 Cal. 671, 679, 118 Pac. 441, 36 L. R. A. (N. S.) 844.

[2] 2. But, say the appellants, the findings actually made do not support the judgment. The court found that the plaintiff and Chute had made a written agreement regarding plaintiff's interest in the property, and it is claimed that this agreement destroyed plaintiff's right to assert ownership. If the finding, which is entirely outside the issues, may be considered at all (Hall v. Arnott, 80 Cal. 348, 22 Pac. 200; Griffith v. Happersberger, 86 Cal. 605, 25 Pac. 137, 487; Rudel v. L. A. County, 118 Cal. 281, 50 Pac. 400), it was in no way inconsistent with the conclusions of law and judgment. By the writing in question the plaintiff simply agreed to transfer his interest in the mine to Chute, on payment of some $4,300. The court found further, however, that no payment or tender of this amount, or any part thereof, had ever been made to the plaintiff. The transaction

did not, therefore, deprive the plaintiff of his interest in the claim.

The judgment is affirmed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

(177 Cal. 266)

In re FRASER'S ESTATE.

FRASER et al. v. LUMBARD et al.

(Sac. 2689.)

(Supreme Court of California. Jan. 22, 1918.)

WILLS 🔑55(1) — MENTAL INCAPACITY—PROOF.

Evidence *held* so insufficient to show testamentary incapacity as to warrant a nonsuit in an action to set aside the probate of a will.

Department 1. Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

In the matter of the estate of Daniel Fraser, deceased. Proceedings by James Alexander Fraser, Tillie Fraser, Adeline Gunnarson, and Jessie Burston against William Lumbard, executor of the last will and testament of deceased, Lulu Watt, Bessie Baum Marshall, and Pauline Baum Wolfe, to revoke the probate of a will. Judgment for defendants, and contestants appeal. Affirmed.

J. H. Morris and Walter H. Duane, both of San Francisco, for appellants. W. P. Rich and W. H. Carlin, both of Marysville, for respondents.

SLOSS, J. The appellants, nephews and nieces of Daniel Fraser, deceased, instituted this proceeding to revoke the probate of Fraser's will. When the contestants had closed their case, the respondents moved for a nonsuit, which was granted. The appeal is from the ensuing judgment.

The appellants contend—and this is the only point made—that their evidence would have warranted a finding that the decedent was not mentally competent to make a will. If they are right in so claiming, the nonsuit should not, of course, have been granted. Burr v. United Railroads, 163 Cal. 663, 665, 126 Pac. 873; Estate of Ross, 173 Cal. 178, 159 Pac. 603. But our reading of the record satisfies us that the evidence in this case, even though it be viewed most favorably to the appellants, was entirely insufficient to show that Fraser did not possess testamentary capacity.

The document in question was executed on February 1, 1910. Daniel Fraser was then about 80 years of age. Until a few years before he had been a farmer, and he had always conducted his business affairs, which were of considerable extent, with prudence and ability. There was no attempt whatever to show his mental condition at the precise time of executing the will. The contestants produced a few witnesses who stated that they considered Fraser mentally weak. The reasons given were, however, so unsatisfactory as to leave the opinions themselves without weight or value. The effect of this testimony was that Fraser had, for many years, been in the habit of drinking intoxicants to excess. When he was under the influence of liquor, his mental operations were not entirely normal. But there was nothing to indicate that his mental soundness was impaired when he was not intoxicated, and contestants made no effort to prove that he was not sober at the time when he executed the will.

With the exception of the testator's intemperate habits, the circumstances relied on to support the claim of incapacity are trivial. One of the contestants based his opinion of the testator's want of mental soundness on the grounds that Fraser spoke with apparent appreciation, of the physical characteristics of women, that he told the witness that he did not drink, and requested the witness not to tell any one that he did. This witness also stated that Fraser sometimes would tell a story, and would repeat it at a later time. The time of these occurrences, relative to the date of the will, was not fixed with any clearness, and the facts themselves were insignificant. A second witness could not specify any reason for doubting Fraser's sanity beyond the circumstance that the testator had disputed his word. The instances of peculiar conduct testified to by the other witnesses were equally unimportant. Besides, they all seem, on a fair consideration of the testimony, to have occurred when the deceased was in his cups.

This court has so frequently defined the measure of mental competency requisite to the making of a will that it is unnecessary to do more than refer to a few of the cases. Estate of Motz, 136 Cal. 558, 562, 69 Pac. 294; Estate of Morey, 147 Cal. 495, 503, 82 Pac. 57; Estate of Huston, 163 Cal. 166, 124 Pac. 852; Estate of Purcell, 164 Cal. 300, 128 Pac. 932. The evidence which we have outlined was entirely inadequate to show that Fraser did not fully understand and carry in mind "the nature and situation of his property and his relations to his relatives and those around him," or that he was not "capable of understanding the act he was doing, and the relation in which he stood to the objects of his bounty," or that he was subject to any delusion "which might lead him to dispose of his property otherwise than he would if he knew and understood what he was doing." Estate of Motz, supra. The court would have been bound to set aside a verdict in favor of the contestants. It was therefore warranted in granting a nonsuit.

The judgment is affirmed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

177 Cal. 284

PEDLEY v. DOYLE. (L. A. 4116.)

(Supreme Court of California. Jan. 23, 1918.)

1. ACCOUNT, ACTION ON 🔑3—OPEN AND MUTUAL ACCOUNT.

That the amount due plaintiff consisted of the reasonable value of the use and occupation of land, so that the balance could not be struck until the value of such use was determined, would not make the existence of an open, mutual, and current account impossible.

2. ASSIGNMENTS 🔑71—MUTUALITY—ASSIGNMENTS.

An assignment does not destroy the mutuality of an account.

3. WITNESSES 🔑287(3)—REDIRECT EXAMINATION—EXTENT.

It was proper for plaintiff on redirect examination to bring out testimony tending to show how much dependence the witness in reaching his estimate of reasonable rental value had placed upon the knowledge he had obtained of prices paid by a certain class of renters; that subject having been introduced on cross-examination.

Department 2. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by W. E. Pedley against James J. Doyle. Judgment for plaintiff. From an order denying motion for new trial, defendant appeals. Affirmed.

Daley & Byrne and Fred A. Wilson, all of San Bernardino, for appellant. Geo. H. Johnson, R. E. Bledsoe, and Curtis & McNabb, all of San Bernardino, for respondent.

MELVIN, J. This is an appeal by defendant from an order denying his motion for a new trial.

There is no great difference in the contentions of the litigants regarding the essential facts, but there is a wide diversity of opinion upon questions of law. That defendant entered into possession of a tract of land then belonging to the Corona Water Company on February 1, 1902, and remained in occupancy of said property until May 13, 1913, is undisputed, and there is no doubt that during that time defendant made payments of money, furnished lumber for a building on the land, paid for capping a well, paid taxes, and expended money otherwise on behalf of the landlord.

The amended complaint was originally in two counts, but the cause was finally tried upon that which charged the primary indebtedness of defendant to plaintiff to be based upon the reasonable value of the premises for the years during which James J. Doyle occupied the land. Plaintiff sued as the alleged assignee and successor of the Corona Water Company. By the complaint the reasonable worth of the right of occupancy which the defendant had enjoyed was alleged to be $6,795, and it was further alleged that at various times during his tenancy defendant had furnished lumber and building materials and pasturage, had performed certain services, and had paid various sums of money for and at the request of plaintiff or his assignor, for all of which the Corona Water Company and the plaintiff as its assignee had agreed to allow defendant "what the same were reasonably worth as matters of set-off against the reasonable value of the use and occupation of said real property." The reasonable value of these credits was alleged to be $2,720, leaving a balance of $4,075, which, as plaintiff averred, was "a balance due under an open, mutual, and current account." In traversing these allegations defendant denied that he furnished services, paid money, etc., to the Corona Water Company, or to plaintiff as its assignee, but admitted that at various times between the 1st day of February, 1902, and the 13th day of May, 1913, he "furnished lumber, building materials, and pasturage, performed certain services, and paid various sums of money, and rented and hired horses, mules, and other animals to plaintiff, at the request of, for and on behalf of, and to said plaintiff." He also admitted "that the said plaintiff agreed to pay and allow defendant what all of said last-mentioned payments, services, and acts of the defendant were reasonably worth as matters of set-off against the reasonable value of the use and occupation of said property," but fixed the value of these items at $2,823, and denied that the amount set forth in the complaint, or any other sum of money, was a balance due under an open, mutual, or current account. The answer contained these further allegations:

> "The reasonable value of the use and occupation of said real property during the time between the 1st day of February, 1902, and the 13th day of May, 1913, is the sum of $2,823, and no more. That the said sum of $3,417.72, being the reasonable value of the lumber, building materials, and pasturage furnished, services performed, rent and hire of horses, mules, or other animals furnished to plaintiff by defendant, and money paid out by defendant at the request of, and for and on behalf of, and to said plaintiff as aforesaid, exceeds the reasonable value of the use and occupation of said real property by the sum of $594.72, and for which excess of $594.72 the plaintiff is indebted to the defendant over and above the reasonable value of the use and occupation of said premises by said defendant as aforesaid."

The prayer of the answer was that plaintiff take nothing, but that defendant have judgment for costs and for other appropriate relief. Defendant also averred that any cause of action was barred by the provisions of sections 337 and 339, Code of Civil Procedure.

[1] We have thus described the pleadings perhaps at unnecessary length because appellant insists that a mutual account was neither pleaded nor established by evidence. He asserts that there can be no open, mutual and current account where all of the averred indebtedness of one of the litigants to the other is based upon quantum meruit. But we find no force in his contention on this point. The reasonable value of the use of

the premises was only one of the items in the mutual account. It is true that the balance due to one from the other of the parties to the action could not be struck until the value of such use was determined, but that fact does not make the existence of an open, mutual, and current account impossible. Where rental of a chattel is set up as an item of such an account, plaintiff demanding the reasonable value of the use of the personal property, it has been held that in the absence of evidence showing an express agreement as to rental the court must fix the proper amount to be charged. Culver v. Newhart, 18 Cal. App. 614–623, 123 Pac. 975. We see no reason why the same rule should not be applied to rental of real property under like circumstances. Plaintiff and defendant each demanded a bill of particulars, and each in his bill enumerated items covering virtually the entire period of tenancy and sought to support his schedule by testimony. In view of these facts and the pleadings it cannot justly be asserted that an "open, mutual, and current account" was not pleaded. But appellant makes the further assertion that no mutual agreement of set-off is shown. But the complaint, in effect, avers such mutual agreement by pleading an open account, and defendant, although denying the existence of such an account, admits a certain amount as being the reasonable value of the use of the premises, and that plaintiff agreed to allow him the reasonable value of his payments, his services, and the commodities furnished by him as a set-off to the rent. If there was an "agreement" it could scarcely be without mutuality, and under the pleadings the only dispute which the court could settle would seem to have been that with reference to the amounts properly to be charged against the items in the bills of particulars and the resulting balance, if any.

[2] Appellant cites authorities from other states to the effect that assignment destroys the mutuality of accounts. We are of the opinion, however, that the better and more just rule is that stated by Mr. Justice Hart in the opinion in Culver v. Newhart, supra, as follows:

> "No one will dispute the proposition that a mutual, open and current account, like an ordinary account, is property—that is, a chose in action—and that, therefore, the plaintiff, as the original owner of the account in question, had the undoubted right to sell and transfer the same to his wife or to any other person (Civ. Code, §§ 1458, 953, and 954), subject, of course, to any equities which might have existed as to said account in favor of the debtor."

[3] The court properly admitted testimony of qualified persons regarding the rental value of the property, but appellant specifies error in the ruling permitting one of these witnesses, Mr. Whitlock, to testify how much rent Chinese gardeners had paid and were paying for the use of land in the neighborhood of that occupied by appellant. This testimony was not given, however, upon the direct examination of the witness. He had testified that from his knowledge of values and conditions he would fix $15 per acre, per year, as a fair rental value of the land in question. On cross-examination he said:

> "It is a fact that I base my statement of $15 an acre rental value largely from the theory and from the thought possibly that land has been renting in that neighborhood to Chinamen for vegetable purposes, at $15 an acre, or possibly more. I don't know whether land there could be rented for $15 an acre in the open market."

On redirect examination it developed that according to the personal knowledge and the information gathered by the witness even higher rental than $15 an acre had been obtained from some of the Chinese gardeners. The subject was introduced by defendant himself, and it was perfectly proper for plaintiff to bring out on redirect examination testimony tending to demonstrate how much dependence the witness, in reaching his estimate of reasonable rental value of this particular tract, had placed upon the knowledge he had obtained of prices paid by a certain class of renters, namely, Chinese gardeners.

No other specifications of alleged errors require analysis or discussion.

The order is affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

177 Cal. 268

DAWSON v. PACIFIC ELECTRIC RY. CO.

(L. A. 4122.)

(Supreme Court of California. Jan. 22, 1918.)

1. MASTER AND SERVANT 🔑278(12) — ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.

In an employé's action for injury sustained while bundles of shakes were being hoisted from a wharf upon flat cars, evidence *held* to warrant the jury in finding that the sling used was not strong enough for the purpose for which it was used.

2. MASTER AND SERVANT 🔑286(18) — ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

Testimony of defendant's witnesses showing that the sling was strong enough for such purpose raised a conflict to be resolved by the jury.

3. MASTER AND SERVANT 🔑286(24) — ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

Where shakes were being unloaded from a vessel lying at a wharf, and were then being hoisted by plaintiff's employer from the wharf upon flat cars, if the employer saw fit for its own convenience to use the ship's slings in connection with its own, it was open to the jury to find that due care required it to make some inspection of the ropes furnished by the vessel before employing them in its work.

4. MASTER AND SERVANT 🔑286(24) — ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

Whether the fact that a greater strain was put on the rope while the load was being hoisted from the ship to the wharf than during the subsequent transfer to the cars justified the employer in assuming that, because it had not broken when used to lift the load to the wharf, it could be used again without danger, and rendered any further test or examination unnecessary, was a question for the jury.

5. TRIAL 🔑63(2)—RECEPTION OF EVIDENCE—REBUTTAL—DISCRETION.

In an action for injuries caused by the breaking of a rope used in hoisting shakes, where plaintiff's testimony in chief tended to show that the load being hoisted weighed 1,500 pounds, but, while defendant was putting in its case, plaintiff's counsel suggested that he might have more definite testimony than that already given about the weight of the load, and in rebuttal offered testimony that the load contained about 115 bundles, weighing 40 pounds each, stating that he had just learned the facts which he desired to present, the court did not abuse its discretion in admitting such evidence, as it is ordinarily within the discretion of the court to allow in rebuttal testimony which should have been offered as a part of the case in chief, and the testimony was relevant to the claim that the rope was unsound and defective.

6. TRIAL 🔑64—REPLY TO EVIDENCE IN REBUTTAL—NECESSITY OF REQUEST.

If defendant was surprised by the new testimony offered in rebuttal, it should have asked an opportunity to meet it.

7. TRIAL 🔑252(11)—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

In an action for injury caused by the breaking of a rope used in hoisting a load of shakes, where the evidence suggested no issue in regard to defendant's negligence, in respect to the size or weight of the load being hoisted at the time of the accident, there was no occasion for a negative charge that the jury could not find defendant negligent in respect to the size or weight of the load.

8. TRIAL 🔑191(10)—INVADING PROVINCE OF JURY—ASSUMPTION OF FACTS.

In an employé's action for injuries, the court, after referring to certain acts as alleged by plaintiff to have been negligent, told the jury that if they believed from the evidence that defendant was guilty of both or either of "said negligent acts," and that they or either of them contributed directly or proximately to cause the accident, then plaintiff might recover. *Held*, that this did not invade the province of the jury by assuming that the acts in question were negligent, as the court was merely referring to its preceding description of acts alleged to have been negligent.

9. TRIAL 🔑296(9)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

There was no room for believing that the jury could have been misled by such instruction where in other instructions the court specifically directed the jury that the burden of proof was on plaintiff to establish a want of ordinary care.

Department 1. Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Louis B. Dawson against the Pacific Electric Railway Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Frank Karr, R. C. Gortner, and A. W. Ashburn, all of Los Angeles (W. R. Millar, of Los Angeles, of counsel), for appellant. E. B. Drake, of Los Angeles, for respondent.

SLOSS, J. The plaintiff brought this action to recover damages for personal injuries alleged to have been caused by the defendant's negligence. A verdict was returned and judgment entered in favor of the plaintiff. The defendant appeals from the judgment and from an order denying its motion for a new trial.

The defendant, an electric railway company, was engaged in loading bundles of shakes upon two of its flat cars, on a wharf at Redondo Beach, in Los Angeles county. The shakes were unloaded from a vessel lying at the wharf. They were first hoisted to the wharf. For this part of the work, use was made of the machinery of the vessel, which was not under the control or operation of the defendant. From the wharf, the shakes were lifted and swung to the cars by means of an electric derrick belonging to the defendant, and operated by its servants. A rope sling was put around a load composed of a number of bundles of shakes, and the load was moved from the ship to the wharf, and again from the wharf to the cars, by hooking the cable of the hoisting machinery or the derrick to a loop in the sling. The plaintiff was in the defendant's employ. His work was to arrange and place the shakes on one of the flat cars. While one of the loads was being hoisted from the wharf to the cars, and was passing over the plaintiff, the sling broke, causing the shakes to fall upon plaintiff.

The complaint charged negligence on the part of the defendant in two particulars, first, in carrying the bundles from the wharf to the flat car by means of a rotten, unsound, or defective rope or sling, and, second, by negligently failing to warn the plaintiff that the load was about to pass, and was passing, over him. The answer denied any negligence on the part of the defendant, and set up negligence on the part of the plaintiff himself.

[1-3] By its verdict the jury found in favor of the plaintiff on these issues. It is urged by the appellant that the evidence is insufficient to show that it had been guilty of any negligence. The rules of law respecting the duty of the employer in cases like the present were fully and clearly stated to the jury. The court charged that the defendant's obligation to furnish safe appliances and a safe place to work was not absolute, but that it extended only to the exercise of ordinary care. Under the instructions, the plaintiff was required to establish, by a preponderance of the evidence, that the sling was, in fact, defective, and that the defendant either knew of the defective condition, or would, by the exercise of ordinary care, have discovered it. It cannot be doubted that the evidence was sufficient to warrant the jury in finding that the sling was not, in fact, strong enough for the purpose for which it was used. One of plaintiff's witnesses, who had had many years' experience as a sailor in examining and using ropes, testified that he had examined the sling just after the accident, and that it was "black

and old looking. * * * It was too old; shouldn't have been used. * * * If I had been there on the ground and examined it, * * * I could have seen that it was an old rope that shouldn't have been used." Another witness testified that he had seen the rope, and that "it was very old;" another that "it was pretty black looking. It didn't look anything extra good." The testimony of contrary import, given by defendant's witnesses, could, of course, do no more than raise a conflict of evidence, and this conflict was to be resolved by the jury. There was, too, ample evidence to justify a finding that defendant had not exercised ordinary care in inspecting the rope to ascertain its condition. Much is made of the fact that the sling in question belonged to the owners of the ship, and that, in the course of the work, the slings were used as they came from the hold without any further inspection. But the evidence shows that the defendant had a number of slings of its own, and that these were used interchangeably with the slings belonging to the vessel. It appears that neither defendant's foreman, nor any other of its servants, made any inspection of the slings belonging to the ship. While the foreman testified, in general terms, that he had examined the slings, his further examination developed the fact that his inspection had been limited to the slings of the appellant. If the defendant saw fit, for its own convenience, to use the ship's slings in connection with its own, it was certainly open to the jury to find that the obligation of due care required it to make some inspection of the ropes furnished by the vessel, before employing them in its work.

[4] In this connection, the appellant directs our attention to certain testimony indicating that a greater strain was put on the rope while a load was being hoisted from the ship to the wharf than during the subsequent transfer to the cars. From this it is sought to be argued that the hoist from the vessel was a sufficient test of the strength of the rope, and that no further test or examination was necessary. The view of some of the witnesses was that, because the rope had not broken when used to lift a load to the wharf, they would assume that it could be used again without danger. But the soundness of this assumption was a question for the jury. To give it the force of a rule of law would dispense with the necessity of ever inspecting any appliance except just before it was used for the first time. The time is bound to come when the accumulated results of wear, strain, and age may cause the appliance to give way. As was aptly suggested at the trial, the case is like that of the proverbial pitcher that goes once too often to the well.

McCall v. Pacific Mail Steamship Co., 123 Cal. 42, 55 Pac. 706, relied on by the appellant, dealt with a situation entirely different from that presented by the record before us. The facts in the McCall Case, as stated by the court in its opinion, were that the rope had been properly inspected before use, and that its breaking was due to "a latent defect not discernible under an examination conducted with ordinary care." The consequent holding that no negligence was shown can therefore not apply to a case in which the evidence authorizes a finding that there was no inspection, and that such inspection would have disclosed the defect.

[5-7] The testimony offered by plaintiff in his case in chief tended to show that the load of shakes weighed 1,500 pounds. After the defendant had offered evidence indicating that the rope in question would carry a considerably greater weight, the plaintiff, on rebuttal, was allowed to offer testimony that the load contained about 115 bundles, weighing 40 pounds each, and consequently weighed over 4,000 pounds. It is ordinarily within the discretion of the trial court to allow, in rebuttal, testimony which should have been offered as a part of the case in chief. We think the ruling here made did not constitute an abuse of discretion. While the defendant was putting in its case, plaintiff's counsel suggested that he might have more definite testimony than that already given about the weight of the load, and when he offered his testimony in rebuttal, he stated to the court that he had just learned the facts which he desired to then present. If defendant was surprised by the new testimony, it should have asked an opportunity to meet it. No such request was made. The testimony was relevant to the charge of negligence made in the complaint, viz. that the sling was unsound and defective. A rope may be sufficiently strong to lift a load of 1,500 pounds, and entirely too weak to support a weight of 4,000 pounds. The question of the sufficiency of the rope was relative to the work which the rope had to do, and the weight of the load was therefore a proper subject of inquiry. At this point we may notice defendant's claim that the court erred in refusing to charge the jury, in effect, that they could not find the defendant negligent in respect to the size or weight of the load of shakes being carried at the time of the accident. No such issue was suggested by the evidence we have been discussing, or otherwise, and there was no occasion to give this negative charge. Furthermore, the jury was expressly told that the plaintiff could not recover unless he established one or the other of the charges of negligence set out in his complaint.

The court sustained an objection to a question asked on cross-examination of plaintiff's witness Wennaberg. We need not discuss the propriety of this ruling, since it appears that virtually the same question was put to the witness, and answered, at a later stage.

[8, 9] The court gave an instruction in which, after defining the two elements of negligence charged by the complaint, it told the jury that:

> "If you believe from the evidence that defendant was guilty of both or either of said *negligent acts*, and that the same or either contributed directly or proximately to cause the accident, then the plaintiff may recover in this case. * * *"

The criticism is made that the use of the italicized words assumes that the acts in question were negligent, and thus invades the province of the jury. We think, however, that the court was merely referring to its preceding description of acts alleged by the plaintiff to have been negligent. Furthermore, in view of other instructions which specifically directed the jury that the burden of proof was upon the plaintiff to establish a want of ordinary care, there is no room for the belief that the jury could have been misled. The real purpose of the charge in question was to direct the attention of the jury to the point that it was not necessary for the plaintiff to establish every act of negligence asserted by him, but that it was sufficient for him to make out either ground alleged. We have no doubt that the instruction was thus understood.

The judgment and the order appealed from are affirmed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

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177 Cal. 308

WESSEL v. SUPERIOR COURT OF IMPERIAL COUNTY et al. (L. A. 5424.)

(Supreme Court of California. Jan. 25, 1918. Rehearing Denied Feb. 21, 1918.)

PROHIBITION 🔑27—TRANSFER OF CAUSES—PRESUMPTION.

Where a superior court on its own motion transfers a cause of action to another county, on application for prohibition against the latter court, it must be presumed that the judges of the transferring court were disqualified and the transfer proper, and it is immaterial that the parties had stipulated to try the case in the transferring court, and had transferred it from the court to which it was retransferred.

In Bank. Application by William Wessel for writ of prohibition against the Superior Court of the County of Imperial and Hon. Franklin J. Cole, judge thereof. An alternative writ was issued by the District Court of Appeal of the Second Appellate District. Such court being unable to agree on a verdict, the proceeding is transferred to this court. Proceeding dismissed, and alternative writ discharged.

Leo V. Youngworth, Frank P. Doherty, and Percy V. Hammon, all of Los Angeles, for plaintiff. Galen Nichols, of El Centro, and H. N. Dyke, of Imperial, for respondents.

ANGELLOTTI, C. J. Plaintiff made application to the District Court of Appeal of the Second Appellate District for a writ of prohibition restraining defendants from proceeding further in the action of said Wessel against Waite et al., instituted in the superior court of Imperial county on or about June 27, 1917, on the ground that said court was without jurisdiction of said cause. An alternative writ of prohibition was issued, and, a return being made, the matter was heard by the District Court of Appeal. The justices of that court were unable to agree upon a judgment, and the proceeding was transferred to this court.

The action of Wessel v. Waite et al., which was one to prevent the enforcement of what was substantially alleged to be an invalid ordinance of the city of Imperial, was commenced in the superior court of Imperial county. We shall assume that it was transferred, under stipulation of the parties, to the superior court of Los Angeles county, although it must be confessed that the proceedings looking to that end were somewhat informal. The superior court of Los Angeles county assumed jurisdiction, passed upon the demurrer to the complaint, and issued a temporary injunction, restraining the enforcement of the ordinance. Subsequently, as its minutes for August 27, 1917, show, it allowed a motion for judgment on the pleadings to be withdrawn, and denied a motion to vacate the injunction. The minutes then proceed as follows:

> "Thereupon the court, of its own motion, with the consent of the defendants and over the objection of the plaintiff, ordered the cause herein transferred from this court to the superior court of Imperial county, Cal., for further proceedings."

It is on this order of transfer that defendants base their claim of present jurisdiction of the action. Plaintiff claims that this order is a nullity, with the result that the action is still pending in the superior court of Los Angeles county.

The attack thus made by plaintiff on the order of transfer is a collateral attack on an order of a court of general jurisdiction. Unless, therefore, the order is void on the face of the record, it is clear that, in view of well-settled principles, it must be held, in so far at least as this proceeding is concerned, to fully vest jurisdiction of the cause in the superior court of Imperial county. That the order cannot be held void on its face is, we think, settled by decisions made by this court.

Of course, it is not disputed that the superior court may lawfully make such an order in a proper case. Ordinarily, unless there be a stipulation of the parties, an application of one of the parties, based on some ground prescribed by statute, is essential. Section 397, Code of Civil Procedure, prescribes the grounds on which such an application may be based. Where such an application is made by a party and granted by the court, the order granting is not a nullity, no matter how defective was the showing of the applicant. This was decided many years ago in People ex rel. Meminger v. Sexton, Judge, 24 Cal. 78, a mandamus proceeding to compel the judge to proceed with the trial of a cause, notwithstanding an order transferring the cause to another county. As here, it was claimed that the order was a nullity. In the well-considered opinion, it was conceded, for the purposes of the decision, that the affidavit filed in support of the application for a change of place of trial did not show any sufficient cause, as indeed was held by the judge in passing on the application, and it was said that it does not result that the court had not the power to grant the change. The court said:

> "In making the order changing the venue, the court acted judicially upon a matter within its cognizance. By this order, the place of the trial of the action became changed from Butte to Yuba county. If, thereby, error intervened, to the petitioner's injury, it cannot be corrected by means of the writ of mandamus."

It was further said that if the court should grant the writ, it would be in effect a reversal of the order, or the expunging of the order, as a judicial proceeding, from the records where it is entered, which, for the reasons stated, the court could not do, and also that the remedy of the aggrieved party on account of any error was by appeal from the final judgment. Our law now gives the remedy in an appeal from the order.

The order here involved does show that it was not made on the application of either party, but was made over the objection of plaintiff and by the court "on its own motion." But we think it is clear that a judge who is disqualified to act in a cause may transfer it without application from either party. The decision in Broder v. Conklin, 98 Cal. 360, 33 Pac. 211, is in point, and absolutely controlling here. On appeal from an order made by the superior court of Mono county, the court to which the action had been transferred by the superior court of Inyo county, the judge of Inyo county deeming himself disqualified, it was sought to question the validity of the order of transfer. This court, in bank, said:

> "Upon this appeal the regularity of the proceedings in transferring the cause to Mono county cannot be considered. *If any condition of facts could exist under which the transfer would be authorized,* the action of the court in making the transfer will be upheld whenever collaterally attacked. Section 170 of the Code of Civil Procedure prohibits a judge from sitting or acting in any action in which he may be disqualified, except that he may transfer the action to some other court; and section 398 of the same Code provides that, if an action is 'pending' in a court, and the judge thereof is disqualified from acting, it must be transferred to the nearest court where the like objection does not exist. We may assume upon this appeal, not only that the judge of Inyo county was disqualified from acting in the cause, but also that the superior court of Mono county was the nearest court in which the like objection did not exist. If for any reason the order of transfer was erroneous, it could have been reviewed by a direct appeal therefrom." (The italics are ours.)

In principle there is no distinction whatever between that case and the one at bar. Section 398, Code of Civil Procedure, now provides that in such a case, in the absence of a stipulation of the parties as to the court to which the transfer shall be made, it shall be "to the nearest or most accessible court, where the like objection or cause for making the order does not exist."

We have in mind the requirement that the action must not be transferred from the superior court of any county on the ground of disqualification of the judge unless *all* of the judges thereof are deemed disqualified. Code Civ. Proc. subd. 4, § 170; subdivision 4, § 397, Code Civ. Proc.; Petition of Los Angeles Trust Co., 158 Cal. 603, 112 Pac. 56. But, in view of what has been said, we must assume that such was the condition as it was made to appear to the Los Angeles superior court, and that the superior court of Imperial county was the nearest or most accessible court where a like objection did not exist. It may be conceded that all this appears very improbable in point of fact, but it is a condition of facts that *could* exist consistently with anything stated in the order, and on any collateral attack on the order must be conclusively assumed to have existed. If the Los Angeles county superior court erred in making the order, plaintiff had a plain, speedy, and adequate remedy by appeal therefrom.

Some reliance appears to be placed by plaintiff on the fact that on the original transfer from Imperial county to Los Angeles county on stipulation of the parties, it was stipulated that jurisdiction of the action be given to the superior court of Los Angeles county. Manifestly the stipulation filed was not a waiver of any disqualification of any judge or judges. Subdivision 2, § 170, Code Civ. Proc. Regardless of this, however, it is plain from what we have said that it is not available for any purpose on a collateral attack on the order of transfer.

The alternative writ of prohibition is discharged, and the proceeding dismissed.

We concur: VICTOR E. SHAW, Judge pro tem.; SLOSS, J.; SHAW, J.; MELVIN, J.

177 Cal. 281

DE KAHN v. CHASE. (L. A. 4089.)

(Supreme Court of California. Jan. 23, 1918. Rehearing Denied Feb. 21, 1918.)

1. SPECIFIC PERFORMANCE 🔑121(9) — EVIDENCE REQUIRED.

Under Civ. Code, § 3390, subd. 6, providing that an agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable, cannot be specifically enforced, when all the evidence tending to establish a contract leaves the terms in doubt, it cannot be specifically enforced.

2. APPEAL AND ERROR 🔑931(1) — MATTERS REVIEWABLE—PREPONDERANCE OF EVIDENCE —SPECIFIC PERFORMANCE.

On appeal from a judgment specifically enforcing a contract, only that evidence favoring the agreement can be considered in determining whether the terms of the contract are clearly ascertainable, under Civ. Code, § 3390, subd. 6, relating to proof of contracts in such cases.

3. SPECIFIC PERFORMANCE 🔑121(9)—VERBAL AGREEMENT FOR LIFE LEASE—SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficiently clear as to the terms of a verbal agreement to give a life lease to support a judgment of specific performance.

4. SPECIFIC PERFORMANCE 🔑121(3)—CLARITY OF TERMS—SUFFICIENCY OF EVIDENCE.

In an action for specific performance of verbal agreement to give a life lease, evidence *held* sufficient to sustain a finding that defendant's son was not to occupy a room as part consideration for the lease, although he had occupied a room for some years after such agreement.

5. SPECIFIC PERFORMANCE 🔑117—ISSUES.

In an action for specific performance of an agreement to give plaintiff a life lease in return for a deed of certain property, plaintiff having lived in house for number of years under the agreement, the amount of taxes paid by defendant during such time is not an issue, and it was not error to exclude evidence thereof.

Department 2. Appeal from Superior Court, Santa Barbara County; Samuel E. Crow, Judge.

Action for specific performance of a contract by Carolina J. De Kahn against Ida M. Stewart Chase. Judgment for plaintiff, and defendant appeals. Affirmed.

Canfield & Starbuck, of Santa Barbara, for appellant. Richards & Carrier and George H. Gould, all of Santa Barbara, for respondent.

WILBUR, J. This is an action for specific performance to compel the execution by the defendant of a lease for a life term to the plaintiff upon a lot occupied by her as a residence from 1905 to 1913, in pursuance of a verbal agreement whereby plaintiff alleges that she conveyed an adjoining lot by deed to the defendant, in consideration of an agreement upon the part of the defendant to erect upon the before-mentioned lot a cottage and give to her a life estate thereon. The deeding of the lot by plaintiff to defendant and the occupancy by plaintiff for eight years of the premises claimed by her are admitted. The lot in question was bounded by fences and hedges. The principal item of the contract in litigation is the length of plaintiff's term. On this subject she testifies:

> "Mrs. Chase said that she was going to build a little cottage for me for life, as long as I lived, and that I could have it for the exchange of the lot on Spring street at that time. That was the agreement. She said that I would never have to pay rent in the little house as long as I lived, ever. I gave the deed before the house was built. I lived in the house till September 21, 1913. I paid no rent, but attended to the repairs of the house. I was to keep the house in repair at my own expense. We would always speak about the little house as mine. She always said I had it for life."

The testimony of the defendant and her witnesses as to the terms under which the plaintiff was allowed to occupy the house were in conflict with such testimony, and appellant insists that this court should review the finding of the trial court in the light of the rule, as she claims, that the plaintiff must have established her case by more than a preponderance of the evidence. The Civil Code provides that an agreement, the terms of which are not sufficiently certain, to make the precise act which is to be done clearly ascertainable, cannot be specifically enforced. Civ. Code, § 3390, subd. 6.

[1, 2] No doubt, therefore, when all the evidence tending to establish such contract, leaves the terms thereof in doubt, it cannot be specifically enforced, and where, on appeal, giving full credit and weight to all evidence affirmatively tending to establish such agreement, disregarding all conflicting evidence, it appears that the terms of such agreement are not clearly ascertainable, then the action of the trial court enforcing such uncertain agreement may be reversed. See Sheehan v. Sullivan, 126 Cal. 189, 193, 58 Pac. 543; Wadleigh v. Phelps, 149 Cal. 637, 87 Pac. 93. The cases in this state relied upon by appellant are not in conflict with this rule. The case of Hall v. Hall, 164 Pac. 390, is cited to the effect that in some classes of civil cases a higher degree of proof than a preponderance must be shown, but an examination of the record discloses that the jury in that case has been instructed at the instance of both parties that a preponderance of the evidence was sufficient to establish plaintiff's case, and the propriety of that rule was not before this court. The question here was the sufficiency of the evidence to justify the finding of the jury. In the case of Monsen v. Monsen, 162 Pac. 90, the question was as to the definiteness and "clearness" of the evidence rather than its weight. In the case of Wadleigh v. Phelps, supra, the court was considering what character of evidence was sufficient to overcome the presumption that a deed is what it purports to be, an absolute conveyance, and establish it to be a mortgage, and, although holding that such evidence must be "entirely plain and convincing," said:

"This, however, does not mean that the evidence in the record on appeal must be entirely plain and convincing to the appellate court. * * * All questions as to preponderance and conflict of evidence are for the trial court."

[3] It is enough, for the purposes of this case, to say that there is sufficient evidence, if believed by the trial court, to justify its finding as to the nature and terms of the contract.

[4] Appellant contends that the judgment is erroneous for the reason that it appears that, as a portion of the agreement of exchange, it was arranged that defendant's son occupy a room in said cottage. That he did so for some years is undisputed, but that there was an agreement therefor at the time the parties entered into said contract of exchange is denied by plaintiff in her testimony, and for that reason the finding of the court on that subject cannot be disturbed.

[5] Appellant offered evidence as to the amount of taxes paid by her on said property, but it was properly ruled out, as there was no issue thereon. The judgment provided:

"That plaintiff is not required to pay any rent for said premises nor any taxes or insurance thereon."

Appellant contends and respondent concedes that this is erroneous as to taxes and insurance, and should be modified by striking therefrom the words "nor any taxes or insurance thereon."

For the foregoing reasons, it is ordered that the decree herein be modified by striking therefrom the words above quoted "nor any taxes or insurance thereon," and as so modified the judgment is affirmed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 300)

In re PLUMB'S ESTATE.

PLUMB et al. v. WOODS et al.

(S. F. 8226.)

(Supreme Court of California. Jan. 25, 1918.)

1. WILLS 🔑358—REVOCATION OF PROBATE—REVIEW—"ORDER REFUSING TO REVOKE PROBATE OF WILL."

An order dismissing a proceeding to revoke the probate of a will was appealable under Code Civ. Proc. § 963, as amended in 1901, as an "order refusing to revoke the probate of a will."

2. WILLS 🔑370—REVOCATION OF PROBATE—REVIEW—RECORD.

Where no bill of exceptions or reporter's transcript is included in the record, the appeal must be considered on the judgment roll or on the papers which, in a probate proceeding, correspond to the judgment roll, which, in a proceeding to revoke probate, include at least the petition or contest, the answer, and the judgment or order.

3. WILLS 🔑384—REVOCATION OF PROBATE—REVIEW—PRESUMPTIONS.

An order dismissing a proceeding to revoke the probate of a will contained a finding that no citation had been issued to the administrator and to all the legatees and devisees mentioned in the will and residing in the state, and particularly that no citation had ever been issued to a named administrator with the will annexed or to W., one of the legatees and devisees. *Held* that, assuming that the failure to issue a citation to the administrator or to W. was obviated by their voluntary appearance, still the order contained a finding that no citation had been issued to all the legatees and devisees named, and the subsequent specification of the administrator and W. as persons to whom particularly no citation had been issued did not limit this general finding, and, as every intendment is in favor of the judgment or order, the finding would be interpreted, if necessary, as a finding that there had been a failure to issue the citation to legatees and devisees other than W.; the will not being a part of the record, and the record not otherwise showing that there were not other legatees and devisees.

4. WILLS 🔑278—REVOCATION OF PROBATE—PLEADING—EFFECT OF ADMISSIONS.

Where the petition for revocation alleged that W. and her husband were the sole legatees and devisees, and this allegation was not denied by the answer filed by the administrator in conjunction with W. and her husband, other legatees and devisees, if any, were not bound by the admission of this allegation.

5. WILLS 🔑270—REVOCATION OF PROBATE—PROCESS—FAILURE TO SERVE.

Under Code Civ. Proc. § 1328, providing relative to the revocation of probate that a citation must be issued to the executor or administrator with the will annexed, and to all the legatees and devisees mentioned in the will and heirs residing in the state, the failure to issue a citation to certain legatees and devisees and serve it on them justified the dismissal of the contest.

6. WILLS 🔑384—REVOCATION OF PROBATE—REVIEW—BURDEN OF SHOWING ERROR.

On appeal from an order dismissing a proceeding to revoke the probate of a will, it is incumbent upon appellants to show, by bill of exceptions or other proper record, such a condition of affairs as would make it appear affirmatively that the court erred in dismissing the contest.

Department 1. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Proceeding by Alonzo T. Plumb and others against Loyal Earl Woods and others, to revoke the probate of the will of Orrin Henry Plumb, deceased. From an order dismissing the proceeding, the contestants appeal. Affirmed.

Daniel A. Ryan, of San Francisco, for appellants. Keith C. Eversole and Charles M. Mannon, both of Ukiah, for respondents.

SLOSS, J. A proceeding for the revocation of probate of the will of Orrin Henry Plumb was dismissed by the court. The contestants appeal from the order of dismissal.

[1] The respondents insist that no appeal lies from such order. But the contrary has been decided in Mahoney v. Superior Court, 140 Cal. 513, 74 Pac. 13, where the court held that the order was, in effect, "one refusing to revoke the probate of a will," and thus appealable under the amendment of 1901 to section 963 of the Code of Civil

Procedure. The ruling was followed in Estate of Baker, 170 Cal. 578, 583, 150 Pac. 989. It may be added that a motion heretofore made by these respondents to dismiss this very appeal on the ground now urged was denied by this court.

[2-4] No bill of exceptions or reporter's transcript is included in the record. The appeal must therefore be considered on the judgment roll, or on the papers which, in a probate proceeding, correspond to the judgment roll. See In re Ryer, 110 Cal. 556, 42 Pac. 1082; Estate of Gamble, 166 Cal. 253, 135 Pac. 970; Estate of Broome, 169 Cal. 604, 147 Pac. 270. In a proceeding to revoke probate, such papers include, at least, the petition or contest, the answer, and the judgment or order, all of which, properly authenticated, are incorporated in the record before us. The order of dismissal contains various recitals and findings. In it the court finds, among other things, that more than one year had elapsed since the admission of the will to probate, and that no citation had been issued to the administrator and "to all the legatees and devisees" mentioned in the will and residing in the state, "and particularly that no citation has ever been issued to Robert R. Patton as administrator with the will annexed of the estate of Orrin Henry Plumb, deceased, or to Sarah L. Woods, one of the legatees and devisees mentioned in said will." (We assume, for present purposes, that "Sarah L. Woods" is identical with the respondent "Sarah F. Woods.")

If this order were to be construed as showing that the only ground for dismissing the contest was the failure to issue a citation to the administrator or to Sarah L. Woods, there might be much force in the appellants' contention that the necessity of a citation to these parties was obviated by their voluntary appearance. Estate of Ricks, 160 Cal. 467, 117 Pac. 539; Fstate of Simmons, 168 Cal. 390, 143 Pac. 697. But the finding in the order is that no citation had been issued to all the legatees and devisees named in the will. The ensuing words specifying the administrator and one of the legatees as persons to whom "particularly" no citation had been issued, do not necessarily limit the general statement that citation had not been issued to all of the legatees and devisees. Every intendment is in favor of the correctness of a judgment or order assailed on appeal, and we must, if such interpretation will support the order, read the finding as declaring that there had been a failure to issue citation to legatees and devisees other than Sarah L. Woods. The record does not show that such finding was contrary to the fact. The will is not a part of the record on appeal, and we cannot say that it did not make provision for various beneficiaries not cited. Appellants argue that the petition for revocation contains an allegation that the sole legatees and devisees were Sarah F. Woods and Loyal Earl Woods, her husband, and that this averment is not denied by the answer filed by the administrator in conjunction with Sarah F. and Loyal Earl Woods. But the allegation (which, by the way, is made inferentially only), may have been contrary to the terms of the will itself, which was before the trial court. Other legatees and devisees who may have been named in the will could not, of course, be bound by any admission contained in an answer in which they did not join. We need not decide whether the citation itself is properly a part of the record. Assuming that it is, it does not show that it was issued to all of the legatees and devisees named in the will.

[5, 6] It is entirely consistent with the record, therefore, that the will may have given devises and bequests to various persons in addition to Sarah F. and Loyal Earl Woods, and that no citation was issued to, or served upon, some of such persons. If this were so, the court was warranted in dismissing the contest. Code Civ. Proc. § 1328. It was incumbent upon the appellants, who attack the order made, to show by bill of exceptions, or other proper record, such a condition of affairs as would make it appear affirmatively that the court below erred in dismissing the contest. This they have failed to do.

The order is affirmed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

(177 Cal. 274)

In re WRIGHT'S ESTATE. (S. F. 8330.)

(Supreme Court of California. Jan. 22, 1918.)

1. Time ⚷9(4)—Computation—Days.

Under Code Civ. Proc. § 1373, requiring that notice of the hearing on a petition for letters of administration be given at least 10 days before the hearing, where the hearing on a petition for letters of administration with the will annexed was fixed for January 15th, notice issued and posted on January 5th complied with the statute.

2. Executors and Administrators ⚷18 — Qualifications of Administrator — Advanced Age.

That a petitioner for letters of administration was 92 years old did not disqualify him, where he was a man of considerable physical activity and of quite remarkable clearness of memory and perception in attending to his own business, and in relation to his knowledge of the decedent's affairs and estate.

3. Executors and Administrators ⚷18 — Qualifications of Administrator—Prejudices.

That a petitioner for letters of administration entertained some prejudices against some of the heirs or devisees did not disqualify him.

4. Executors and Administrators ⚷21(1) — Proceedings for Appointment — Harmless Error.

While, on a petition for letters of administration with the will annexed, the court might well have admitted evidence of the petitioner's declarations that he was too old to qualify, and did not feel able to do so, the exclusion of such evidence was not prejudicial, where the petitioner was before the court, and was fully examined and cross-examined as to his physical and mental capabilities to perform the functions of administrator.

Department 1. Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Proceeding for the appointment of an administrator of the estate of Jarena D. Wright, deceased, with the will annexed. From an order and decree appointing William B. Brown, C. M. Long appeals. Affirmed.

R. L. Thompson, of Santa Rosa, for appellant. Geary & Geary, of Santa Rosa, for respondent.

RICHARDS, Judge pro tem. This is an appeal from an order and decree appointing William B. Brown administrator with the will annexed of the estate of Jarena D. Wright, deceased. The facts of the case are these:

Jarena D. Wright died testate in the county of Sonoma in November, 1916, leaving an estate consisting of real and personal property in said county, and also leaving a will disposing of the same, wherein Robert A. Forsyth was named as executor. The latter having died prior to the death of the testatrix, it became necessary to have letters of administration with the will annexed issued to some competent and qualified person. Such letters were issued to Virginia S. Blake, a sister of the deceased, who, however, died shortly after the issuance of such letters to her. Thereupon, and on January 4, 1917, one C. M. Long filed his application for the issuance to him of letters of administration with the will annexed, alleging himself to be a nephew of the deceased, Wright. Notice of the hearing of said application was issued and posted upon said last-named day, wherein the hearing of the petition on said application was fixed as January 15, 1917. On January 5, 1917, William B. Brown filed his petition for the issuance to himself of letters of administration with the will annexed, alleging himself to be the sole surviving brother of the decedent, and on said day notice was issued and posted, which also fixed the date of hearing upon said petition for January 15, 1917. Both of these petitions came on for hearing before the court on January 22, 1917, at which time said C. M. Long presented and filed his answer and opposition to the petition of said William B. Brown, based upon two grounds:

"1. That said court is without jurisdiction to hear or determine said petition of William B. Brown, upon the ground that said petition was not duly noticed for hearing according to the provisions of section 1373, Code of Civil Procedure.

"2. That said petitioner William B. Brown is not competent to qualify or act as such administrator with the will annexed of said estate, under the provisions of section 1369, Code of Civil Procedure, for want of understanding and integrity, in this: That said petitioner is old and infirm physically and mentally, being of the age of 91 years; that his memory is defective; that he resides at a distance of more than 50 miles from Santa Rosa where the greater portion of said estate exists and where said estate is in process of probating; that petitioner C. M. Long is informed and believes that said estate includes a large amount of real and personal property exceeding the value of $100,000, and that a vast amount of labor, investigating, research, and litigation will be required to bring said property into said estate; that owing to the age and infirmity of the said petitioner William B. Brown, he is not his own free agent, but is dominated and influenced in his action by others; and that he is not impartial and unbiased as to the parties interested in said estate, but is biased and prejudiced, and has expressed and avowed his prejudices against the interest of certain heirs and legatees of said estate."

Upon the hearing William B. Brown offered himself as a witness in support of his petition for letters, and was examined and cross-examined quite fully as to his age, residence, habits of life, relations with his deceased sister, knowledge of the amount, condition, and value of her estate, and also as to his feelings and prejudices affecting certain of her heirs and devisees. From such examination it appeared that William B. Brown was of the age of 92 years, a widower living with his daughter in Berkeley, having retired from active business several years before, and occupying his time chiefly in doing the chores in and about his daughter's home, going to the market or bank, buying provisions, paying bills, and the like. He testified quite at length respecting his occasional visits to his sister, and as to the condition and value of her estate. From such examination, as well as from his appearance and conduct upon the hearing, the court determined that he was both competent and qualified to have letters of administration issued to him, and made its order and decree accordingly appointing him administrator with the will annexed of his deceased sister's estate. From such order and decree, the petitioner C. M. Long prosecutes this appeal.

[1] The first contention of the appellant is that the court did not acquire jurisdiction to hear and determine the petition of Brown, because the notice of hearing thereon was not given for the period required by section 1373 of the Code of Civil Procedure. There is no merit in this contention. The petition of Brown was filed on January 5, 1917, and the notice of hearing thereon was issued and posted on that day. The time fixed for the hearing was January 15, 1917. This constituted sufficient notice to satisfy the requirement of section 1373 of the Code of Civil Procedure. Bates v. Howard, 105 Cal. 173, 38 Pac. 715.

[2] The next contention of the appellant, that the evidence touching the competency of William B. Brown to receive the appointment as administrator and to act and serve

as such was insufficient to establish the same, is equally unmeritorious. It is true that the petitioner Brown was of the age of 92 years, but this fact alone would not constitute a disqualification, since the statute fixes no time above the age of majority when advanced age will of itself amount to a disqualification for the office and duties of administrator of an estate. Discussing a similar contention in the Estate of Pacheco, 23 Cal. 476, this court said:

> "The fact of her great age, and that she cannot read or write, and cannot speak English, do not show any want of understanding within the statute. It is true, they may render it difficult for her to perform some of her duties properly, yet they do not render it impossible."

In the instant case, in spite of the advanced age of the petitioner Brown the evidence sufficiently showed him to be a man of considerable physical activity and of quite remarkable clearness of memory and perception, for one of his years, in attending to his own business, and in relation to his knowledge of his deceased sister's affairs and estate. The court had, therefore, ample proofs before it to sustain its order.

[3] Nor would the fact that the petitioner Brown entertained some prejudices against some of the decedent's heirs or devisees suffice to disqualify him to serve as administrator of her estate, and for that reason the action of the court in sustaining objections to questions propounded by appellant along that line of inquiry, and also in refusing to permit in evidence a letter of the petitioner wherein expression was given to these prejudices, would not be erroneous. Estate of Bauquier, 88 Cal. 478, 26 Pac. 373.

[4] It is finally contended by the appellant that the court erred in sustaining the objection to certain questions put by him to the witness Brown as to whether he had not at some time prior to the filing of his petition for letters of administration stated to several persons that he was "too old to qualify, and did not feel able to do so," and in refusing to allow appellant to call and examine witnesses to prove these previous statements of the petitioner in that regard. The court might well have permitted this evidence to go in, although at most it would only have shown a change of opinion on the part of the petitioner Brown as to his ability to perform the duties of administration. But the error of the court, conceding it to be such, was not sufficiently prejudicial to justify the reversal of this case, in view of the fact that the petitioner Brown was before the court upon his own application for letters, and was fully examined and cross-examined as to his physical and mental capabilities to perform the functions of administrator; and the court having thus had an abundant opportunity to observe and determine for itself the present fitness of the petitioner Brown, it became quite immaterial what the latter might have thought or said as to his own qualifications at some earlier point of time.

This disposes of the several contentions that the appellant urged upon this appeal.

Order and decree affirmed.

We concur: SLOSS, J.; SHAW, J.

177 Cal. 295

HAZARD, GOULD & CO. et al. v. ROSENBERG et al. (L. A. 4074.)

(Supreme Court of California. Jan. 24, 1918.)

1. Constitutional Law 🔑208(6), 276, 299—Mechanics' Liens 🔑3 — Liability of Contractor's Sureties — Due Process — Class Legislation.

Code Civ. Proc. § 1183, as amended in 1911, gives a lien to mechanics, materialmen, etc., and provides that such liens shall not be limited to the contract price agreed upon between the contractor and the owner except as therein provided, that in case the contract shall be filed before the work is commenced with a bond of the contractor with good and sufficient sureties, conditioned for the payment of laborers and materialmen, and by its terms inuring to their benefit and giving them a right of action thereon, then the court must, where it would be equitable so to do, restrict the recovery under the liens, to an aggregate amount equal to that due from the owner to the contractor, and render judgment against the contractor and his sureties on the bond for any deficiency or difference. *Held*, that this is not unconstitutional as impairing the right of contract and thereby depriving one of property without due process of law, as an attempt to enact prohibited class legislation, or as depriving the surety of property without due process by placing upon it a legal obligation for which it never contracted, and by taking from owners and the surety inherent and inalienable rights.

2. Appeal and Error 🔑1071(5)—Harmless Error—Findings by Court.

In a suit to enforce mechanics' liens and to recover against the surety on the contractor's bond, if it was error to find that the contractor was a copartnership composed of certain persons, because the partnership was not a party and there was no allegation that the contractor was a partnership, the error was not material, especially as to a claimant who was not looking to the sureties for satisfaction, but only to the premises and to the owners; the contractor not being a necessary party.

3. Mechanics' Liens 🔑263(9) — Enforcement—Parties—Contractor.

The contractor is not a necessary party in a suit by materialmen to foreclose a mechanic's lien.

4. Evidence 🔑338—Certified Copies—Necessity.

Under Code Civ. Proc. § 1918, subd. 6, providing that documents of classes other than those specified in preceding subdivisions may be proved by the original or by a copy certified by the legal keeper thereof, the fact that a so-called company was a partnership and the names of the partners could be proved by producing the original certificate from the files of the county clerk's office, instead of by a certified copy.

5. Evidence 🔑161(1)—Best and Secondary Evidence—Contents of Writings.

Where offered testimony regarding the personnel of a partnership was based upon a writing which was not offered in evidence, the witness' oral declarations regarding its contents were not the best evidence.

6. PRINCIPAL AND AGENT 🔑23(3) — EVIDENCE OF AGENCY—SUFFICIENCY.

In a suit to foreclose mechanics' liens, the testimony of one of the owners of the building that C., as manager of the firm of contractors, signed the contract for the construction of the building, and that he dealt with him as such manager, the testimony of a representative of one of the claimants that he contracted with the firm transacting the business with C., and testimony that C. signed the checks for the payment of the men employed by the firm and managed the business and ordered all the material for use on the building, sufficiently showed his agency for the firm, as such agency might be proved by circumstances.

7. TRIAL 🔑98—OBJECTIONS TO EVIDENCE—NECESSITY OF RULINGS.

Where in an action to enforce mechanics' liens a witness testified to certain items of materials, and on objection being made to some of the items the court reserved its ruling, subsequent testimony of the witness that some of such items were credited back at the time of filing the lien neutralized the former statement regarding the charges for those items, and rendered any ruling on the objection unnecessary, so far as the items credited back were concerned.

8. APPEAL AND ERROR 🔑1047(2)—HARMLESS ERROR—FAILURE TO RULE.

The failure to rule favorably to defendants on objections to such items was without injury to defendants.

9. APPEAL AND ERROR 🔑206(1) — RESERVATION OF GROUNDS OF REVIEW — RECEPTION OF EVIDENCE.

Where a witness testified by reference to certain slips and defendants did not object to the omission to read the slips into the record, it could not complain of such omission on appeal.

10. MECHANICS' LIENS 🔑157(1) — CLAIM OF LIEN—MISNOMER OF CONTRACTOR.

That the findings in a suit to enforce a mechanic's lien described one member of the firm of contractors as N. M. P., while in the claim of lien his name was given as M. N. P., was immaterial, as the misnomer of the contractor in the claim of lien is harmless, unless some one is misled to his injury.

Department 2. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Suit by Hazard, Gould & Co. and others against R. Rosenberg, H. W. Calkins, the National Surety Company, and others. From the judgment and from an order denying a new trial, the defendants named appeal. Affirmed.

Sam Ferry Smith, of San Diego, for appellants. Johnson & Ryan, M. H. Fleming, A. H. Sweet, Hamilton & Lindley, and Luce & Luce, all of San Diego, J. H. Shankland, of Los Angeles, and Chas. H. Forward, of San Diego, for respondents.

MELVIN, J. Actions to enforce six several mechanics' liens were consolidated. The property against which the liens were sought was owned by appellants Rosenberg and Calkins. The National Surety Company was sued upon a contractor's bond given by the Chaffey Concrete Construction Company under the provisions of section 1183, Code of Civil Procedure, to protect Rosenberg and Calkins against liens for labor or materials. One of the lien claimants was nonsuited, and is not a party to this appeal. The others were given judgments against the property owners and a personal judgment against the surety upon the contractor's bond. After the appeal was perfected and the bill of exceptions was settled, but before the transcript was printed, a new trial was granted as to the entire claim of the Chas. R. McCormick Lumber Company, as to the claim of Hazard, Gould & Co., as to that of the California Portland Cement Company, and as to the judgment against appellant National Surety Company. The motion was denied as to all other claimants. From the judgment and from the order denying the motion for a new trial Rosenberg and Calkins and the National Surety Company have appealed.

[1] Appellants rely upon nine specified alleged errors, the first six of which, they assert, are applicable to all of the lien claims, and the others to particular ones. The first four of these allegations of error are attacks upon section 1183 of the Code of Civil Procedure as amended in 1911, upon the grounds: (1) That it is unconstitutional and void; (2) that it impairs the right of contract, and consequently deprives one of property without due process of law; (3) that the section is an instance of an attempt to enact prohibited class legislation; and (4) that it deprives the surety of property without due process by placing upon it a legal obligation for which it never contracted, and if enforced would take from both owners and surety inherent and inalienable rights upon which the Legislature has no right to encroach. All of these objections have been considered and decided adversely to the contention of appellants in the recent case of Roystone Co. v. Darling, 171 Cal. 526, 154 Pac. 15, which was followed in the very late case of Hollenbeck-Bush Planing Mill Co. v. Amweg, 170 Pac. 148 (Sac. Nos. 2470 and 2503, opinion filed December 31, 1917). Upon the authority of those two decisions the objections to the section in question are found to be of no force.

[2-4] In one of the findings attacked the court declared that during all of the times mentioned in all of the complaints and cross-complaints the Chaffey Concrete Construction Company was a copartnership composed of E. C. Chaffey and N. M. Parker. Appellants say that Chaffey Concrete Construction Company was not a defendant in the complaints of Hazard, Gould & Co. and San Diego Lumber Company, but Chaffey and Parker were named individually in those pleadings, although some attempt was made to state a cause of action against some sort of copartnership, but the Chaffey Construction Company as such partnership or entity was not made a party to the action. In the amended cross-complaint of J. S. Schirm reference is made to "said defendant to cross-complaint

Chaffey Concrete Construction Company" as a copartnership composed of M. N. Parker and E. C. Chaffey, but the difficulty is, according to appellant, that the concrete company was not a defendant in the action. Moreover, say counsel for appellants, this cross-complaint names an entirely new partner, i. e., M. N. Parker. The contention is that as the Chaffey Concrete Construction Company as an entity was not a party to the action, and as there was no allegation of such copartnership as a fact, the finding is without the issues, and is prejudicially erroneous. The error, if it be one, is not material, so far as respondent Hazard, Gould & Co. is concerned. That respondent is not looking to the sureties for satisfaction of the judgment, but to the premises and to the owners. But it is not material in any aspect of the case. A contractor is not a necessary party in a suit to foreclose a mechanic's lien. Green v. Clifford, 94 Cal. 49, 29 Pac. 331; Yancy v. Morton, 94 Cal. 558, 29 Pac. 1111. It has also been held in this state that a mistake in naming the contractor in a claim of lien is immaterial, unless the misnomer misled the owner to his prejudice. Tibbetts v. Moore, 23 Cal. 208; First Presbyterian Church of Hutchinson v. Santry & Co., 52 Kan. 462, 34 Pac. 974. It appears that the owners dealt only with the Chaffey Concrete Construction Company as the contractor erecting the building, and that was the entity named in the contract. The original certificate that the so-called "company" was a partnership, and giving the names of the copartners, was produced from the files of the county clerk's office and read into the record. This was proper (subdivision 6, § 1918, Code Civ. Proc.), and there is no merit in the contention that a certified copy would have been the only admissible evidence upon the subject. It is obvious from the record that the owners and the surety company were not, nor was any one of them, misled by any error or informality in the finding which is attacked. It sufficiently appears that, to whomsoever the lien claimants furnished materials and labor, that was the person or entity who was acting with the knowledge and consent of the owners.

[5] Appellant National Surety Company makes the assertion by its counsel that it offered to show by the testimony of Earl A. Garretson, its agent in San Diego, that the Chaffey Concrete Construction Company, for which the bond was issued, was a copartnership composed of A. E. and E. C. Chaffey, but that the proffered testimony was rejected by the court. The proffered testimony was purely hearsay, and was properly excluded from the record. Besides, the statement regarding the personnel of the copartnership which the witness was not allowed to make was based, he said, upon a writing which was not offered in evidence. If he had such writing (and it appears from his own statement that it had been filed with his company) his oral declarations regarding its contents were clearly not the best evidence.

[6] The finding that certain of the plaintiffs furnished materials to the copartnership acting by A. E. Chaffey, as agent, meets with objection on the part of appellants on the ground that the evidence did not even tend to support the court's conclusion respecting agency. It is asserted in the brief of appellants that all of the testimony regarding agency was made up of declarations of the alleged agent himself regarding his asserted authority to bind the copartnership. But Mr. Rosenberg, one of the owners of the real property, testified that A. E. Chaffey, as manager of the Chaffey Concrete Construction Company, signed the contract for the construction of the building, and that witness dealt with Mr. Chaffey as such manager. Mr. A. E. Chaffey according to the witness always acted as manager. The representative of Hazard, Gould & Co., testified that he entered into a contract with the Chaffey Company, transacting the business with Mr. A. E. Chaffey. There was further testimony to the effect that A. E. Chaffey signed the checks for the payment of the men employed by the copartnership, and there was a further statement of a witness that Mr. A. E. Chaffey managed the business and ordered all of the material for use on the building of Rosenberg and Calkins. There was abundant evidence of circumstances showing agency—a fact that may be proved in this manner. Puget Sound Lumber Co. v. Krug, 89 Cal. 237, 26 Pac. 902; Bergtholdt v. Porter Bros. Co., 114 Cal. 681, 46 Pac. 738; Reid v. Clay, 134 Cal. 207, 66 Pac. 262.

[7, 8] Certain items in the claim of lien of Hazard, Gould & Co. met with objections, and the court reserved its rulings upon said objections, and never did rule upon them. Appellants say that they were injured by the court's neglect to pass upon the objections so interposed by them, but this is denied by respondents, who invoke section 4½ of article 6 of the Constitution of California. The items were one-third of a dozen long-handled square point Imperial shovels, six No. 54 concrete wheelbarrows, 6 feet of 3-foot half-inch mesh hardware cloth, and 3,835 square feet, 4x12, three-eighths Clinton fabric. It appears from the record that while witness Warren Miller was testifying he enumerated certain matters which, according to the theory of Hazard, Gould & Co., were properly charged to the owners of the property. Objections were made to some of these charges upon the ground that they represented material not used in the construction of the building. After discussion by counsel, indicated but not reproduced in the transcript, counsel for defendants himself proposed that the court reserve its ruling "until," as he said, "we get through the entire bill of particulars." Later Mr. Miller testified that "there is a large amount of

this stuff that was credited back at the time of filing the lien," and among the commodities so credited were, as he testified, the one-third dozen Imperial shovels and the six No. 54 concrete barrows. There was no contradiction of this testimony, and it completely neutralized the former statement regarding the charges for these articles in the books of the lien claimant. No ruling on the objection was necessary. The other items, namely, the "6 feet of 3 foot ½ inch mesh hardware cloth" and "3,835 square feet of 4x12, three-eighths Clinton Fabric" went into the construction of the reinforced concrete building. The failure to rule favorably to defendants upon the objections to these items was without injury to them.

[9] The court did not err in finding in favor of San Diego Lumber Company. Popenoe, one of the men employed by the Chaffey Company, was asked regarding a list of materials contained in a writing called "San Diego Lumber Company's Exhibits 1 and 2." He testified that all of the lumber there specified was actually received and used on the building. Appellants now complain that these slips were not read into the record, but they did not object, at the time to that omission. Other witnesses told of the value of the lumber, and that there were two loads, their testimony giving substantial support to the finding now attacked.

[10] And, finally, the court is charged with error in finding in favor of respondent J. S. Schirm. This specification is based upon the fact that in the finding one of the copartnership the Chaffey Concrete Construction Company is described as "N. M. Parker," while in J. S. Schirm's claim of lien the name of one of the said copartners appears as "M. N. Parker." This objection is utterly destitute of merit, and is completely answered by the authorities cited herein, to the effect that misnomer of the contractor in the claim of lien is harmless, unless some one is misled thereby to his injury.

The judgment and order are affirmed.

We concur: VICTOR E. SHAW, Judge pro tem.; WILBUR, J.

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177 Cal. 262

McSWEENEY v. HYNES et al. (L. A. 4055.)

(Supreme Court of California. Jan. 19, 1918. Rehearing Denied Feb. 18, 1918.)

1. Landlord and Tenant 🔑83(5) — Findings—Responsiveness to Issues.

A finding that there was a renewal lease for one year at $750 a year was a sufficient finding upon the issue, whether there was a renewal lease for a year at $300.

2. Landlord and Tenant 🔑83(5)—Renewal Lease—Sufficiency of Evidence.

In an action to compel specific performance of a verbal agreement to give a three-year lease at an annual rental of $1,000, evidence *held* sufficient to support a finding that there was a lease for one year only at $750 a year.

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by E. D. McSweeney against Mary Josie Hynes and others. From a judgment for defendants, and from an order denying new trial, plaintiff appeals. Affirmed.

J. E. Hannon, of Los Angeles, for appellant. M. J. McGarry, of Los Angeles, for respondents.

WILBUR, J. Appeal from a judgment in favor of defendants, and from an order denying plaintiff's motion for new trial.

[1, 2] Plaintiff states his cause of action in two counts, the first an action to compel the specific performance of a verbal agreement to give a three-year lease of certain land known and designated as lot 4 of tract 1812, at an annual rental of $1,000. The second count is based upon the renewal of a previous verbal lease for one year, which expired December 1, 1913; it being alleged that "the said lease was renewed for the term ending December 1, 1914, on the same terms and rental as the said lease ending December 1, 1913," namely, at a yearly rental of $300, payable in advance. It is admitted that the plaintiff was in possession for the year ending December 1, 1913, and has ever since remained in possession of the premises. It is admitted that he has paid rental therefor amounting to $1,000, $250 of which the defendants have offered to return. The court found that there was no agreement to give a lease for three years at $1,000 per annum, but that there was an agreement to lease the premises for one year at a rental of $750. Appellant complains that no finding was made upon the issue as to whether or not there was a renewal lease for a year at $300 per annum, but the finding of the court that there was a renewal lease for one year at a rental of $750 per annum is a sufficient finding on that subject. The next point raised is that the evidence is insufficient to justify the finding that there was an agreement to rent the premises for one year at $750 per year. The evidence shows that from December 16, 1913, to April 11, 1914, negotiations were in progress between the parties. Plaintiff testifies that an agreement was made to lease him the premises at $1,000 per year for three years on December 16th. This is denied by the defendant, who immediately and repeatedly refused to sign a three-year lease. It is clearly shown that negotiations were in progress for a lease until April 11th, at which time the defendant Mary Josie Hynes, having received an account from the plaintiff showing that he claimed to have paid on her account the sum of $500, as final payment of the $1,000 due on the first year of the three-year lease, replied that she would not accept such payment, but would repay to him the sum of $250 as shown in his ac-

count, and retain the balance as final payment on a one-year lease at $750 per annum. In pursuance of the negotiations and before a final agreement had been made, the defendant erected a pumping plant on the premises for pumping irrigation water, which during said negotiations she agreed to furnish to the plaintiff. This fact accounts for the increased rental. Under all the circumstances, which need not be set forth in detail, we are satisfied that the trial court was justified in its findings.

Judgment and order appealed from are affirmed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

175 Cal. 95

MACDERMOT et al. v. HAYES et al.

(S. F. 7126, 7298.)

(Supreme Court of California. May 9, 1917. Opinion Corrected and Rehearing Denied June 8, 1917.)

1. TRUSTS 🔑101 — INVOLUNTARY TRUSTS—LIABILITY FOR PROFITS — "INVOLUNTARY TRUSTEE."

Civ. Code, § 2224, provides that one who gains a thing by fraud or other wrongful act is an involuntary trustee for the benefit of the person who would otherwise have had it. Sections 2229, 2230, 2233, 2234, 2237, prohibit trustees from acquiring adverse interests in the trust property, or being personally interested in transactions relating thereto. Section 2243 provides that any one to whom property is transferred in violation of a trust holds the same as an involuntary trustee, unless a purchaser in good faith, for a valuable consideration. The agent of plaintiff's ancestor purchased bonds from a corporation through his son, who was an employé thereof, with the money of plaintiff's ancestor, and concealed the fact that a bonus of stock was given with the purchase and kept such stock for himself. *Held*, that he was a trustee for his principal, as to the stock.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Involuntary Trustee.]

2. APPEAL AND ERROR 🔑1008(1)—REVIEW—FINDINGS OF FACT.

In a suit to recover corporation stock as trust property, a finding that a corporation employé, selling bonds to one who bought as agent, was disposing of his own property, rightfully acquired from the corporation, and that he was entitled to retain a stock bonus without disclosing such fact to the purchaser, would not be disturbed; since, where the facts established may reasonably authorize opposite inferences, the adoption of one of such inferences by the court is binding on appeal.

3. TRUSTS 🔑103(2) — CONFIDENTIAL RELATION—"INVOLUNTARY TRUSTEE."

Where a father bought from his son, who was a corporation employé, certain bonds with trust funds, the parental relation did not of itself operate to create such a confidential relation between the son and the father's principal as to charge him as "involuntary trustee" for the principal as to corporation stock given as a bonus with the bonds but retained by him.

4. TRUSTS 🔑375(1)—INVOLUNTARY TRUSTS—DESCENT OF TRUST PROPERTY.

In a suit to recover corporation stock as trust property, a finding that the stock was not bought with the money of the buyer's principal prevents the entry of a judgment transferring the property to the principal on the theory that the property which the trustee wrongfully allowed his vendor to retain subsequently devolved to him through inheritance, and became chargeable with a trust in favor of the principal on account of the previous bad faith on the agent's part.

5. LIS PENDENS 🔑4—PERSONAL PROPERTY—COMMON-LAW RULE.

Since Code Civ. Proc. § 1908, subd. 2, making a judgment conclusive only in those cases where the parties had notice, actual or constructive, of the pendency of the action or proceeding, abolishes the common-law rule as to lis pendens, except as preserved by section 409, which is applicable only to actions concerning real property, the common-law doctrine that a purchaser pendente lite of the subject of the suit takes as a volunteer in subordination to the judgment does not apply to a purchaser of corporation stock, pending action in equity to recover it as trust property.

6. ESTOPPEL 🔑75 — CLOTHING ANOTHER WITH APPARENT TITLE—CORPORATE STOCK.

Where one placed his money in control of another, permitted him to buy stock therewith, and to hold himself out to third persons as to absolute ownership thereof, he is estopped to claim title thereunder, as to one who purchased from the apparent owner in good faith.

7. TRUSTS 🔑371(1) — ACTION TO RECOVER TRUST FUNDS—IDENTITY OF PROPERTY.

In a suit to recover corporation stock as trust funds, a judgment transferring to plaintiff certain shares belonging to trustee's estate, similar to trust shares sold by him to an innocent purchaser, cannot be entered in the absence of an allegation that defendant is in a position to make such delivery.

8. TRUSTS 🔑371(8) — RECOVERY OF TRUST PROPERTY—PLEADING—EVIDENCE.

In a suit to recover corporation stock as trust funds, evidence that the purchaser by pledging his principal's bonds obtained money wherewith to purchase certain other bonds, possession of which is sought, was properly rejected as not corresponding to the allegations of the complaint.

9. PLEADING 🔑236(2) — AMENDMENT—DILIGENCE.

In a suit to recover corporation stock as property of an involuntary trust, refusal of an amendment raising new issues not asked until the second trial seven years after the decision of the first appeal, and after two amendments in regard to the same matter had been granted, was within the court's discretion.

10. APPEAL AND ERROR 🔑877(1)—RIGHT TO APPEAL—PERSONS INTERESTED.

In a suit to recover corporation stock as property of an involuntary trust, a naked trustee cannot object that the judgment, requiring him to surrender the property, is erroneous; he having no beneficial interest therein.

11. TRUSTS 🔑366(3) — ENFORCEMENT — DEFENDANTS—TRANSFER OF INTEREST.

Where a corporation which was the successor of a previously existing company received certain stock belonging to the company, for the sole purpose of transferring the stock, in a suit to recover the stock as trust property, it is not necessary to make the corporation a party, where the former company has been joined; since Code Civ. Proc. § 1908, provides that title obtained by persons not parties to the action subsequent to the commencement thereof shall be subject to the judgment if such purchasers have actual or constructive notice of the suit.

12. APPEAL AND ERROR ⟹882(4)—RIGHT TO ALLEGE ERROR—FAILURE TO BRING IN PARTIES.

In a suit to recover corporation stock as trust funds, the defendant cannot object that the judgment is erroneous, because a corporation which was defendant's successor in interest was not made a party to the suit, where an order was entered by the trial court directing defendant to bring in all parties interested.

13. LIMITATION OF ACTIONS ⟹66(7) — RECOVERY OF TRUST FUNDS—DEMAND.

In a suit to recover dividends on corporation stock as trust funds, the statute of limitations does not begin to run until a demand for such dividends was made, unless demand was unreasonably delayed.

14. LIMITATION OF ACTIONS ⟹195(3)—LACHES—RECOVERY OF TRUST FUNDS.

In a suit to recover dividends in corporation stock as trust funds, the burden was upon defendants to prove that plaintiffs unreasonably delayed making demand therefor; the plaintiffs not being required to make a demand unless they knew or had good reason to believe that dividends had been declared.

Department 1. Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by Louis M. MacDermot and others against Mary E. Hayes, executrix, and others. From the judgment, plaintiffs and defendant Standard Portland Cement Company and cross-defendant L. F. Young, brought in by order of the court, appeal. Judgment and denial of new trial affirmed.

Geo. W. Towle, Grant & Zimdars, and William H. Bryan, all of San Francisco, for appellants MacDermot and others. Morrison, Dunne & Brobeck, W. H. Smith, Jr., Charles W. Slack, and J. R. Pringle, all of San Francisco, for respondents.

SHAW, J. The plaintiffs appeal from the judgment so far as it is against their claim set forth in the complaint, and the defendants Standard Portland Cement Company and cross-defendant L. F. Young each appeal from the judgment and from an order denying a motion for a new trial. By stipulation, all the appeals are presented on one transcript of the record. The plaintiffs' appeal is numbered 7126, and those of said defendants are numbered 7298 on the register of this court.

The action was begun on March 29, 1904, Charles Main being the original plaintiff and Thomas R. Hayes, individually and as executor of the estate of C. E. Hayes, deceased, and Standard Portland Cement Company the original defendants. Main afterwards died, and his estate was distributed to Flora B. MacDermot, who was substituted as plaintiff. She also died, and her estate was then distributed to the present plaintiffs, who have been duly substituted as plaintiffs in her stead. Thomas R. Hayes subsequently died, and Mary E. Hayes, as his executrix and as administratrix with the will annexed of the estate of C. E. Hayes, deceased, has been duly substituted as defendant. The case was tried prior to April, 1906, and the resulting judgment for the defendants was reversed on appeal. Bone v. Hayes, 154 Cal. 759, 99 Pac. 172. Afterward, by order of the court, the cement company, in October, 1911, filed a cross-complaint, bringing in James B. Smith, F. A. Losh, and L. F. Young as parties to the action. The judgment now under review was the result of the second trial. The respective appeals will be considered together.

The object of the action as set forth in the prayer of the original complaint was to have 600 shares of stock of the Standard Portland Cement Company, evidenced by certificates 78, 79, 80, 84, 85, and 170, declared to be the property of the original plaintiff, Charles Main. The ground of the claim is that said shares of stock were purchased by Thomas R. Hayes with moneys of Main held in trust by Hayes, that Thomas R. Hayes took 300 of said shares in his own name, being certificates 78, 79, and 84, and that C. E. Hayes took the remaining 300 shares in his name, being certificates 80, 85, and 170, with knowledge of the fact that they had been paid for by Thomas R. Hayes with the moneys of Main. Certain undisputed facts showing the conditions existing when the alleged cause of action arose will be first stated.

In 1902, William J. Dingee and William G. Henshaw owned a large tract of land on which they proposed to establish a cement factory. They organized a company, called it Standard Portland Cement Company, and conveyed to it the land in exchange for all of its capital stock, which was nominally $2,000,000, divided into 20,000 shares of the face value of $100 each. The company then created a bond issue of $500,000, consisting of 500 bonds of $1,000 each. These bonds were then sold and delivered to Dingee and Henshaw, who were to pay for them at par as tendered to them by the company. The object was to raise the money in this manner wherewith to build the cement works. The plan was that they should sell the bonds to others for cash and take up the bonds, as sold, until sufficient money was obtained. To induce purchases, they offered to sell 20 shares of the company stock and one bond to any purchaser, at the price of $1,000 for both bond and stock. The stock was called a bonus, but the transaction, when complete, was, in its legal aspect, as much a sale of the stock as of the bonds. We deem it unnecessary to discuss the distinction sought to be made by the defendants on this point further than to say that it has no substantial existence. Thomas R. Hayes was the father of C. E. Hayes. The latter was an employé of Dingee and Henshaw and a personal friend of Henshaw. He was on a fixed salary, but there was an understanding that he would have an opportunity to make some additional money if from their operations it should become available and seem advisable. By his will, C. E. Hayes gave all his property, including his right, title, and interest in the 300 shares of stock so issued to him, to his father. Thomas R. Hayes was and long had been the confidential agent and trustee of Charles Main, the original plaintiff, in control of Main's money and empowered as such agent to invest it at his own discretion. This was fully known to C. E. Hayes at the time of the transactions in question.

The complaint is in three counts. It states the causes of action with great detail. In substance, the charge is that Thomas R. Hayes, as agent of Main and with Main's money, purchased for Main from Dingee and Henshaw 25 of these bonds and 600 shares of the stock for $25,000; that C. E. Hayes assisted his father in making the purchases and was fully aware of all the facts; that Thomas R. Hayes accounted for and delivered to Main all of the bonds and did not deliver to him any of the stock, but that he and his son caused 300 shares thereof, certificates Nos. 78, 79, and 84, to be issued to Thomas R. Hayes, and the remaining 300 shares, certificates Nos. 80, 85, and 170, to be issued to C. E. Hayes; that said stock was issued solely in consideration of the purchase of said bonds and the payment of said sum of money. The first count relates to 15 of these bonds and 300 shares of the stock, being certificates 78, 79, and 80, which were purchased on September 29, 1902; the second count to 5 of the bonds and 200 shares of stock, being certificates Nos. 84 and 85, which were purchased on October 4, 1902; and the third count to the remaining 5 bonds and 100 shares of stock, being certificate 170, which were purchased on January 8, 1903. It is alleged in the original complaint that on October 4, 1902, Thomas R. Hayes bought five bonds, in consideration of which 200 shares of stock were issued as a bonus; one certificate, No. 84, being taken in his own name and the other certificate, No. 85, being taken in the name of C. E. Hayes, each for 100 shares. By amendments filed in 1913, it is alleged that only 100 shares of stock were issued in consideration of the purchase of these five bonds on October 4, 1902, to wit, either certificate 84 in the name of Thomas R. Hayes, or certificate No. 85 in the name of C. E. Hayes, and further that on that day Thomas R. Hayes, through and by C. E. Hayes, purchased ten of said bonds, five with Main's money, and the other five partly with his own money, in consideration of which purchase the said two certificates were issued. It is not alleged that any of Main's money was used to pay for the second five of this block of ten bonds. Consequently, as the pleadings stood at the time of the trial, the claim was for 500 shares of stock instead of the 600 originally claimed, and it was left uncertain whether the plaintiff claimed certificate 84 or 85 in consideration of the purchase of five of the bonds on October 4, 1902. It will be observed that the charge, in effect, is that these 25 bonds and the accompanying stock were purchased by Thomas R. Hayes, with the assistance of his son C. E. Hayes, from Dingee and Henshaw.

The findings of the court were not entirely in accordance with these allegations. The findings are that Dingee and Henshaw gave to C. E. Hayes the option of purchasing from them 100 of said bonds with the accompanying stock of 20 shares per bond, at the rate of $1,000 for each bond and the accompanying shares, and of reselling the bonds and stock, separately or together, for his own account, on such terms as he saw fit, and that at the time of the purchases aforesaid C. E. Hayes bought the bonds and stock of Dingee and Henshaw and resold the bonds to Thomas R. Hayes at the price of $1,000 for each bond, the same being paid for with money of Main, that upon the said purchases, at the direction of C. E. Hayes, certificates Nos. 78, 79, and 84, aforesaid, were issued to Thomas R. Hayes, and certificates Nos. 80, 85, and 170, aforesaid, were issued to C. E. Hayes, and that the certificates so issued to Thomas R. Hayes were delivered by Dingee and Henshaw to C. E. Hayes. It is further found that Thomas R. Hayes used the moneys of Main in purchasing the bonds from C. E. Hayes but did not use Main's money in purchasing or paying for any of the shares of stock, except that the said certificates for such stock were issued at the direction of C. E. Hayes upon the purchase of the bonds by C. E. Hayes from Dingee and Henshaw, that Thomas R. Hayes, in purchasing the bonds, did not use the services of C. E. Hayes otherwise than as above stated. This, it must be conceded, is rather obscure. But as a finding must be construed so as to support the judgment, if reasonably possible, the meaning, in effect, is that C. E. Hayes bought the bonds and stock for his own account from Dingee and Henshaw, that he resold them to Thomas R. Hayes for Main, giving as a bonus therefor only 300 shares of stock instead of the 600 shares as claimed in the complaint. There is no evidence other than the bare record of the transactions to show any knowledge on the part of C. E. Hayes of the failure of Thomas R. Hayes to inform Main of the stock bonus, or that he knew that Main had not directed Thomas R. Hayes to buy the bonds alone and refuse to accept the stock. It may be added that there is no allegation that C. E. Hayes had knowledge of these two matters. Fair dealing is presumed in the absence of knowledge or notice to the contrary, and C. E. Hayes therefore had the right to proceed on the assumption that Main did not want to take the stock, and on that theory he had the right to offer all or a part of such stock to his father. The court also found that Main had no previous knowledge whatever of the purchase of any of these bonds except the last lot of five, and that he had no knowledge at all of the fact that there was a stock bonus offered or given with the bonds. As to certificate 78 issued to Thomas R. Hayes, the court found that after this action was begun it was sold and transferred to said James B. Smith, and that he paid a valuable consideration and took said 100 shares without notice of the rights of Main therein, or of the facts above stated.

The judgment of the court below was in favor of the plaintiffs with regard to the certificates Nos. 79 and 84, aforesaid, and in favor of the defendants for the other shares of stock in controversy. The Standard Portland Cement Company was directed to issue to the plaintiffs out of the stock in question a new certificate for 200 shares of its stock. The court was of the opinion that the sale of 100 shares represented by Thomas R. Hayes to James B. Smith, a cross-defendant, after the suit was begun, put that stock out of its power and beyond the reach of the plaintiffs because of the fact that Smith was a purchaser for value without notice of the plaintiff's equities. It therefore refused to give plaintiff any relief on account of those shares. As to the three certificates for 300 shares issued to C. E. Hayes as aforesaid, the theory, as we understand it, is that said Hayes was not chargeable with any trust in favor of the plaintiffs with respect thereto, but held the same as his own property in virtue of the transactions by which he acquired them.

[1] We are satisfied that the court was correct in its conclusion that Thomas R. Hayes was chargeable as an involuntary trustee for the benefit of Main of the 300 shares of stock issued to him. He could not use or deal with Main's money for his own profit, nor, without the consent of Main made after full disclosure by him to Main of all the facts affecting the transaction, take part therein in order to obtain an interest beneficial to himself, or without immediately informing Main of that fact. His conduct constituted a fraud against Main, and he was accountable in equity for everything gained by himself in the transactions. Civ. Code, §§ 2224, 2229, 2230, 2233, 2234, 2237, 2243. In view of the findings with respect to these 300 shares, we must assume that the court believed that Thomas R. Hayes obtained the stock by purchasing the bonds, that he concealed that fact from Main and availed himself of the opportunity of buying the bonds with the purpose of benefiting himself by taking the stock in his own name. It is immaterial whether they were given to him by his son or obtained through the form of a purchase with the bonds. In either case he was bound to give the benefit to his principal, and he cannot be allowed to hold such property against the demand of his principal for a restitution. The rights of Smith as an innocent purchaser of 100 shares will be considered later.

[2] The main contention of the plaintiffs upon their appeal is that the court erred in holding that C. E. Hayes took the stock issued to him free from any charge as involuntary trustee thereof in favor of Main. It is also claimed that the court should have held that Thomas R. Hayes, as successor in interest of his son, and because he was the original wrongdoer, took the same by the bequest from his son subject to the claims of Main, which thereupon reattached to the stock.

The theory of the plaintiffs is that C. E. Hayes was buying these bonds from Dingee and Henshaw for Main at the request of Thomas R. Hayes and that in so doing he was the agent of the latter and, of course, a subagent for Main; in which case he also would be chargeable as trustee and would be obliged to account for and render up to Main, or his successors, all benefits received by him in the transaction. Civ. Code, §§ 2229, 2230, 2237, and 2243. The evidence which it is claimed establishes such subagency on the part of C. E. Hayes is altogether circumstantial, consisting of inferences from the facts shown and admitted to be true and which are claimed to be necessary inferences therefrom. The rule is too well settled to require citation of authority that, where the facts established may reasonably authorize opposite inferences and the trial court has adopted one and rejected the other, its decision is binding upon this court upon appeal; the case being in substance the same as that where it decides upon the weight of contradictory evidence. We are not disposed to say that, if the trial court had found from the facts established that C. E. Hayes was merely acting as intermediary of Thomas R. Hayes for the purpose of buying for Main from the cement company, or from Dingee and Henshaw, the bonds in question, such decision would not be supported by the reasonable inferences deducible from the facts proven. But the facts also authorize the opposite inference; that is to say, that C. E. Hayes was disposing of his own property and rights and was acting wholly on his own account and for his own advantage in making the sale of the bonds to Thomas R. Hayes, and that no trust relation, either express or implied, existed between him and Thomas R. Hayes or Charles Main. Dingee and Henshaw had given him the option or privilege of selling the bonds and stock of the company for his own account, the sole condition being that he must pay the full price of $1,000 for each bond and the corresponding stock sold as a bonus therewith. Whether a binding contract or not, the effect is the same, for they recognized its obligation and carried it out. Under this arrangement, he was himself, in legal contemplation, the owner of the stock and bonds which he undertook to sell. He was under no obligation to disclose either to his father or to Charles Main the conditions upon which he was authorized to sell the bonds, nor the benefits which could be derived therefrom, or, if he did disclose to his father the fact that he was to receive a stock bonus with each bond, he was under no obligation, in equity and good conscience, to offer both to his father for Main, even if he did have knowledge that his father was investing the money of Main. He was at liberty to offer his father the bonds at the par value and at the same time state his intention to keep the stock for himself. If his father was content with the price, C. E. Hayes was under no obligation to object or to call attention to the fact that it was his father's duty to insist upon receiving the stock also. The offer and acceptance created no trust relation between C. E. Hayes and his father and would not make the former the agent of the latter or of Main. There is no evidence that C. E. Hayes was aware of the fact that his father had not fully informed Main of the conditions upon which the bonds were sold and had not received from Main instructions to buy the bonds without the stock. The relation of C. E. Hayes to the parties did not make it his duty to inquire concerning these facts. He had the right to rely upon the presumption that his father was acting honestly and in good faith toward his principal. The enterprise of the Standard Portland Cement Company was at that time in its beginning. The value of the stock was then largely prospective, and it was not unreasonable to suppose that it had no appreciable value. Neither the evidence nor the allegations show that it then had any value. It is not unusual for such stock to become more of a liability than as asset to the holder. Under such circumstances, it was not unreasonable for C. E. Hayes to suppose, if the question had been suggested to him, that Main preferred to take the bonds without any stock. All these inferences might have been made by the court below from the facts with as much reason as the opposite inferences contended for by the plaintiffs. Under these circumstances, we are not disposed to disturb the finding of the court that C. E. Hayes took this stock as his own without any obligation to account therefor as either a voluntary or involuntary trustee for Main.

[3] There is no merit in the claim that the relation of father and son, of itself, operated to create a confidential relation between the son and Main, so as to charge the son as an involuntary trustee for Main of the stock issued to himself. The relation of father and son is, by the rules of equity jurisprudence, deemed confidential. So also is the relation of principal and agent, and each party to one of these relations is bound to the utmost good faith with the other party in that relation. But we are unaware of any principle of law or equity to the effect that in one such relation the duty of one party to the other extends to a third person dealing with one of them as to whom he occupies a different relation, as, for example, that where a father is agent for a stranger his parental relation makes all his children fiduciaries to the stranger. No authority is cited for the proposition, and we are unable to discover any principle or sound reason on which to found such an extension of the law of confidential relations, or on which to hold that the duty of a father as agent of a stranger is obligatory upon each of his children. On the contrary, we think it must be admitted that his children, in dealing with him concerning the subject of his trust, occupy the same independent position as other third persons and are no more required to insist upon a faithful performance of his fiduciary obligations by the father, or to inquire as to the fact of such faithful performance, than would any other person having such dealings. If it was a fact, as the court may have inferred, that C. E. Hayes sold the bonds to Main, through the agency of his father, in the belief that Main desired the bonds alone without the stock, C. E. Hayes was not chargeable with any trust in regard to the stock toward Main and could dispose of it as he saw fit when the transaction was made. If thereupon he chose to keep some of the shares for himself and have others issued to his father, no involuntary trust would arise as to him with regard to the shares which he thus kept. If the son, upon selling the bonds, occupied a position which would authorize him justly to retain the stock as his own, as we must assume the court below believed, he was at liberty, upon making such sale, to give a part of the stock to his father, if he chose, and the fact that he did so does not of necessity, raise an inference that he had knowledge of bad faith on the part of his father in accepting the offer of the bonds alone for Main. Perhaps the court below might better have made such inference from the bare facts shown; but we cannot say as matter of law, it was bound to do so, or that the contrary inference was beyond the limits of reason. The argument for the plaintiffs in some of its aspects appears to assume that C. E. Hayes was making a general offer to all persons to sell the stock with the bonds for a fixed price per bond, and that he was under some obligation to hold out this opportunity to purchasers from him. This, however, as we have seen, was not a necessary inference, and we must assume that the court did not so hold.

[4] The plaintiffs, in their reply brief, claim that, while it may be true that C. E. Hayes had a perfect title to the stock free from any charge in favor of Main, nevertheless, when the property devolved upon Thomas R. Hayes in virtue of the bequest to him from C. E. Hayes, it immediately became

charged with a trust in favor of Main because of the previous bad faith of Thomas R. Hayes in purchasing the bonds without the stock and allowing his son to take the same in his own name. There is authority for this proposition, although none is cited by the plaintiffs. Mr. Perry, on this subject, says:

> "But if the property comes back into the hands of the original trustee, or into the hands of any one affected with the guilt of the original sale, he will be a trustee for the defrauded party, although the property may have passed through several innocent hands." 1 Perry on Trusts, § 222; Id. § 830.

See, also, 20 Cyc. 654; Church v. Ruland, 64 Pa. 444; Kennedy v. Daly, 1 Sch. & Lefroy [Irish Ch.] 379; Bourquin v. Bourquin, 120 Ga. 115, 47 S. E. 639; Ely v. Wilcox, 26 Wis. 91; Williams v. Williams, 118 Mich. 477, 76 N. W. 1039; Bovey v. Smith, 2 Ch. Cas. 124, 1 Vern. 60, 85.

The difficulty with the proposition is that the only foundation which is laid for it in the pleadings is destroyed by the findings, which, as we have seen, are supported by sufficient evidence. The sole theory upon which the complaint charges an involuntary trust with respect to the 300 shares issued to C. E. Hayes is that they were purchased with the bonds by Thomas R. Hayes, through the medium of C. E. Hayes, that is, with his assistance as subagent, from Dingee and Henshaw and paid for with the money of Main, of which latter fact C. E. Hayes had knowledge. The court found that the bonds and stock were not purchased by Thomas R. Hayes from Dingee and Henshaw, but that the bonds were purchased by Thomas R. Hayes from C. E. Hayes with, at most, only 300 shares of stock as a bonus. It is not alleged that Thomas R. Hayes knew that Dingee and Henshaw were offering bonds with a 20-share bonus, or knew that they had bonds or stock for sale at all, or that he had information to the effect that he could have procured for Main twenty shares of stock for each bond he bought, or any greater number of shares than the 300 which he took in his own name, or that with reasonable diligence he would have discovered these facts, or that by his negligence he failed to make such discovery. Consequently, no fraud or involuntary trust based on these facts, or any of them, can be adjudged against the defendants under this complaint. The involuntary trust alleged as to these shares is predicated wholly on the use of Main's money to buy them, and this charge is disposed of by the findings to the effect that this stock was not bought with Main's money, that only the other 300 shares were offered to or bought by Thomas R. Hayes, and that these 300 shares were rightfully and properly retained by C. E. Hayes as his own profit upon his resale. As to them, under the pleadings and findings, there was no trust in favor of Main.

[5] James B. Smith had purchased the 100 shares of stock represented by certificate 78 before he was made a party to the action. He paid full value and took the stock without actual notice of the facts upon which the plaintiffs base their claim, or of the pendency of the action. It is claimed by the plaintiffs that a purchaser of such property pending an action in equity to recover it as the subject of a trust in the hands of a defendant is charged with constructive notice of the facts asserted in the complaint and takes subject to the judgment finally rendered in the action. The general rule has been said to be that:

> "Every man is presumed to be attentive to what passes in the courts of justice of the state or sovereignty where he resides, and therefore a purchase made of property actually in litigation pendente lite for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice; he will accordingly be bound by the judgment or decree in the suit." 1 Story, Eq. Jur. § 405, quoted with approval in Sampson v. Ohleyer, 22 Cal. 210.

The case cited was an action for the possession of land. At that time the Practice Act (section 27), providing for the filing of a lis pendens notice, applied only in actions affecting the title to real property and was not applicable in cases for the mere possession. Wattson v. Dowling, 26 Cal. 124. It was said that this statute did not otherwise change the law on the subject and that the purchaser pending an action for possession, only, might be bound, although no lis pendens notice had been filed. But the case was decided on the ground that the purchaser had actual notice. The statute has since been changed so that the right to file a notice of the pendency of an action extends to actions for possession of real property as well as to those affecting the title thereto. Code Civ. Proc. § 409. The question whether or not the doctrine of lis pendens applies to actions to reach specific personal property has not heretofore been decided or considered by this court, so far as we are advised. Section 409 is limited in its application to cases affecting real property. It appears to be the established rule that, where a lis pendens statute has no negative words or repealing clause, it is to be "regarded as supplemental to the common law and not as repealing it, so that the common law will govern in all cases not covered by the statute." 25 Cyc. 1453. On the question whether or not the common-law doctrine of lis pendens applies to actions involving specific personal property the authorities are in conflict. 21 Am. & Eng. Ency. of Law, 626. In England, in Wigram v. Buckley, L. R. 1894, 3 Ch. Div. 483, the court, after careful consideration, decided that it did not apply to purchases of personal property pendente lite from a party to the action. In Cyclopedia of Law and Procedure (25 Cyc. 1453), it is stated that the prevailing rule is that it does apply in purchases of personal property. But an examination of the cases cited shows that few of them are well considered and several have been questioned in subsequent cases. We think it has been generally supposed that in this state the doctrine applies only to real property. It is said in Sampson v. Ohleyer, supra, that even in cases of suits affecting real property, prior to the enactment of any law for the recording of any lis pendens notice, the rule sometimes operated as a hardship upon parties who had no actual notice. The provision for the recording of notice was doubtless intended to prevent such injustice. It is apparent that the injustice would be much greater and of more frequent occurrence if the doctrine were extended to specific personal property, the possession or evidence of title whereof may be passed from hand to hand without public or written evidence of its transfer. In Page v. Chase Co., 145 Cal. 581, 79 Pac. 279, the court said:

> "The rule of the common law that a purchaser pendente lite of the subject of the controversy took as a volunteer or intruder and in subordination to the judgment thereafter rendered in the action is not in force in this state. * * * The provision, in section 1908 (subd. 2) of the Code of Civil Procedure, that a judgment is conclusive with respect to the matter directly adjudged between the parties and their successors in interest by title subsequent to the commencement of the action, is by the concluding clause of the section applicable only to those cases where the parties have had 'notice, actual or constructive, of the pendency of the action'" or proceeding.

This, of course, cannot refer to the constructive notice which at common law was imputed to all persons from the fact that an action was begun, for if that was its meaning the proviso would be without any force whatever as to actual notice, since the action would always be constructive notice and all persons would be concluded whether they had actual notice or not. It must refer to constructive notice arising from some other fact than that of the pendency of the action. The provision applies to all classes of actions other than those described in subdivision 1 of the section. It therefore excludes the common-law doctrine that the pendency of an action is, itself, constructive notice to all. This is the basis of the rule that purchasers pendente lite are charged with notice and take subject to the judgment. The effect of this section, therefore, is to abolish the common-law rule, except in so far as it is preserved by section 409, Code of Civil Procedure. That section applies only to actions concerning real property. The result is that in this state the doctrine does not apply to personal property in actions of this character.

[6] The plaintiffs invoke the doctrine that the vendor of personal property can transfer no better title than he himself possesses, as against the true owner, unless an estoppel exists against such owner. Here, however, the facts show an estoppel against Main. He placed his money in the possession and control of Hayes, who thereupon used it to buy these bonds, and so was enabled to procure the stock in his own name without anything on the face of the certificate to identify it as the property of Main. Main in this manner permitted Hayes to clothe himself with all the evidences of ownership of the stock and enabled him to represent to third persons that he was the absolute owner thereof. He is therefore estopped to claim title against one who has purchased and paid for the stock in good faith relying upon the apparent ownership which the conduct of Main thus made possible. The case comes within the principle stated in Fowles v. National Bank, 167 Cal. 656, 140 Pac. 271, and Thompson v. Toland, 48 Cal. 112.

[7] The plaintiffs further urge that inasmuch as it appears that there is other stock of the cement company belonging to the estate of Hayes, sufficient to replace the shares sold to Smith, and of like kind, the court should have directed a transfer to plaintiffs of 100 shares thereof. The argument is that the identity of the shares, in such a case, is immaterial if substantial restitution can be made out of other property of the same kind belonging to the wrongdoer. Bell v. Bank, 153 Cal. 239, 94 Pac. 889; Atkins v. Gamble, 42 Cal. 101, 10 Am. Rep. 282; Krouse v. Woodward, 110 Cal. 643, 42 Pac. 1084. The answer to the argument is found in the cases cited in support of it. Bell v. Bank; Krouse v. Woodward, supra. The court, in Bell v. Bank, says that, where one is seeking to enforce an involuntary trust of this character by a transfer from the trustee to him of similar property in lieu of that which has passed out of the control of the trustee, he "must allege and show that the defendant is in a position to make such delivery." The complaint contains no allegation of this character, and no such issue is embraced in the pleadings. It is true that the findings do show that the 300 shares issued to C. E. Hayes belong to the estate of Thomas R. Hayes. But the point that 100 of those shares might be substituted for those sold to Smith was not made in the court below, nor in this court except in the reply brief. It may be that if the point had been presented in the lower court the defendant Hayes could have shown good cause for denying the relief. Under these circumstances, we will not change the judgment in this particular.

[8, 9] The refusal of the court to allow evidence that Thomas R. Hayes, by pledging the bonds of Main in his possession, obtained the money wherewith he purchased five of the ten bonds sold him on October 4, 1902, resulting in the issuance of certificate 85, or to allow an amendment of the complaint alleging that fact, is assigned as error. The evidence did not correspond to the allegations of the complaint at that time and it was properly rejected for that reason. The true question, therefore, is whether or not the court erred in refusing leave to amend. Such an amendment would have raised new issues. It was not sought until the second

trial, seven years after the first appeal was decided, a decision containing a suggestion that the complaint be amended, and after at least two amendments thereto had been made relating to the stock. The lack of diligence in offering to amend is obvious. Nothing was shown in excuse. It was a matter within the discretion of the court, and we perceive no abuse of discretion.

The appeals of Young and the Standard Portland Cement Company are presented together. The points urged in support thereof are: (1) That it was error to direct Young to surrender for cancellation and transfer to the plaintiffs his certificate of stock in the cement company, representing the 200 shares adjudged to plaintiffs by the the judgment; and (2) that it was error to give judgment against the cement company for the dividends declared on the stock up to April 15, 1907. In explanation it will be necessary to state some additional facts.

After the action was begun the stockholders of the cement company, not including plaintiffs, organized a new corporation named Standard Portland Cement Corporation with a capital stock of $4,000,000 divided into 40,000 shares of $100 each. It was arranged that the capital stock of the "corporation" should be issued to L. F. Young, that the "company" should transfer all of its property and business to said "corporation," that the stockholders of the "company" should then surrender their shares in the "company" to Young in exchange for stock in the "corporation," at the rate of one share in the "company" for two shares in the "corporation." In this manner the "corporation" would take over the property and business of the "company" and the stockholders of the latter would receive in exchange for each share of that stock double the number of shares in the stock of the "corporation." This arrangement was carried out on April 19, 1907, and thereupon the "corporation" succeeded to the property and business of the "company." Plaintiffs did not consent to the arrangement, and there was no consideration for the respective exchanges of property and stock except as above stated. The defendant Hayes surrendered the two certificates 79 and 84, and new certificates for the 200 shares were issued, one to Frank A. Losh and the other to L. F. Young. Neither paid value for the transfer. Losh had notice of plaintiffs' claims at the time, but Young did not. According to the findings, by various surrenders and transfers of the stock represented by the aforesaid certificates 79 and 84, it came about that the shares represented thereby were all transferred on the books of the company to L. F. Young in pursuance of the arrangement for the exchange of stock aforesaid and he still holds the same in his name. In lieu thereof there were transferred by him to Frank A. Losh and Mary E. Hayes, respectively, 200 shares each of stock in the said "corporation." This was done in the carrying out of the arrangement above mentioned. Young was not a bona fide holder or purchaser for a valuable consideration of any of said shares. They were transferred to him for the purpose of effecting the exchange of stock mentioned. All the other parties except Young had full notice of the claims of the plaintiffs and of Charles Main, against the said stock.

At the time the action was begun, May 29, 1904, no dividends on the stock had been declared. The plaintiffs, in addition to the specific prayer, asked for general relief, but did not mention dividends. On October 27, 1909, a supplemental complaint was filed alleging that up to April 15, 1907, the cement company had declared dividends on its stock amounting to the sum of $16.75 upon each share, and that after that time, the property and business of the company having been in the meantime transferred to the new corporation under the name of the Standard Portland Cement Corporation, additional dividends had been declared up to October 15, 1907, on account whereof plaintiffs would be entitled to $7,200 in respect of the 200 shares of the company decreed to them by the judgment; that on August 31, 1909, plaintiffs had demanded payment of said dividends, which was refused, and praying judgment for the amount thereof against the defendant company. The court gave judgment in favor of the plaintiffs for $4,474.30 against the company on account of the dividends up to April 15, 1907, and accrued interest. It refused to allow judgment for the dividends declared by said "corporation."

A corporation is created and given a legal existence in order that it may, in its legal capacity, hold and manage the property transferred and business committed to it by its stockholders. They are the beneficial owners of the corporate property. The corporation is their agency and holds the property for their benefit and in trust for them. The interest of each stockholder in the property is the proportion which his shares of stock bear to all the stock outstanding. The certificates are not property in the real sense, but are merely evidences of the undivided interests of the several stockholders in the corporate assets and business. The transactions above set forth, being without valuable consideration and with full notice to all the parties concerned of the claims of the plaintiffs and of the pendency of the action, did not change the relative rights of the parties, so far as the plaintiffs are concerned, nor in any manner affect their rights or the power of the court, by its judgment, to give the plaintiffs all relief appropriate to the form of the action and to enforce its judgment by suitable legal process against all the parties. The titles so obtained by third persons not parties to the action, being taken subsequent to the commencement of the action, are subject to any judgment regularly given therein. Code Civ. Proc. § 1908, subd. 2. Notwithstanding the subsequent dealings mentioned, these parties each stand charged with notice of plaintiffs' claims and hold the shares and property received by them, respectively, charged with the trust alleged and found to exist in favor of the plaintiffs and with the same liability and obligation to account to plaintiffs for said shares and the proceeds thereof as did the original parties to the action. Civ. Code, § 2243. With respect to making transfers of its stock, as between opposing claimants thereof, the corporation occupies the position of an agent or trustee of both and is bound to the exercise of good faith. Upon the beginning of the action, the defendant corporation was bound at its peril to preserve the property in statu quo, so far as should be necessary to protect the rights claimed by plaintiffs and to keep the stock subject to the power of the court. Cooper v. Spring V. W. Co., 171 Cal. 162, 153 Pac. 936; 26 Am. & Eng. Ency. L. 888; Civ. Code, § 2237. It was not authorized to transfer the shares on its books to a new party, or in any manner hinder or delay the plaintiffs, unless by their consent, or under permission of the court. Civ. Code, §§ 2230, 2232, 2237. The fact that it was not enjoined from so doing by an interlocutory order would exempt it from a charge of contempt of court therefor, but would not affect its liability to the plaintiffs on account thereof nor the power of the court to give relief against it in the final judgment.

[10] So far as the defendant Young is concerned, he holds the stock as a naked trustee, having no beneficial interest therein, and his claim that the judgment is erroneous, in so far as it requires him to surrender the same and permit the issuance of the proper number of shares to plaintiffs, is wholly without merit.

In their briefs, counsel for the defendant say that the defendant company could not determine which of the contending claimants to the stock was entitled to the dividends. This is true, but it does not follow that it was therefore free to pay the dividends to the record holders of the stock, or to transfer such stock upon the order of such record holders, without regard to or responsibility for the rights of plaintiffs therein. The troubles of the defendant company arise from the fact that it did assume the power which its counsel say it did not possess, the power to decide between the contenders. Its dividends were owing to the true owners of the shares. In paying them to the record holders of the stock claimed by plaintiffs, it decided that such holders were the true owners and that plaintiffs had no interest therein. It made a like decision when it transferred the stock on the orders of such record holders. It cannot be allowed to obtain any benefit or advantage from these erroneous and unauthorized decisions. The transferees with notice stand in like position and must respond to the judgment of the court, so far as it applies to them.

[11] It is urged on behalf of the defendant company that the transfer of these shares in the manner directed by the judgment cannot be allowed, unless the aforesaid "corporation" is brought in so that it can be bound by the judgment. It is pointed out that 400 of the shares of said "corporation" have been exchanged for the plaintiffs' 200 shares in the cement company, standing in the names of Losh and Hayes, that this constitutes a valuable consideration given by the "corporation," that the 200 shares so received and exchanged for the 400 "corporation" shares are the property of the "corporation" and are held by Young as its agent and trustee, wherefore it would be erroneous to compel the "company" to issue new certificates to the plaintiffs, unless the "corporation" is made a party so as to be bound to make the same good to the "company" out of the shares so held by Young. There are two answers to this contention. In the first place, the entire transaction and exchange was a mere form. The "corporation," without consideration, received the property belonging to the "company," the property in which the plaintiffs had an equitable interest to the extent of the 200 shares.

[12] Upon this property it issued its capital stock and offered the same to the persons holding stock in the "company" at the rate of two for one, they being the persons owning the beneficial interest in the property. All this was done with notice by the officers of the "corporation" of the pendency of the action and of the rights of the plaintiffs. Under section 1908 of the Code of Civil Procedure the judgment is conclusive against the "corporation," upon the facts found by the court, whether it is a party to the judgment or not. The "company," having brought about the formation of this "corporation" and the exchange of shares, must look out for itself with respect to the consequences which may ensue because of the complications thereby caused. It cannot throw that burden on the plaintiffs. In the second place, the court below, during the pendency of the action and before the trial was closed, made an order directing the defendant company to file a cross-complaint bringing in as parties "all persons and corporations who are now holders of any certificate or certificates, or any shares of stock in said Standard Portland Cement Company, the title to which is derived from Thomas R. Hayes under and by means of the transfer of certificates 78, 79, and 84, of said Standard Portland Cement Company, subsequent to the commencement of this action." Long before that time the aforesaid arrangement for the transfer of property and exchange of stock had been made and carried out and the said "corporation" had acquired whatever interest it now

has in the stock of the defendant company. In partial compliance with this order, the defendant company filed a cross-complaint naming as additional parties to the action James B. Smith, Frank A. Losh, and L. F. Young, but failing to name the said "corporation" as a party, or to state anything whatever concerning the issuance of shares by the "corporation," the transfer of property and business to said "corporation," or the fact that it had an interest in the stock in question. Under these circumstances, it does not lie in the mouth of the defendant company to say that the judgment is erroneous because of the fact that the "corporation" was not made a party to the action.

It may be true, as argued by defendants, that 400 shares of the stock of said "corporation" in equity belongs to plaintiffs and that the court, upon the facts found, might have given judgment accordingly. The plaintiffs did not ask such relief, so far as appears. They were not bound to follow the property that far. It is true that the 200 shares in defendant company, adjudged to plaintiffs, are held by Young in trust for said "corporation," so far as their rights as between themselves are concerned; said 200 shares having been received by him in exchange for 400 shares of stock in the "corporation" which have been transferred and certificates therefor delivered to Losh and Mary E. Hayes, respectively. This is no cause for reversal in favor of defendants. The said "corporation," being in fact a volunteer with notice of the pendency of the action, is bound by the judgment as rendered. Neither it nor the defendants are wronged thereby. It might have been cause for a modification of the judgment in favor of plaintiffs by a direction that said Losh and Hayes, respectively, deliver to plaintiffs said shares in the "corporation," had they asked it. But they are apparently content to allow the judgment to remain as it is on that point.

[13, 14] The cause of action for dividends is not barred by the statute of limitations. It did not begin to run until a demand was made therefor. Bills v. Silver King M. Co., 106 Cal. 21, 39 Pac. 43; Ralston v. Bank, 112 Cal. 215, 44 Pac. 476. To the claim that the demand was unreasonably delayed, the answer is that plaintiffs were not required to make a demand unless they knew, or had good reason to believe, that dividends had been declared. We are not cited to anything in the record indicating that there was any unreasonable delay in making the demand, and therefore we cannot hold the conclusion of the trial court on this subject to be without sufficient support in the evidence.

There are no other points that require discussion.

The judgment and orders denying a new trial are affirmed.

We concur: SLOSS, J.; LAWLOR, J.

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177 Cal. 289

GEORGIA CASUALTY CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION (two cases). (L. A. 4847, 4929.)

(Supreme Court of California. Jan. 24, 1918.)

1. MASTER AND SERVANT ⟹405(2)—WORKMEN'S COMPENSATION PROCEEDINGS—EVIDENCE—RELATION OF PARTIES.

A contractor agreed to grade and complete the roadbed for a railway and to furnish all tools and appliances, and in the work used a steam locomotive in charge of a train crew employed by it of which deceased was a member. Its contract did not require it to lay the track, but there was evidence that the track for which such crew was hauling materials at the time deceased was injured was laid at the contractor's request, and was necessary to use a steam shovel to complete the roadbed, though when laid it would be a part of the permanent equipment of the railway. Deceased was engaged and paid by the contractor. *Held*, that the evidence warranted the Industrial Accident Commission in finding that deceased was in the contractor's employ at the time of the injury.

2. MASTER AND SERVANT ⟹419—WORKMEN'S COMPENSATION PROCEEDINGS—INCREASE OF COMPENSATION—JURISDICTION OF COMMISSION.

Workmen's Compensation Act (St. 1913, p. 279) § 81, provides that persons aggrieved by any award may apply for a rehearing. Section 82 requires that applications for rehearings be made within 20 days, but further provides that nothing therein shall be construed to limit the right of the Commission at any time within 245 weeks from the date of the award to review, diminish, or increase any compensation awarded upon the grounds that the disability of the person in whose favor it was made has either increased, diminished, or terminated. Section 25 provides that the Commission shall have continuing jurisdiction over all its orders, decisions, and awards, and may at any time, upon notice, rescind, alter, or amend any such order, decision or award. *Held*, that these sections must be read together, and so construed, if possible, as to present a harmonious system for the re-examination of matters decided by the Commission, and when so read and construed, section 82 so limits the more general terms of section 25 as to permit the Commission to retain jurisdiction over its orders, decisions, and awards during a period of 245 weeks for the sole purpose of making such changes as may be required by the occurrence of new facts arising after the date of its original decision, and where no such new facts had occurred, the Commission had no authority to increase its award after denying a rehearing more than two months after the date of the award.

In Bank. Proceeding under the Workmen's Compensation Act by Laura Sims, to obtain compensation for the death of Lewis Hicks, opposed by Robert Sherer & Co., alleged employer, and the Georgia Casualty Company, insurer. Compensation was awarded which was subsequently increased, and the employer and the insurer bring writs of review. Original award affirmed. Increased award annulled.

George H. Moore, of Los Angeles (Redman & Alexander, of San Francisco, of counsel), for petitioners. Christopher M. Bradley, of San Francisco (Daniel W. Burbank, of San Francisco, of counsel), for respondents.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

RICHARDS, Judge pro tem. The facts of these two applications, so far as they are necessary to a decision of the questions presented thereby, are fully and correctly set forth in the former opinion filed herein, and are as follows:

> "Two proceedings in certiorari were brought to review successive awards made by the Industrial Accident Commission.
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> "The application for compensation was made by Laura Sims, claiming to be the dependent sister of Lewis Hicks, who died in consequence of injuries received by him in December, 1915. The Commission found that at the time of his injury Hicks was in the employ of Robert Sherer & Co., and made an award against said Robert Sherer & Co. as employer, and Georgia Casualty Company as insurance carrier. The award, which was made May 5, 1916, was for $1,872. A petition for rehearing addressed to the Commission having been denied, Sherer & Co. and the Casualty Company applied to this court for a writ of review, and such writ was issued on July 20, 1916. It is proceeding No. 4847.
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> "In the meanwhile, on June 19, 1916, two days after the denial of the petition for rehearing, to which we have referred, the Commission had given notice to Sherer & Co. and the insurance carrier to show cause why the findings and award theretofore made should not be amended, and the award increased to $3,461.25. On July 12, 1916, the Commission filed amended findings, and made a new award increasing the amount to $3,461.25. The second proceeding, No. 4929, is a writ of certiorari to review this increased award.
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> "The two cases are presented on a single set of briefs."

[1] Upon the writ involving the validity of the first award the single question is whether there was evidence before the Commission to justify its findings that Hicks, at the time of his injury, was in the employ of Robert Sherer & Co. The claim of the petitioners is that the evidence shows conclusively that the employer of Hicks was the Pacific Electric Railway Company.

Robert Sherer & Co., as contractor, had entered into, and was engaged in performing, a written agreement with the Pacific Electric Railway Company, by which said contractor agreed to perform "all the labor of constructing * * * the grading and other work required to complete the roadbed for a railway," said railway, when constructed, to be a part of the system of the Pacific Electric Railway Company. The contractor agreed also to furnish all tools and appliances required in the work. Among other appliances, Sherer & Co. used in the work a steam locomotive. For the operation of this locomotive, and the cars which it hauled, the contractor employed a train crew, and the deceased, Hicks, was a member of this crew, acting as conductor. He had been engaged by Sherer & Co. for a monthly compensation of $75. All that the contract of Sherer & Co. required them to do was to grade the roadbed. They were not called upon to lay the track. On the day on which Hicks met his injuries, the train crew was operating a train made up of the locomotive and two cars (the cars belonging to the Pacific Electric Railway Company). The work in which the crew was engaged during that day was the hauling of materials for the laying of track upon a portion of the grade which had been completed. The contention of the petitioners is that because the work of laying track, then under way, was not a part of the grading, which the contractor had undertaken to perform, the railway company is to be regarded as the employer, for the time being, of the men composing the train crew. But there is evidence in the record tending to show that this track was laid at the request of the contractor, and that its laying was, as stated in a supplementary contract signed by Sherer & Co., "necessary to use the steam shovel to complete the roadbed in our contract with your company." While the track, when completed, would be a part of the permanent equipment of the railway, the laying of it was incidental to the work of grading, upon which the contractor was engaged. It appears, then, that Hicks was engaged and paid by the contractor, and that he met his injuries while he was doing work which was necessary to enable said contractor to carry out the stipulations of the contract for grading. Without going into other considerations suggested by counsel, we have here ample evidence to warrant the Commission in finding that Hicks was in the employ of Robert Sherer & Co.

[2] As to the second writ the sole contention is that when the Commission had once made an award and had denied a rehearing, its jurisdiction to alter or annul its award was exhausted, unless based upon the ground that the disability had increased, diminished, or terminated, and that when any later attempted exercise of jurisdiction was sought to be based upon this ground, it could only arise out of the proof of facts occurring after the date of its original award. The determination of this question depends upon the construction to be placed upon the several sections of the Workmen's Compensation Act relating to the power of the Commission over its awards, and the time within which these powers are to be exercised. Sections 81 and 82 of said act relate to the matter of rehearings before the Commission. Section 81 provides that persons aggrieved by any award of the Commission may apply to the Commission for a rehearing in respect to the matters determined by it of which they complain, and provides the procedure for the making, service, and hearing of said application. Section 82 provides that applications for rehearings must be made within 20 days after service of the decision of the Commission upon those claiming to be aggrieved thereby, and further proceeds to specify the grounds upon which the rehearing must be applied for within said limited time. Subdivision (b) of said section 82 reads as follows:

> "Nothing contained in this section shall, however, be construed to limit the right of the Commission, at any time within two hundred forty-

> five weeks from the date of its award, and from time to time, after due notice and upon the application of any party interested, to review, diminish or increase, within the limits provided by this act, any compensation awarded upon the grounds that the disability of the person in whose favor such award was made has either increased or diminished or terminated."

In addition to these two sections of the act thus providing for rehearings before the Commission, section 25 of the act is in the following words:

> "(d) The Commission shall have continuing jurisdiction over all its orders, decisions and awards made and entered under the provisions of sections twelve to thirty-five, inclusive, of this act and may at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter or amend any such order, decision or award made by it upon good cause appearing therefor. * * *"

It is the contention of the respondent to this writ that by the terms of the section last above quoted the commission is given unlimited power over its orders, decisions, and awards during the period of 245 weeks to rescind, alter, or amend the same, and that the Commission, in the instant case, having concluded to amend its findings and increase its original award during such period, its power to do so cannot be questioned upon this writ. We do not so construe the powers of the Commission under the several sections of the Workmen's Compensation Act above referred to. These several sections, all referring to the powers of the Commission over its orders, decisions, and awards, must be read together, and must be so construed, if possible, as to present a harmonious system for the re-examination of matters decided by the Commission, and for the determination of the finality of such decisions. When these several sections are so read and construed together, it seems quite obvious that the provisions of subdivision (b) of section 82, which permit the Commission within the period of 245 weeks after its award to rescind, diminish, or increase the same "upon grounds that the disability of the person in whose favor such award was made has either increased or diminished or terminated," contemplates a change in conditions arising after the making of the original award, and by which the disability of the person in whose favor such award was made has been either increased, diminished, or terminated, and that under this subdivision of section 82 of the act the power of the Commission thus extended over the period of 245 weeks after the date of its original award is limited in its exercise to the consideration of such facts only as have arisen since the making of such award, and that it is only upon the proof of such facts that the Commission has jurisdiction to review, diminish, or increase such award. When subdivision (b) of section 82 of the act is thus construed, it operates to so limit the more general terms of subdivision (d) of section 25 of said act as to permit the Commission to retain jurisdiction over its orders, decisions, and awards during the period of 245 weeks thereafter for the sole purpose of making such changes therein as may be required by the occurrence of new facts arising after the date of its original decision.

In the instant case the second award of the Commission was not predicated upon any new facts occurring since its original award, but was based solely upon a reconsideration of the facts upon which such former award was made. We are satisfied that upon a proper construction of the foregoing sections of the Workmen's Compensation Act the jurisdiction of the Commission to alter or amend its original award expired when it denied the application for a rehearing thereon, except as these sections give to the Commission a continuing jurisdiction during a period of 245 weeks after the date of its award to alter or amend the same upon proof of facts occurring during such period, and upon such proof alone, and that no such proof having been presented as a basis for the second award of the Commission, for the annulment of which this writ was sought, it follows that in making such second award the Commission acted in excess of its jurisdiction.

The judgment of this court will therefore be as follows: As to the first writ, L. A. No. 4847, the award is affirmed. As to the second writ, L. A. No. 4929, the award is annulled.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; SHAW, J.; MELVIN, J.; WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

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35 Cal. App. 501

PEOPLE v. KESELING. (Cr. 690.)

(District Court of Appeal, First District, California. Dec. 8, 1917. Rehearing Denied by Supreme Court Feb. 7, 1918.)

1. CRIMINAL LAW 🔑507(4)—TESTIMONY OF "ACCOMPLICES"—DETECTIVES AND INFORMERS.

Witnesses one of whom employed by the state for that purpose, was treated by defendant and the other of whom paid for such treatment, were not "accomplices" to the crime of practicing dentistry without a license under Pen. Code, § 1111, as amended by St. 1915, p. 760, defining an accomplice as one who is liable to prosecution for the identical offense charged against the defendant, since when the commission of a crime by one person involves the co-operation of another person, the latter becomes an accomplice only in the event that his co-operation in the commission of the crime is corrupt.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

2. CRIMINAL LAW 🔑510—TESTIMONY OF ACCOMPLICES—NECESSITY OF CORROBORATION.

Even though such witnesses were feigned accomplices, still their testimony needed no corroboration as the uncorroborated testimony of one who under the direction of officers of the law feigns complicity in the commission of a crime merely for the purpose of detecting and prosecuting the perpetrators thereof will support a conviction.

3. STATUTES 🔑250—TIME OF TAKING EFFECT—CONSTRUCTION OF STATUTE.

Dental Act 1901 (St. 1901, p. 571) § 25, provided that it should take effect September 1, 1901, and that all prior laws were thereby repealed. Pol. Code, § 323, provides that every statute, unless a different time is prescribed therein, takes effect on the sixtieth day after its passage. *Held*, that the entire act for all purposes went into effect September 1, 1901, and the repeal of prior acts did not, as claimed, take effect 60 days after the passage of the act, and therefore there was no interregnum in the law between the repeal of the prior acts and the taking effect of the new act in which it was lawful to practice dentistry without a license.

4. INDICTMENT AND INFORMATION 🔑111(1)—NECESSITY OF NEGATIVING EXCEPTIONS.

It was not necessary that an information for practicing dentistry without a license should traverse the exceptions contained in the statute.

5. PHYSICIANS AND SURGEONS 🔑6(2)—PRACTICING WITHOUT AUTHORITY—DENTISTS—"PRACTICING DENTISTRY."

Under St. 1915, p. 698, making it an offense to practice dentistry without a license, and providing that a person shall be understood to practice dentistry within the meaning of that act who shall, for a fee, salary, or reward, paid directly or indirectly to himself or some other person, perform an operation on the human teeth or jaws, etc., it is not necessary that the fee be paid by the person upon whom the work is performed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Practice of Dentistry.]

6. STATUTES 🔑98(1)—SPECIAL AND LOCAL LAWS—JURISDICTION OF COURTS.

St. 1915, p. 698, does not violate Const. art. 4, § 25, prohibiting the enactment of local or special laws in the cases therein enumerated in view of article 6, § 5, providing that the superior court shall have original jurisdiction in cases of misdemeanor not otherwise provided for.

7. CONSTITUTIONAL LAW 🔑230(2)—PHYSICIANS AND SURGEONS 🔑2—LICENSES—DISCRIMINATION.

St. 1915, p. 701, § 6, prescribing who shall be eligible to take an examination before the board of dental examiners, is not unconstitutional as discriminatory, since, while it is discriminatory in a certain sense, it discriminates only between those who have the necessary degree of learning and skill and those who have not.

8. STATUTES 🔑87—SPECIAL AND LOCAL LAWS—REGULATION OF CRIMINAL PROSECUTIONS—"PRACTICING DENTISTRY."

St. 1915, p. 705, § 11, providing that any person shall be understood to be practicing dentistry within the meaning of that act who shall do the things therein specified, such as advertising as a dentist, performing operations, etc., does not render the statute violative of Const. art. 4, § 25, subd. 3, prohibiting special or local laws, regulating the practice of courts of justice, as the statute does not specify what shall constitute sufficient evidence, but specifies the acts that shall constitute the practice of dentistry.

9. PHYSICIANS AND SURGEONS 🔑6(10)—PRACTICING WITHOUT AUTHORITY—EVIDENCE.

On a trial for practicing dentistry without a license, evidence as to the character of work performed by defendant, offered for the purpose of showing that he was a good dentist, was properly excluded as not responsive to any issue in the case.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Frank Keseling was convicted of practicing dentistry without a license, and he appeals. Affirmed.

W. H. H. Hart and T. John Butler, both of San Francisco, for appellant. U. S. Webb, Atty. Gen. (John H. Riordan, Deputy Atty. Gen., and Oliver Dibble, of San Francisco, of counsel), for the People.

LENNON, P. J. The defendant herein was charged in an information filed in the superior court of the city and county of San Francisco with the crime of misdemeanor, namely: Practicing dentistry without a license in violation of the provisions of an act of the Legislature regulating the practice of dentistry in the state of California. Stats. 1915, p. 698. The defendant pleaded not guilty, waived a trial by jury, and after a trial by the court was adjudged guilty and sentenced to pay the minimum fine provided by the statute, namely, $100. The appeal is from the judgment and from an order denying the defendant a new trial.

[1] The testimony of Edith McDonnell and Louise St. John, witnesses for the people, did not require corroboration. Although employed by the state to seek and submit to the services of the defendant, they were not accomplices of the defendant in the perpetration of the crime charged within the meaning of section 1111 of the Penal Code, as amended in 1915 (Stats. 1915, p. 760), which defines an accomplice "as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

Whenever the commission of a crime by one person involves the co-operation of another person, the latter becomes an accomplice only in the event that his co-operation in the commission of the crime is corrupt. The participation by the two witnesses in question in the dental practice of the defendant, one as the subject of treatment, and the other paying for the same, was not by the law denounced as a crime, and clearly, therefore, it was lacking in the criminal intent necessary to the corrupt co-operation that would make them liable to prosecution and conviction for the identical offense charged against the defendant.

[2] Even though they were feigned accomplices, still their testimony needed no corroboration, for it is the settled law that the uncorroborated testimony of one who, under the direction of officers of the law, feigns complicity in the commission of a crime merely for the purpose of detecting and prosecuting the perpetrators thereof will support a conviction. People v. Farrell, 30 Cal. 316; People v. Bolanger, 71 Cal. 17, 11 Pac. 799;

People v. Barric, 49 Cal. 342; People v. Fong Ching, 78 Cal. 169, 20 Pac. 396.

[3] The defendant claims that the evidence shows that he was practicing dentistry at and prior to the time the act of 1901 was passed and took effect, and that inasmuch as that act expressly repealed all preceding acts governing and controlling the same subject-matter as does the act of 1915, under which the defendant was prosecuted, and exempted from its provisions those persons who had "the lawful right" to practice dentistry at the time of its passage, he could not be charged with and convicted of the crime of practicing dentistry without a license. More precisely stated, the contention of the defendant in this behalf is that he was actually practicing dentistry between March 23, 1901, and September 1, 1901; that section 25 of the Dental Act of 1901 should be construed to mean that all prior acts regulating the practice of dentistry in the state of California were repealed 60 days after March 23, 1901; and that inasmuch as the act of 1901 did not by its terms go into effect until September 1, 1901, there was between May 23d (60 days after the passage of the act of 1901) and September 1st (the time when the act was by its terms to go into effect), an interregnum in the law during which time it was not unlawful for him to practice dentistry without a license.

We are not satisfied that the evidence shows that the defendant was actually practicing dentistry between March 23, 1901, and September 1, 1901. But, however that may be, the contention just stated is untenable. Section 323 of the Political Code provides that "every statute, unless a different time is prescribed therein, takes effect on the 60th day after its passage." This section was in effect at the time of the passage of the Dental Act of 1901 and if no provisions to the contrary were contained in said dental act it would therefore have taken effect 60 days after March 23, 1901. But section 25 of that act declared that it should "take effect September 1, 1901"; that is to say, the entire act should take effect September 1, 1901, and not that one portion thereof should take effect on that date and another part thereof on some other day. The entire act for all purposes went into effect September 1, 1901, and on that date, and not before, the prior acts regulating the practice of dentistry became absolutely and finally repealed. In this construction of the statutory situation there was no interregnum in the law, and the defendant, as the record shows, never having been licensed as a dentist, did not have the lawful right to practice dentistry at the time charged in the information.

[4, 5] The defendant's demurrer to the information was properly disallowed. It was not necessary that the information should traverse the exceptions contained in the act. Ex parte Hornef, 154 Cal. 355, 97 Pac. 891. Neither was it necessary that the information should have charged that the fee paid for the work performed by the defendant was paid by the person upon whom the work was performed. The statute provides that a person shall be understood to practice dentistry within the meaning of this act who shall have a fee, salary, or reward paid, directly or indirectly either to himself or to some other person performing an operation, etc. St. 1915, p. 705, § 11.

[6] The objection presented by the demurrer that the Dental Act of 1915 contravened section 25 of article 4 of the state Constitution is answered by the provisions of article 6, § 5, of the Constitution, which provide that the superior court shall have original jurisdiction in cases of misdemeanor not otherwise provided. See, also, People v. Fortch, 13 Cal. App. 770, 110 Pac. 823, where it is held that the Legislature has the right to prescribe the punishment for this character of misdemeanor.

[7] The provisions of section 6 of the Dental Act of 1915, prescribing who shall be eligible to take an examination before the board of dental examiners, is not unconstitutional upon the ground that it is discriminatory. In disposing of precisely the same objections as the defendant makes here to section 12 of the act of 1901, which also prescribed the conditions upon which a person might take examination for a license, the Supreme Court of the state in the case of Ex parte Whitley, 144 Cal. 167, 77 Pac. 879, 1 Ann. Cas. 13, said:

> "It is entirely within the power of a legislature to fix any reasonable standard for determining the competency of an applicant for admission to the practice of dentistry. * * * The law, no doubt, is discriminatory, but not in any constitutional sense. It does not discriminate between classes. The discrimination goes to the degree of learning and skill which all applicants for examination must possess. It discriminates between those who have the necessary degree of learning and skill and those who have not; between those who are able and those who are unable to acquire it. It is not an unreasonable or capricious discrimination applying to classes as such, or members of a class, but is based solely upon professional qualification. It is a discrimination which, in the interest of the public welfare, it is the duty of the Legislature to make, and the necessity for which, and its nature and extent—whether an examination and right to practice shall depend on the possession by the applicant of a diploma of a dental college only, or be extended to others, and how far—depend primarily upon the judgment of the Legislature, which, when reasonably exercised, the courts cannot control. These principles will be found fully discussed and sustained in State v. Vandersluis, 42 Minn. 129 [43 N. W. 789, 6 L. R. A. 119]; Dent v. West Virginia, 129 U. S. 122 [9 Sup. Ct. 231, 32 L. Ed. 623]; also Ex parte Gerino, 143 Cal. 412 [77 Pac. 166, 66 L. R. A. 249]."

The defendant does not point out in his brief how or in what manner the information fails to substantially conform to sections 950, 951, and 952 of the Penal Code, nor in what respect the information fails to contain in ordinary and concise language a statement of the acts constituting the offense, etc. Our reading of the information satisfies us that it meets with all of the requirements of the rules of criminal pleading.

[8] There is no merit to the contention that section 11 of the Dental Act of 1915 renders the entire act unconstitutional because, as it is alleged, that section violates subdivision 3 of section 25 of article 4 of the Constitution of the state of California, in that it specifies what shall constitute sufficient evidence to convict a person under the law, and therefore is special legislation. That section does no more than define what shall constitute the practice of dentistry in the state of California and "the Legislature had the power to thus define what is meant by the term 'practicing dentistry,' and to thus make clear what acts it intended to make unlawful." People v. Fortch, 13 Cal. App. 770, 775, 110 Pac. 823, 825.

[9] Nor is there any merit in appellant's contention that the court erred in sustaining certain objections made by the people to questions propounded by defendant's counsel to Albert Meyer, the purpose of which was to show by the character of the work performed by defendant that he was a good dentist, etc. This evidence was not responsive to any issues in the case. The defendant was not being prosecuted for being a bad dentist, but for practicing dentistry—good, bad, or indifferent—without first having obtained a license to do so.

What we have thus far said disposes of every point made in support of the appeal which are worthy of discussion.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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35 Cal. App. 652

SANTA ANA SUGAR CO. OF SANTA ANA et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 2441.)

(District Court of Appeal, Second District, California. Dec. 19, 1917. Rehearing Denied by Supreme Court Feb. 14, 1918.)

1. Master and Servant 🔑405(4) — Workmen's Compensation Act—Findings of Industrial Board—Evidence to Support.

Finding of Accident Commission that cancer resulted from fall of workman, *held* supported by evidence.

2. Master and Servant 🔑405(1) — Workmen's Compensation Act—Findings of Industrial Commission.

The Accident Commission is not bound to take the greater quantity of the evidence as against the lesser; the principal embodied in Code Civ. Proc. § 2061, subd. 2, providing that juries are to be instructed that they are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction against a less number satisfying their minds, operating as strongly upon the commission as instructions under it do upon juries.

Proceedings before the Industrial Accident Commission by Candelario Villa for compensation, opposed by the Santa Ana Sugar Company of Santa Ana, Cal., and another. Award for claimant, and defendants make application for a writ of review. Award affirmed.

Redman & Alexander, of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

WORKS, Judge pro tem. Candelario Villa suffered a fall while engaged as a workman at the plant of the petitioner, Santa Ana Sugar Company. He made claim for compensation for a sarcoma or cancer on his left clavicle, which he contends resulted from the fall. The respondent Accident Commission found that it did so result, and the finding is assailed as being without the support of any evidence.

[1] The testimony of the physicians who were called as witnesses before the commission was in accord upon the point that the lump or swelling indicating the presence of a sarcoma, if it is caused by a fall or a blow, will not make itself manifest upon a bone on the day of the injury, nor on the next day, but only after a "few days," at the earliest; and the evidence appears to show that a sarcoma once appearing will remain apparent to palpation. Villa, his wife, and a friend of his family all testified to the presence three or four hours after the accident of a lump at the place on the clavicle at which, according to the testimony of nearly all of the experts, there was, at the time of the hearing before the commission, a sarcoma. The petitioner contends that the evidence of Villa, his wife, and their friend as to the presence of the lump immediately after the accident is uncontradicted, and that therefore the sarcoma could not have resulted from the fall. The cases of Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35, and Employers' Assurance Corporation v. Industrial Accident Commission, 170 Cal. 800, 151 Pac. 423, are cited to the point that where all the evidence before the commission upon a particular question tends in one direction, and the commission makes a finding contrary to it, the finding must be set aside. But the record presented here is not a one-sided record. The physician who attended Villa immediately after the accident, and on the same day it occurred, says that he then discovered no injury to Villa except a scalp wound. He saw the patient the next morning, however, and at the request of his wife made a special examination of his left shoulder, stripping it down and going over it carefully. He says: "It was sensitive, also tender. I don't recall that it was swollen." The accident had occurred on September 5, 1916, and on the 8th the physician took

an X-ray picture of the region he had thus examined. He says: "It showed a normal condition of the clavicle." There is other testimony to the same effect from the same physician.

[2] There is thus a substantial conflict between the testimony of the physician and the testimony of the three other witnesses, although there is no doubt that the greater quantity of the evidence, looking at quantity alone, was to the effect that there was an elevation on the clavicle soon after the accident and on the same day. But the commission was not bound to take the greater quantity of the evidence as against the lesser. Its members may have seen ample reason to accept the testimony of the physician as against that of the other witnesses. In this state juries are to be instructed that:

> "They are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number, * * * satisfying their minds." Code Civ. Proc. § 2061, subd. 2.

The principle behind this rule operates as strongly upon the Industrial Accident Commission as instructions under it do upon juries.

The award is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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35 Cal. App. 509

BELLINGHAM BAY LUMBER CO. v. WESTERN AMUSEMENT CO. et al.

(Civ. 2240.)

(District Court of Appeal, First District, California. Dec. 10, 1917. Rehearing Denied by Supreme Court Feb. 7, 1918.)

1. APPEAL AND ERROR ⚷151(6) — PERSONS ENTITLED TO APPEAL—"AGGRIEVED PARTY."

In a suit to foreclose a materialman's lien, a defendant who owned the property when the materials were furnished and the claim of lien filed, but who subsequently conveyed the premises, and against whom no judgment for costs was rendered, was not entitled to appeal from a judgment for plaintiff under Code Civ. Proc. § 938, authorizing appeals by any "aggrieved party."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Aggrieved Party.]

2. MECHANICS' LIENS ⚷310(1) — ENFORCEMENT—COSTS—PERSONS ENTITLED.

In an action to foreclose a materialman's lien, where plaintiff alleged that the defendant S. was the owner in fee of the premises, and S. filed an answer denying that he was the owner of the premises subsequent to a specified date, and alleging that on that date he conveyed all of his right, title, and interest to another party, and the court rendered a judgment adjudging that the claims and interests of all of the defendants were subject and subordinate to plaintiff's lien, S. was not entitled to costs, though the court found, as alleged by him, that he had conveyed all of his interest in the property subject to the furnishing of the materials and the filing of the claim of lien, since, notwithstanding this fact, he was a proper party, and plaintiff was entitled to a judgment against him establishing the validity and superiority of his lien.

Appeal from Superior Court, City and County of San Francisco; John L. Childs, Judge.

Action by the Bellingham Bay Lumber Company against the Western Amusement Company and others. From a judgment for plaintiff, the defendant Rudolph Spreckels appeals. Affirmed.

Charles S. Wheeler, John F. Bowie, and Nathan Moran, all of San Francisco, for appellant. William M. Cannon, of San Francisco, for respondent.

RICHARDS, J. This is an action to foreclose a materialman's lien. Rudolph Spreckels was the owner of the property sought to be impressed with the plaintiff's lien at the time of the erection of the building for which the plaintiff's materials were supplied to the Western Amusement Company, a sublessee of said Spreckels, by whom the building was being erected. On March 30, 1908, the plaintiff filed its claim of lien against the building and premises for material furnished by it. On April 13, 1908, Rudolph Spreckels conveyed the property affected by said lien to the Realty & Rebuilding Company, a corporation, the deed evidencing such conveyance being recorded on May 11, 1908. On June 27, 1908, this action was commenced for the foreclosure of said lien. In the complaint then filed Rudolph Spreckels was made one of the parties defendant, and was alleged to be the owner in fee of the premises subject to the plaintiff's lien. On February 15, 1909, an amended complaint was filed in which the same averments appear. The Realty & Rebuilding Company was not made a party by name in either of these complaints, but several fictitious names were given as defendants, with the usual averment and prayer that as the true names of said defendants were discovered they might be inserted with proper averments in the complaint. On April 30, 1909, the defendant Spreckels filed his answer to the amended complaint, wherein, after denying practically all of its other averments, he also denied that he was the owner of the premises in question subsequent to the 23d day of April, 1908, upon which date he alleged that he conveyed all of his right, title, and interest in the said premises to the Realty & Rebuilding Company. On June 19, 1911, the Realty & Rebuilding Company was served with summons in the city and county of San Francisco under the name of "First Doe," one of the fictitious defendants. On July 10, 1911, the cause came on for trial, Rudolph Spreckels and certain other defendants appearing, but the Realty & Rebuilding Company not appearing, the time for its appearance having expired and its default having been entered, and the cause was tried upon all of the issues raised by the answers of the several defendants who had appeared, including Rudolph Spreckels. At the conclusion of the trial the court filed its findings, wherein it found that the plaintiff was entitled to the foreclosure of its lien against all of the defendants, but also specifically found that the defendant Rudolph Spreckels had conveyed all of his interest in the property to the Realty & Rebuilding Company on April 23, 1908. In its judgment following said findings the court rendered no judgment against Rudolph Spreckels, except in so far as he might be affected by the general statement in said judgment that the claims and interests of all of the defendants in said property were subject and subordinate to the plaintiff's lien. No judgment for costs was awarded against said Spreckels; neither did the court award him costs against the plaintiff. From this judgment the defendant Spreckels prosecutes this appeal.

[1, 2] We are unable to perceive how the appellant herein is a party aggrieved by the judgment in this case so as to entitle him to prosecute this appeal. As to the issues tendered by his answer with respect to the validity of the plaintiff's lien and to a right to its foreclosure of the same, the defendant Spreckels has no interest in these injuriously affected by the judgment in view of his averment and of the court's finding that he had conveyed away all of his interest in the property prior to the commencement of the action. The appellant's right, if any, to prosecute this appeal, is thus reduced to the single contention that the trial court should have awarded him his costs, and that not having done so he is a party aggrieved to that extent, and hence entitled to appeal.

This contention is based upon the claim that the judgment was in his favor as to his nonownership of the property at the time of the commencement of the action. But this was not a material issue in the case, except as it might possibly have affected the right of the plaintiff to recover his costs against this particular defendant. The action was one for the impressment of a materialman's lien upon the property, regardless of its ownership, and for a judgment declaring such lien to be superior to the claims or interests of each and all of the defendants. Upon these issues the court found fully in the plaintiff's favor, and such finding and the judgment which followed it can in no sense be deemed a judgment in favor of the appellant herein. The case of Martin v. Porter, 84 Cal. 476, 24 Pac. 109, cited by the appellant in support of his contention, is not analogous to the case at bar, for in that case the ownership of the property was the only issue involved in the action, and the defendant having filed a disclaimer as to such ownership, and the facts showing that he was not the owner thereof at any time, and hence should not have been made a defendant at all, the court on appeal rightly held that the defendant should have been awarded his costs by the trial court. But in the instant case, the defendant Spreckels was admittedly the owner of the property at the time the plaintiff's' materials were furnished, and at the time its claim of lien was filed. He was therefore a proper party to the action, even though subsequent to the filing of the plaintiff's claim of lien he had undertaken to convey to another his interest in the premises; for as to him as well as to his transferee the plaintiff was entitled to a judgment establishing the validity and superiority of his lien. The judgment herein did this, and hence was not in the defendant Spreckels' favor, except in so far as it did not award costs against him, which it might well have done in view of the fact that the defendant Spreckels was not content to file or rest upon a disclaimer, but put in issue in his answer and actively contested at the trial the right of the plaintiff to his lien upon the premises and to any judgment in its favor for its foreclosure. Under such conditions he was clearly not entitled to a judgment in his favor even for his costs. We find, therefore, no merit in this appeal, nor any right in the appellant, as an aggrieved party, under the terms of section 938 of the Code of Civil Procedure, to take or to prosecute the same.

Judgment affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

35 Cal. App. 515

BELLINGHAM BAY LUMBER CO. v. WESTERN AMUSEMENT CO. et al.

(Civ. 2274.)

(District Court of Appeal, First District, California. Dec. 10, 1917. Rehearing Denied by Supreme Court Feb. 7, 1918.)

1. Dismissal and Nonsuit ⚷57—Delay in Service or Return of Process.

Under Code Civ. Proc. § 581a, providing that all actions must be dismissed on the court's own motion or on motion of any party interested unless the summons shall be served and return thereon made within three years after the commencement of the action, where the summons was served on a defendant before, but returned after, the expiration of the three-year period, the court erred in refusing to dismiss the action as to such defendant on its motion.

2. Dismissal and Nonsuit ⚷57—Delay in Service or Return of Process.

Under Code Civ. Proc. § 581a, providing for the dismissal of actions where the summons is not served and return thereon made within three years after the commencement of the action, but further providing that such actions may be prosecuted if appearance has been made by defendant within such three years, defendant's appearance after the expiration of three years did not defeat its right to a dismissal of the action.

Appeal from Superior Court, City and County of San Francisco; John L. Childs, Judge.

Action by the Bellingham Bay Lumber Company against the Western Amusement Company and others. From orders and judgment against it, the defendant Realty & Rebuilding Company appeals. Reversed, with instructions.

Charles S. Wheeler, John F. Bowie, and Nathan Moran, all of San Francisco, for appellant. William M. Cannon, of San Francisco, for respondent.

RICHARDS, J. This is an action to foreclose a materialman's lien. Rudolph Spreckels was the owner of the property sought to be impressed with the plaintiff's lien at the time of the erection of the building for which the plaintiff's materials were supplied to the Western Amusement Company, a sublessee of said Spreckels, by whom the building was being erected. On March 30, 1908, the plaintiff filed its claim of lien against the building and premises for material furnished by it. On April 13, 1908, Rudolph Spreckels conveyed the property affected by said lien to the Realty & Rebuilding Company, a corporation, the deed evidencing such conveyance being recorded on May 11, 1908. On June 27, 1908, this action was commenced for the foreclosure of said lien. In the complaint then filed Rudolph Spreckles was made one of the defendants, and was alleged to be the owner in fee of the premises subject to the plaintiff's lien. On February 15, 1909, an amended complaint was filed in which the same averments appear. The Realty & Rebuilding Company was not made a party by name in either of these complaints, but several fictitious names were given as defendants with the usual averment and prayer that as the true names of said defendants were discovered they might be inserted with proper averments in the complaint. On April 30, 1909, the defendant Spreckels filed his answer to the amended complaint, wherein, after denying practically all of its other averments, he also denied that he was the owner of the premises in question subsequent to the 23d day of April, 1908, upon which date he alleged that he conveyed all of his right, title, and interest in the said premises to the Realty & Rebuilding Company. On June 19, 1911, the Realty & Rebuilding Company was served with summons in the city and county of San Francisco under the name of "First Doe," one of the fictitious defendants. On July 10, 1911, the case came on for trial. The time of the Realty & Rebuilding Company within which to appear after service of summons had expired, but as yet its default had not been entered. On July 22, 1911, the default of the Realty & Rebuilding Company was entered by the court upon plaintiff's motion. The plaintiff, however, did not at any time formally amend its complaint by the insertion of the name of the Realty & Rebuilding Company therein in place of one of the fictitious defendants. On July 24, 1911, the Realty & Rebuilding Company filed and served separate notices of two motions to be heard on the following day. One of these was a notice of motion to dismiss the action as to said Realty & Rebuilding Company upon the ground that the summons had not been served and a return thereon made within three years after the commencement of the action. The other notice was of a motion for an order relieving said Realty & Rebuilding Company from its default upon the ground of its mistake, inadvertence, surprise, and excusable neglect. Upon the hearing of these two motions on the following day the attorney for the Realty & Rebuilding Company stated in open court that it made no point on the motion for an order relieving it from its default but stood solely upon its motion to dismiss the action. This latter motion was then argued and submitted to the court for decision. On July 31, 1911, the court made an order denying the motion for relief from the default upon the ground of want of prosecution and abandonment of the same; and also made an order denying the motion to dismiss the action. Thereafter and on August 1, 1911, the court filed its findings of fact and conclusions of law in the case, and ordered judgment in favor of the plaintiff therein, which judgment was duly entered upon the following day. From the foregoing orders and judgment the Realty & Rebuilding Company prosecutes this appeal.

The appellant herein contends that the refusal of the trial court to dismiss this action as to it upon its motion and upon the ground that the summons had not been returned within three years after the commencement of the action was error. In urging this contention the appellant relies upon the express and mandatory terms of section 581a of the Code of Civil Procedure. That section reads as follows:

> "No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced must be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued within one year, and all such actions must be in like manner dismissed unless the summons shall be served and return thereon made within three years after the commencement of said action. But all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served; provided, that, except in actions to partition or to recover possession of, or to enforce a lien upon, or to determine conflicting claims to, real or personal property, no dismissal shall be had under this section as to any defendant because of the failure to serve summons on him during his absence from the state, or while he has secreted himself within the state to prevent the service of summons upon him."

This section of the Code in substantially its present form was formerly embraced in section 581 of the Code of Civil Procedure under subdivision 7 thereof, but was made a separate section in 1907. It has been the subject of frequent interpretation by the Supreme Court by which its terms have uniformly been held to be mandatory and to impose a compulsion upon trial courts to order the dismissal of an action wherein the summons has not been served and returned within 3 years from the date of the commencement of the action, some of these cases going so far as to hold that after the expiration of the three-year period prescribed by this section the court has no jurisdiction to do other than dismiss the action. Vrooman v. Li Po Tai, 113 Cal. 305, 45 Pac. 470; Davis v. Hart, 123 Cal. 385, 55 Pac. 1060; White v. Superior Court, 126 Cal. 247, 58 Pac. 450; Modoc Land Co. v. Superior Court, 128 Cal. 255, 60 Pac. 848; Sharpstein v. Eells, 132 Cal. 508, 64 Pac. 1080; Grant v. McArthur, 137 Cal. 271, 70 Pac. 88; Swortfiguer v. White, 141 Cal. 576, 75 Pac. 172.

[1] The case of Modoc L. Co. v. Superior Court, supra, presents a state of facts practically identical with those of the case at bar in the respect that the summons had been served before but returned after the expiration of the three-year period prescribed by the section of the Code under review. The Supreme Court issued a peremptory writ of prohibition, forbidding further proceedings in that case, and in so doing said:

> "The statute imposes the penalty of dismissal in all cases where the return is made more than three years after the commencement of the action. The court is deprived of jurisdiction to take any other action than to dismiss the cause, whether one day or many years elapse before its attention is called to the subject. The declaration that "no further proceedings shall be had therein" is a statutory prohibition against any further proceedings; and, if the court should assume to act in disregard of this prohibition, * * * it would be acting without any jurisdiction."

[2] The only answer which the respondent has to make to this contention of the appellant and to the authorities which support it is that the said defendant made a general appearance in the case by its motion for relief from its default, and that this general appearance on its part obviated the necessity of either a service or return of the summons, and constituted a waiver of its right to move to dismiss the action upon the ground stated. No authorities are cited in support of this position; and it would seem that none could be in the face of the express terms of section 581a of the Code of Civil Procedure, which make it a condition precedent to the further prosecution of the action that any appearance which the defendant might make must have been made within the three-year period prescribed in the section; and this is the construction which has been placed upon the portion of the section which so declares. Grant v. McArthur, supra; Swortfiguer v. White, supra.

In the presence of this uniform line of decisions construing section 581a, Code of Civil Procedure, to be mandatory, and in some instances prohibiting the trial courts from further proceeding with causes coming within its provisions, we are constrained to hold that the court was in error in its refusal to dismiss this action against the Realty & Rebuilding Company upon its motion, and that as to it the action must be dismissed.

It is unnecessary to consider any other of the points made by the appellants upon this appeal.

Judgment reversed, with instructions to the trial court to enter its order dismissing this action as to the appellant herein.

We concur: LENNON, P. J.; KERRIGAN, J.

35 Cal. App. 508

GAZETT v. EPPERLY et al. (Civ. 2260.)

(District Court of Appeal, First District, California. Dec. 8, 1917.)

TRIAL ⚷395(7)—FINDING OF FACT—SUFFICIENCY—CONCLUSION OF LAW.

In an action by an incompetent's guardian for rescission of his contract involving exchange of his realty, valued by him at $6,000, actually worth $4,500, for $2,000 cash and 46 shares of stock, of a par value of $100 each, the finding that the stock had value was not insufficient, as based on conclusion of law, because containing a statement that there was not sufficient proof to sustain the averments in an allegation of the complaint; the entire finding that the stock had value not being predicated on the statement, a mere conclusion of law, the finding further containing facts affirmatively showing the stock had value, while other findings fully covered the issue and established the fact.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Agnes W. Gazett, as guardian of the estate and person of Jacob B. Gazett, an incompetent person, against Mary J. Epperly and the C. L. Decker Company, a corporation. From a judgment for defendants, plaintiff appeals. Judgment affirmed.

Milton S. Hamilton, of San Francisco, for appellant. Robinson & Robinson, of Oakland, for respondent Epperly. Peck, Bunker & Cole, of San Francisco, for respondent C. L. Decker Co.

KERRIGAN, J. This appeal is from a judgment rendered in favor of defendants in an action brought by plaintiff for a rescission of a contract involving the exchange of property. The appeal is upon the judgment roll alone, and the sole point presented for a reversal is that a portion of the particular finding involving the issue of value of certain stock which constituted part of the exchanged property is insufficient to sustain the judgment.

It appears from the complaint and the findings that one Jacob B. Gazett, who, subsequent to the transaction here involved, was declared an incompetent, owned certain real property in the city of Oakland, which he exchanged with the defendant Epperly for the sum of $2,000 in cash and 46 shares of the capital stock of the Madera Electric Water Company, of the par value of $100 per share. In making the exchange, Gazett valued the real property at the sum of $6,000, the actual value of which, however, was found by the trial court to be but $4,500. The finding that the stock had value is claimed to be insufficient, for the reason that it contains a statement that "there is not sufficient proof to sustain the averments in allegation X of the complaint." It is the claim of the appellant that the entire finding that the stock had value is predicated upon this statement, which it is asserted is but mere conclusion of law, and for that reason insufficient.

There is no force or merit in the objection. Assuming the portion of the finding complained of to be defective in form, the finding further contains facts affirmatively showing that the stock had value, besides which other findings fully and sufficiently cover the issue and conclusively establish this fact. In addition to this, it appears from the findings that the relative values of the exchanged properties were not made the basis of the agreement. It further appears that the defendants made no representations which were false, that Gazett was himself familiar with the stock and had made independent investigation regarding the same, that plaintiff was not entitled to a rescission, and that judgment was rightfully given for defendants.

For the reasons stated the judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

35 Cal. App. 560

RONCONI v. NORTHWESTERN PAC. R. CO. (Civ. 2250.)

(District Court of Appeal, First District, California. Dec. 13, 1917. Rehearing Denied by Supreme Court Feb. 11, 1918.)

1. MASTER AND SERVANT 🔑293(1)—TRIAL 🔑243—INJURIES TO SERVANT — INSTRUCTIONS.

In an action for injuries to a railroad employé while operating a hand car, where there was testimony that the foreman of the hand car crew had his attention directed to the defective condition of the handle, which broke under plaintiff's manipulation, and said, "It is all right; go ahead," an instruction that the law does not permit an employer to take any chances as to the safety of its employés, in view of the evidence, was not an incorrect statement of the law, or inconsistent with other full and correct instructions on the duty of the employer.

2. MASTER AND SERVANT 🔑293(16)—INJURIES TO SERVANT—INSTRUCTIONS.

In such action, read in the light of the evidence, and in respect of the particular appliance which plaintiff was required to use, an instruction that a visual or ocular inspection of external conditions does not satisfy the employer's obligation, where the servant's safety depends on the soundness of the material or the firmness of attachment of several parts, correctly stated the law, particularly in view of the fullness and correctness of the main body of the instructions on such phase of the case.

3. MASTER AND SERVANT 🔑124(6)—INJURY TO SERVANT—INSPECTION BY EMPLOYER — "SIMPLE TOOL."

The handle of a hand car to be used by one standing in such a position that, if it should suddenly give way, the user would be precipitated in front of the moving car, is not a simple tool, such as a hammer, crowbar, pick, or shovel, of which a mere visual or external inspection by the employer might ordinarily suffice to satisfy its duty to inspect.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Simple Tool.]

4. MASTER AND SERVANT 🔑265(5)—INJURIES TO SERVANT—RES IPSA LOQUITUR.

The doctrine of res ipsa loquitur applies to cases of master and servant.

Appeal from Superior Court, City and County of San Francisco; Wm. D. Dehy, Judge.

Action by Egidio Ronconi against the Northwestern Pacific Railroad Company, a corporation. From a judgment for plaintiff, and an order denying new trial, defendant appeals. Judgment and order affirmed.

Stanley Moore, of San Francisco, for appellant. James A. Bacigalupi and Edmund Nelson, both of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff, and also from an order denying a new trial in an action for damages arising out of injuries sustained by the plaintiff as one of the defendant's employés while engaged in the operation of a hand car upon its railroad line. The hand car in question was one of regular standard make, equipped with wooden handles, which were used by the men in propelling the car. At the time of the accident which caused his injuries the plaintiff was standing on the front end of the car facing backward, and was engaged in "pumping" or pulling upon one of the handles used in operating the car, when said handle broke, and he fell backward in front of the car, which ran over him and seriously and permanently injured him. The evidence is strongly conflicting as to the condition of the handle at the time of the accident. The appellant does not question its sufficiency, but rests his appeal upon certain alleged errors in the instructions of the court to the jury.

[1] The first instruction assailed in the briefs of counsel for appellant is one which reads as follows:

> "You are further instructed that the law does not permit an employer to take any chances as to the safety of his employés."

The appellant insists that this instruction constitutes an erroneous statement of the law, and also that it is contradictory to other instructions given by the court. The appellant, however, concedes that the court quite fully instructed the jury upon every phase of the case, and that, with the exception of the particular instructions it criticizes, the court correctly laid down the law as to the degree of care which an employer should exercise in relation to his employés and to the appliances with which they were expected to work. The instruction above quoted appears to have been taken from the language of the decision of the Supreme Court in the case of Brown v. Sharp-Hauser Contracting Co., 159 Cal. 89, 94, 112 Pac. 874. Its precise words were used in that case as applying to a state of facts where a foreman, representing the employer in relation to its employés, in the presence of a known danger concluded to "take a chance." The evidence in the case before us discloses a similar situation, for there is testimony to the effect that the foreman of the hand car crew had his attention directed to the defective condition of the handle which broke under the plaintiff's manipulation, and that he said, "It is all right; go ahead." From this testimony the jury might well have arrived at the conclusion that the foreman of the defendant, in the presence of the known defect in the handle, concluded to "take a chance." The instruction complained of, when read and construed in the light of this evidence, is, we think, not subject to the appellant's criticism as either an incorrect statement of the law, or as inconsistent with the other very full and quite correct instructions of the court bearing upon the duty of the employer toward its employés.

[2, 3] The next criticism of the appellant is aimed at an instruction which reads as follows:

> "You are instructed that a merely visual or ocular inspection of external conditions does not satisfy the measure of the employer's obligation where the servant's safety depends upon the soundness of the material of which an instrumentality is composed, or upon the firmness with which the separate parts of such instrumentality are attached to each other."

The extent of the appellant's criticism of this instruction is that it is misleading; but as to this objection it also is to be read in the light of the evidence in the case and in respect of the particular appliance which the plaintiff was required to use at the moment of his injuries. So regarded we think this instruction very correctly stated the law applicable to the instant case. The handle of a hand car which is to be used in its propulsion by one standing in such a position that, if it should suddenly give way, its user would be precipitated in front of the moving car, cannot be classed in the category of those simple tools such as a hammer, a crowbar, a pick, or a shovel, for which a mere visual or external inspection might ordinarily suffice. Where the employé's safety essentially depends upon the soundness of the material of which the handle bar of a hand car is composed, or upon the firmness with which it is held in its place in view of the strain to which it is subjected in the operation of the car, it becomes one of those appliances for which a mere visual or external inspection on the employer's part would not ordinarily be sufficient. 1 Labatt on Master and Servant, § 161; St. Louis, I. M. & S. Ry. Co. v. Webster, 99 Ark. 265, 137 S. W. 1103, 1199, Ann. Cas. 1913B, 141. We are of the opinion that the above instruction correctly stated the law applicable to the facts of this case, and that the jury could have been in no way misled thereby, especially in view of the fullness and conceded correctness of the main body of the court's instructions bearing upon this particular phase of the case.

[4] The final contention of the appellant is that the doctrine of res ipsa loquitur, as embodied in one of the instructions given to the jury, has no application to cases of master and servant; but as to this contention the contrary has been recently and quite uniformly held to be the rule. O'Connor v. Mennie, 169 Cal. 217, 146 Pac. 674; Van Horn v. Pacific Refining Co., 27 Cal. App. 105, 148 Pac. 951; Nolen v. Engstrum Co. (Sup.) 166 Pac. 346; Lippert v. Pacific Sugar Corp., 33 Cal. App. 198, 164 Pac. 810.

This disposes of the contentions of the appellant on this appeal. Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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35 Cal. App. 593

McCARTER et al. v. ZELLER. (Civ. 2244.)

(District Court of Appeal, First District, California. Dec. 14, 1917.)

1. CONTRACTS ⚷94(7) — RESCISSION — MISREPRESENTATIONS—OPINIONS OF LAW.

An alleged misrepresentation, consisting of a mere opinion on a question of law, made by defendant to plaintiff, toward whom he occupied no confidential relationship, does not justify plaintiff in relying thereon, and furnishes no ground for rescission.

2. CONTRACTS ⚷94(5) — RESCISSION — GROUNDS — RELIANCE ON MISREPRESENTATION.

Plaintiff cannot rescind for misrepresentation by defendant, when before making the agreement she sought the advice of an attorney and acted thereon.

3. ELECTION OF REMEDIES ⚷3(2) — INCONSISTENCY.

In suit to rescind option contract for alleged misrepresentation that plaintiff's rights under prior contract had been lost, where plaintiff's recovery depended on establishing the validity of the original contract, the court properly excluded evidence offered by plaintiff of failure of consideration for notes given pursuant to the original agreement.

4. NOVATION ⚷1—WHAT CONSTITUTES.

Where plaintiffs bought personalty and leased hotel, giving notes therefor which provided that, on default in payment of any one of them, the entire sum should fall due immediately, and they defaulted, a new agreement giving to one plaintiff an option to lease the premises at a higher monthly rental and to buy the personalty at a higher price, and a second similar option at still higher prices, was not a novation.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Suit by Ida McCarter and another against

John A. Zeller. Judgment for defendant, and plaintiffs appeal. Affirmed.

A. S. Schapp, for appellants. John T. York, of Napa, for respondent.

LENNON, P. J. On February 4, 1912, the defendant, John A. Zeller, sold and delivered to the plaintiffs all the furniture, household goods, and personal property, stock of liquors, etc., then situate in the Palace Hotel in the city of Napa, for the purchase price of $8,000. Four thousand dollars was paid in cash, and the balance was evidenced by a series of eleven joint and several promissory notes, all bearing interest at the rate of 7 per cent. per annum from February 4, 1913, executed and delivered by the defendants to the plaintiff, each for the sum of $200, and one joint and several note for the sum of $1,800. All of these notes were secured by a chattel mortgage, dated February 4, 1913, whereby the personal property so sold and delivered by defendant to the plaintiffs, together with all furniture, household goods, provisions, supplies, and all personal property of every nature, which should thereafter be purchased, acquired, or owned by the mortgagees for use in the hotel business, was thereby mortgaged to secure the payment of the said notes, with interest, and the performance of the covenants of the chattel mortgage. The mortgage provided that, if default should be made in the payment of any of these notes, the mortgagee, without commencing an action for foreclosure, could take possession of the mortgaged property and sell it in the manner provided by law.

On February 4, 1913, the defendant executed a lease to the plaintiffs of the premises known as the Palace Hotel in the city of Napa, for the term of five years, commencing February 1, 1913, for a monthly rental of $250, payable on the 1st day of each month in advance. This lease, executed with all the formalities of a chattel mortgage, provided that the personal property so sold was mortgaged to secure all rent due or to become due under the terms of the lease, and the performance of all the covenants and conditions therein contained, and also contained a provision that, upon the breach of any covenant or condition of the lease, it should be lawful for the lessor, when the breach continued for 10 days after written notice to remedy the same, to enter upon the premises or any part thereof and to repossess the same as of his former estate. The plaintiffs entered into the possession of the property under this lease, and paid, as they severally became due, eight of the promissory notes, and in the meantime purchased additional personal property of the value of about $300, which they installed in the hotel.

On November 4, 1913, the plaintiff George A. McCarter left Napa, and the court found as a fact that he then and there intended to desert and abandon his wife, the plaintiff Ida McCarter, and then and there intended to cease to conduct or manage said hotel. On the day he left one of the series of notes for $200 matured, and there also remained unpaid two additional $200 notes and one for the sum of $1,800, all with interest from February 1, 1913, and, according to the express provisions of the chattel mortgage, these four notes, aggregating $2,400, by reason of the default in the payment of the note maturing November 4, 1913, at the option of the payee, all became immediately due and payable.

On December 1, 1913, defendant requested Ida McCarter, who was still conducting the business, to pay the rent for December, 1913, but she stated that she was unable to pay the same, whereupon the defendant served upon her the 10 days' notice provided for in the lease, and later took possession. But, just before the defendant took possession under the provisions of the lease, Mrs. McCarter, accompanied by one King, whom she had employed as counsel, had a conference with the defendant Zeller, at which time they entered into another agreement, which bears date December 12, 1913, and which in substance gave to Ida McCarter, personally, an option for 30 days to lease the hotel premises for the term of 5 years at a monthly rental of $260, and to purchase the personal property, with good will of the hotel business, for the sum of $2,737, and a further additional sum, which would consist of any additional personal property which the respondent might purchase during the existence of the option. There was also a second similar option given extending over a period of 60 days which would be exercised upon the payment of $2,850 plus the value of personal property purchased before its exercise. It was also agreed in the case of the exercise of either option that $2,000 of the purchase price would be accepted in secured notes.

This action was commenced for the purpose of rescinding and annulling the latter agreement. The defendant answered, and also filed a cross-complaint, asking for a foreclosure of the chattel moregage given to secure the lease and the promissory notes. The court gave judgment in favor of defendant in a certain sum, and directed the sale of an undivided one-half interest of all the personal property which was the subject-matter of the sale made by defendant to the plaintiffs on February 4, 1913. This is an appeal from the judgment.

It was the theory of the plaintiffs' case that Ida McCarter was induced to enter into the agreement in question by misrepresentations of the defendant, and in this behalf the complaint alleged that the defendant represented to plaintiff that she and her husband had lost all right and title to the personal property sold to them and had also lost all right to the possession of the leased premises; that she believed said misrepresentation, and was induced thereby to execute the agreement in question.

[1] The court expressly found that the defendant did not make the alleged representation, and counsel for plaintiffs fails to point out any testimony contradictory to this finding. But, even if the facts did support the allegation of the complaint as to the misrepresentation, nevertheless the alleged representation was a mere opinion on a question of law made by the defendant to the plaintiff toward whom he occupied no confidential relationship, and therefore it cannot justify the plaintiff in relying upon it, and does not furnish ground for rescission. Champion v. Woods, 79 Cal. 17, 21 Pac. 534, 12 Am. St. Rep. 126; Rheingans v. Smith, 161 Cal. 362, 119 Pac. 494, Ann. Cas. 1913B, 1140.

[2] Furthermore it affirmatively appears that the plaintiff did not rely upon any representations of the defendant. The record shows that Mrs. McCarter, before making the agreement in suit, sought the advice of an attorney and acted throughout the transaction on his advice. This fact also tends to condemn the contention that Ida McCarter was not in a condition of mind to realize and appreciate the nature and character of the agreement.

[3] It is claimed that the court erred in refusing to allow the plaintiffs to prove that there was a failure of consideration for the promissory notes, given pursuant to the original agreement. The very object of the action was to obtain the rescission of the last agreement of December 12, 1913, and the plaintiffs' complaint prayed the return to them of the property which was the subject-matter of the original agreement, and therefore plaintiffs must stand squarely upon and affirm the original transaction. Surely the plaintiffs will not be permitted to insist upon a failure of consideration of a contract, under the terms of which they were seeking the relief sued for.

[4] It is contended that the trial court found in effect that the last agreement, dated December 12, 1913, constituted a novation, and that a novation to be effective must be as to all of the parties to the original contract. Therefore it is argued that the findings to this extent are erroneous, and will not suffice to support the judgment of foreclosure rendered and entered pursuant to the issues raised by the cross-complaint. The findings do not, either expressly or impliedly, proceed upon the theory of a novation, and, so far as we have been able to ascertain, the agreement in question possessed none of the elements of a novation in so far as the security held by the defendant was concerned.

Judgment affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

35 Cal. App. 612

DOZIER v. NATIONAL BORAX CO. et al.

(Civ. 2246.)

(District Court of Appeal, First District, California. Dec. 17, 1917. Rehearing Denied by Supreme Court Feb. 14, 1918.)

1. Exchange of Property ⇨10 — Corporate Stock—Demand.

Under Civ. Code, § 1448, providing that if an obligation requires performance of one of two acts, in the alternative, the obligor has the right of selection, unless otherwise agreed, where defendants contracted to deliver to plaintiff within a certain time on demand either corporate stock or a named sum upon plaintiff's surrender of certain other stock, plaintiff's demand for the named sum only was insufficient, it being incumbent on him to make demand in the alternative for either the stock or cash, since section 1449, providing that if the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time fixed, etc., the right of selection passes to the other party, did not apply, because until plaintiff made proper demand there was no right of selection by defendants.

2. Alteration of Instruments ⇨12—Authority to "Fill in" Blanks in Contract.

Authority to a co-obligor to "fill in" an executed agreement for exchange of corporate stock in which were left blank the obligee's name and the numbers of shares of the respective stocks did not authorize such co-obligor to interlineate "or $2,700," creating an alternative obligation to deliver that sum or the stock; such interlineation being a most material alteration in the terms of the agreement.

3. Alteration of Instruments ⇨27(3)—Evidence of Agency—Altering Executed Contract.

Under Code Civ. Proc. § 1982, as to explaining alteration in writing produced in evidence, the burden of proving authority from the obligor to his co-obligor to make an interlineation making a material change in an executed contract for exchange of property is upon plaintiff obligee producing such contract and relying upon it as genuine.

4. Alteration of Instruments ⇨29—Proof of Agency—Altering Executed Contract.

In such case, proof that the alteration in the body and terms of the instrument was authorized by the obligor must be clear and conclusive to bind the obligee.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by M. R. Dozier against the National Borax Company and others. From judgment for plaintiff and order denying new trial, defendant L. W. Dake appeals. Reversed.

Duryea & Bantel, of San Francisco, for appellant. Thomas B. Dozier, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff for the sum of $2,700 and costs in an action to recover said sum upon an alleged written contract upon which the appellant Dake was a surety.

The facts of the case, in so far as they are undisputed, are as follows: The appellant L. W. Dake and one Max P. Fries were interested together as stockholders and directors in the National Borax Company, a corporation of which the said Max P. Fries was president and manager. In the month of February, 1913, a transaction was pending between Max P. Fries, as president of the National Borax Company, and M. R. Dozier, the plaintiff and respondent herein, involving an exchange of certain corporate stock, in which transaction, when the terms thereof were reduced to writing, the plaintiff had insisted that the said L. W. Dake should sign such writing as a surety for the performance of the agreement which was to be contained therein. On February 13, 1913, Max P. Fries requested said Dake to sign and acknowledge, and the latter did sign and acknowledge, the following document:

....

> One year after date upon demand, we or either of us, hereby agree to deliver to ......, ... shares of the capital stock of the California State Life Insurance Company, upon surrender to the undersigned or either of them, of his certificate of ...... shares of the capital stock of the National Borax Company.
>
> [Corporate Seal] National Borax Company,
> Max P. Fries, Pre. & Gen'l Mgr.,
> L. W. Dake.
>
> (Acknowledgment of L. W. Dake.)

This agreement in blank, when so signed by Dake, was delivered by him to Fries, who took the same to Woodland, the home of the plaintiff, and there the transaction was consummated between himself, acting on behalf of the National Borax Company, and the plaintiff, the said Fries, writing into the above document as executed by Dake words which caused it to read as follows:

> Woodland, Cal., February 25, 1913.
>
> One year after date upon demand, we or either of us, hereby agree to deliver to M. R. Dozier $200 cash and 140 shares of the capital stock of the California State Life Insurance Company, or $2,700.00 cash upon surrender to the undersigned or either of them, of his certificate of 250 shares of the capital stock of the National Borax Company.
>
> [Corporate Seal.] National Borax Company,
> Max P. Fries, Pres. & Gen'l Mgr.
> L. W. Dake.

The words "or $2,700.00 cash" in the foregoing form of the completed document were not written into any blank space therein, but were interlined at the place in which they appear in the handwriting of Fries.

A year later and on February 25, 1914, the said plaintiff demanded of the National Borax Company and also of the said L. W. Dake the payment of the $2,700 mentioned in said agreement, and at the same time offered to deliver and surrender to each or both of them the certificate for 250 shares of the National Borax Company as provided for therein. This demand not being complied with, the plaintiff instituted this action for the recovery of said sum. The defendant National Borax Company was never served with process in the action and never appeared therein, but the defendant L. W. Dake, being served, appeared with a demurrer to the sufficiency of the complaint, which demurrer being overruled he answered, denying the execution of the instrument sued on in so far as the insertion of the words "or $2,700.00 cash" was concerned, and affirmatively alleging that in the insertion thereof in said document said Max P. Fries acted without the authority of said defendant Dake and without his knowledge and consent.

Upon the trial of the cause the court rendered its findings and judgment in plaintiff's favor, and from said judgment and from an order denying defendant's motion for a new trial the said defendant L. W. Dake prosecutes this appeal.

The first point made by the appellant involves the sufficiency of the complaint. The plaintiff in his said complaint set forth in hæc verba the instrument upon which he depended for a recovery. He then averred that on the 25th day of February, 1914, he demanded from each and both of said defendants, the signers of the same, the sum of $2,700 cash, at the same time offering to deliver the 250 shares of the capital stock of the National Borax Company duly indorsed. The appellant insists that this averment of the plaintiff's demand is insufficient to form a basis for the present action, for the reason that by the terms of the writing as set forth in the complaint the defendants were given an option to deliver to the plaintiff upon his demand either the sum of $2,700 in cash, or $200 in cash and 140 shares of the California State Life Insurance Company; and hence that the plaintiff's demand should have been as broad as the defendants' said option. The respondent, on the other hand, contends that under the terms of the said writing the option and election was his to determine which of the two alternatives stated in the agreement he would require to be performed; and that he had elected to require and demand the cash payment of $2,700.

[1] We do not think the writing in question will bear the construction for which the respondent contends. Section 1448 of the Civil Code provides as follows:

> "If an obligation requires the performance of one of two acts, in the alternative, the party required to perform has the right of selection, unless it is otherwise provided by the terms of the obligation."

In view of this section of the Code, and under the clear terms of the writing itself, we are constrained to hold that the defendants and not the plaintiff had the option to determine which one of the two alternatives of their agreement they would elect to perform. The only election which this writing gives the plaintiff is that of determining whether he will insist upon its terms at all, for it will be noted that the agreement is unilateral in the respect that the plaintiff is not required to surrender to the defendants the 250 shares of the stock of the National Borax Company unless at the expiration of one year from the date of the writing he shall elect so to do, and shall manifest his election by making the alternative demand for which the writing expressly provides. It was therefore incumbent upon the plaintiff to make and aver his demand as broadly as the writing requires, and hence to have alleged a demand upon the defendants for the performance in the alternative by them and each of them of their agreement. The complaint does not allege that the plaintiff ever made this demand.

The respondent, however, contends that at the time of the commencement of his action the right of election under the agreement in question had passed to him by virtue of section 1449 of the Civil Code, which section reads as follows:

> "If the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose, or if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party."

The answer to this contention, however, is that according to the terms of the agreement there was no obligation, right, or duty reposed in the defendants herein to do anything in the way of an offer of performance of either one of the alternative conditions of said agreement to be by them performed until the plaintiff, by making a proper demand therefor, had set in motion both the duty of the defendants to offer to perform one or other of the said alternatives, and the right of said defendants to a surrender by plaintiff of his certificate of 250 shares of the capital stock of the National Borax Company. It was therefore first incumbent upon the plaintiff to make a proper and sufficient demand, and this, as we have seen, he is not alleged in the complaint to have done.

It follows that the complaint herein was insufficient in this respect to state a cause of action, and hence that the trial court was in error in overruling the defendants' demurrer upon that ground.

[2-4] The second point urged by the appellant herein is that there was no sufficient evidence to sustain the findings of the trial court to the effect that the appellant, L. W. Dake, authorized Max P. Fries, as his agent, to complete a pending negotiation with the plaintiff to the extent of binding the former to the alternative of paying the sum of $2,700, or of inserting in the agreement which he had already executed the words "or $2,700 cash." We have scrutinized this record carefully for the purpose of discovering such evidence if it exists sufficient to sustain the finding of the trial court in this regard, and have been unable to do so. The plaintiff and the defendant Dake never met prior to the execution of the writing in question, nor in fact thereafter until the time of the trial of the case. The plaintiff himself expressly deposes that the terms and conditions of the agreement between himself and Max P. Fries, acting for the National Borax Company, had been fully understood and agreed to prior to February 24, 1913, the date when Dake executed the writing in the form in which it was at the time he signed the same and prior to the filling in of its blank spaces and to the interlineation of the words "or $2,700 cash." The only witness who testified on the trial to the understanding between Dake and Fries respecting what the agreement was or was to be when fully filled in is the appellant Dake himself, who swears that there never was any understanding or agreement on his part to pay the sum of $2,700 to the plaintiff, nor did Fries have any authority from him to insert the words "or $2,700 cash" in the body of the written agreement. The only evidence to which our attention has been directed which countervails this showing is that of plaintiff's counsel and of one or two of his other witnesses respecting conversations had with the defendant Dake after the date of the maturity of said agreement and shortly before the institution of this action. By reference to these conversations the utmost extent to which the alleged admissions of the defendant go is his admission that he had authorized Fries to "fill in the agreement." Such an admission is clearly nothing more than an admission that Fries had authority from Dake to fill in the blank spaces in the agreement, but not to interlineate therein such material matter as the phrase "or $2,700 cash," for the insertion of which not only was there no blank space in the document, but clearly such an addition was not contemplated by its phraseology or form. The interlineation of these words in this writing obviously was an afterthought to its creation, and also obviously works a most material alteration in its terms; and, having been confessedly inserted after the execution of the writing by Dake, the burden of accounting for it was cast upon the plaintiff producing the writing and relying upon it as genuine under the express terms of section 1982 of the Code of Civil Procedure. In such case the proof that the alteration in the body and terms of the instrument was authorized by the party affected by it must be clear and conclusive in order that such party may be bound thereby. Walsh v. Hunt, 120 Cal. 46, 52 Pac. 115, 39 L. R. A. 697. The evidence in this case upon which the plaintiff relies to hold the appellant liable upon this altered writing falls far short of this measure, and is clearly insufficient in our opinion to sustain the foregoing finding of the trial court.

It follows that for this reason also the contention of the appellant Dake upon this appeal must be sustained.

It is unnecessary to discuss the other points presented upon the appeal from the order denying a new trial.

Judgment and order reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

35 Cal. App. 563

GINTJEE v. KNIELING et al. (Civ. 2269.)

(District Court of Appeal, First District, California. Dec. 13, 1917. Rehearing Denied by Supreme Court Feb. 11, 1918.)

1. PRINCIPAL AND SURETY 🔑149—CONTRACTOR'S BOND—TIME FOR SUIT.

Contractor's bond, providing that any suit brought thereon to recover any claims thereunder must be instituted within the time allowed by law for instituting a suit to enforce a lien claim, did not require the building owner to bring his suit on the bond on account of the contractor's default, within such time, since he could not within such time have been apprised of the extent of his damages when mechanics' lien and other claims could have been sued on after it would have been necessary for him to bring his action.

2. APPEAL AND ERROR 🔑1011(1) — SCOPE — FINDINGS OF FACT.

The finding of the trial court upon an issue as to which the evidence is substantially conflicting will not be disturbed on appeal.

3. EVIDENCE 🔑358 — BUILDING SPECIFICATIONS—ADMISSIBILITY.

In an action on a contractor's bond securing the performance of a contract of which the specifications for the building were expressly made a part, the specifications were admissible in evidence on the issue whether the architect's certificate of partial completion was correct and binding on both parties.

4. APPEAL AND ERROR 🔑1051(1)—HARMLESS ERROR.

In action on contractor's bond, where there was sufficient evidence to justify finding that architect's certificate of partial completion was correct, admission of other evidence consisting of specifications for the building if error, was harmless.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by T. J. Gintjee against A. Knieling and the Guardian Casualty & Guaranty Company. Judgment for plaintiff, and order denying new trial, and the Guaranty Company appeals. Affirmed.

S. Laz. Lansburgh, of San Francisco, for appellant. Brittain & Kuhl, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff and from an order denying a new trial in an action upon a building contractor's bond.

The plaintiff and the defendant Knieling entered into a written contract for the erection by the latter of a building upon the plaintiff's lot. The Guardian Casualty & Guaranty Company, appellant herein, became the surety upon the said contractor's bond. The first payment of $2,850 under the terms of the contract was to be made when the second floor joists were in place. The contractor proceeded with the erection of the building until November 28, 1913, upon which date, the architect having given his certificate that the second floor joists were in place, the plaintiff made said first payment of $2,850 to the contractor as provided in the contract. The contractor immediately thereafter abandoned the contract. On January 14, 1914, the owner filed in the record's office notice of the contractor's cessation of labor and abandonment of the contract. On June 2, 1914, the plaintiff commenced this action to recover upon the contractor's bond.

Two defenses were urged at the trial and are insisted upon on this appeal. These are: First, that the action was not commenced in time; and, second, that the plaintiff's said payment of $2,850 to the contractor was premature for the reason that the second floor joists were in fact not in place at the time such payment was made. The first of these defenses depends for its validity upon a construction of the terms of the bond upon which this suit is brought. This bond was given in compliance with the provisions of the mechanics' lien laws in force at the time of the making and execution of the contract in question, and, while it ran primarily in favor of the plaintiff as the owner of the premises, it also expressly stated, as the law required, that it should inure to the benefit of any and all persons performing labor upon or furnishing materials to be used in the work to be done under the contract so as to give such persons a right of action on the bond, in any suit to foreclose their liens for such materials or labor, or in a separate action brought upon the bond. It then proceeds to use the following language:

> "That any suit brought on this bond to recover any claims hereunder must be instituted within the time allowed by law for instituting a suit to enforce a lien claim."

It is the contention of the appellant that the provision of the bond last above quoted applies to every action to be brought on this bond whether by the owner or by lien claimants for materials or labor, and that as to all such actions they must have been commenced within the time for instituting suits to enforce lien claims, and hence, according to the appellant's said contention, this action by the owner, having admittedly been commenced after the statutory period for instituting actions upon lien claims against the plaintiffs' property had expired, it cannot be maintained. The respondent, on the other hand, insists that the clause in the bond above quoted cannot be held to apply to an action by the owner to enforce the obligation of the bond, but that it is only to be given application to actions upon the claims of materialmen and laborers; that otherwise the phrase "to recover any claims hereunder" in said clause of the bond would be superfluous and meaningless; and that in any event such a clause in the contractor's bond would be impossible and unreasonable in its application to the owner's right of action, for the reason chiefly that the extent of his right of recovery upon the bond could not be ascertainable until after the time for the commencement of actions by lien

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

claimants had expired, by which time, according to the appellant's contention, the owner's action would be too late.

[1] We are of the opinion that the respondent's contention in both the foregoing respects must be sustained.

The condition of the bond in question, in so far as it refers to the obligation of its surety to the owner, is that its principal, the contractor, shall faithfully perform his contract, and shall also pay in full the claims of all persons performing labor upon or furnishing materials to be used in the required work. It is obvious that no limitation of the time within which the owner must begin his action would be reasonable which should attempt to limit the owner's right of action to the same time within which lien claimants must begin their suits, for the sufficient reason that the owner could not know the extent of his detriment until either such actions had been commenced, or until the statutory time within which they were required to be commenced had fully expired. The construction of the clause of the bond in question for which the appellant contends would therefore, in our opinion, render it, as applied to the owner, unreasonable and therefore void. Fitger Brewing Co. v. American Bonding Co., 127 Minn. 330, 149 N. W. 539; Pac. Mut. Life Ins. Co. v. Adams, 27 Okl. 496, 112 Pac. 1026.

We do not feel, however, that we are required to give the clause in this bond under review such a construction, but rather to construe it by its own express terms as limited to actions to recover such claims thereunder as might be brought by lien claimants, and which would thus properly confine such litigants to the statutory limit for commencing suits for the enforcement of their lien claims.

[2] As to the second contention of the appellant, to the effect that the first payment by the owner to the contractor was prematurely made, we find it to be without merit for the reason that upon the issue as to whether or not the second floor joists were in place at the time such payment was made the evidence is substantially conflicting, and hence the finding of the trial court in plaintiff's favor upon that issue will not be disturbed upon appeal.

[3, 4] We also find no merit in the appellant's contention that the court erred in admitting in evidence the specifications for the purpose of showing that the architect's certificate as to the second floor joists being in position was binding upon the contractor, and hence upon the appellant, for the twofold reason that the specifications were expressly made a part of the contract, and for that reason were admissible for all purposes; and also that, there being sufficient evidence otherwise to justify the trial court in its finding that the second floor joists were actually in position at the time said first payment was made, the error, had the court made any, in its admission of the specifications in evidence, would have been harmless.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(35 Cal. App. 628)

EASTMAN v. SUNSET PARK LAND CO. et al. (Civ. 1970.)

(District Court of Appeal, Second District, California. Dec. 17, 1917. Rehearing Denied by Supreme Court Feb. 14, 1918.)

1. BILLS AND NOTES 🔑162—NEGOTIABILITY—NOTE PAYABLE IN UNITED STATES GOLD COIN—"PAYABLE IN MONEY ONLY."

A note payable "in United States gold coin" is a note payable in money only, within Civ. Code, § 3088, requiring a negotiable instrument to be "made payable in money only," and hence is a negotiable instrument.

2. BILLS AND NOTES 🔑160—NEGOTIABILITY—SUM CERTAIN—ATTORNEY'S FEES—"NEGOTIABLE INSTRUMENT."

Since, although Civ. Code, § 3087, defining a "negotiable instrument" as a promise to pay a certain sum, is not in direct terms amended by section 3088, making the exception that a note may provide for the payment of attorney's fees and costs in case of suit to collect it, it is necessarily modified thereby, a note providing for such attorney's fees as the court may adjudge reasonable in case of suit to collect is a negotiable instrument, although not for a sum certain.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negotiable Instrument.]

3. DAMAGES 🔑71—ATTORNEY'S FEES.

Expenditures made for attorney fees in an action based upon a contract containing a stipulation for such fees are in the nature of special damages incidental to the breach of the contract and which, according to the terms of the contract, are to be compensated for in addition to recovery of the principal sum due.

4. BILLS AND NOTES 🔑160—NEGOTIABILITY—ATTORNEY'S FEES.

Since it would not be impracticable or extremely difficult for the court, in action on a note, to fix the actual damage in the way of necessary attorney's fees suffered by the noteholder, an agreement attempting to fix the amount of such damage in anticipation of a breach of the obligation to pay the note is not enforceable, under Civ. Code, §§ 1670, 1671, as to contracts providing for damages for their breach.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by George L. Eastman against the Sunset Park Land Company and another. From judgment for plaintiff, the named defendant appeals. Affirmed.

John E. Biby, of Los Angeles, for appellant. Emmet H. Wilson, of Los Angeles, for respondent.

CONREY, P. J. The plaintiff, being the owner of a promissory note made by the defendant Sunset Park Land Company in favor of defendant T. G. Rickman, brought this action and obtained judgment, from which the Sunset Park Land Company appeals. It is admitted that the judgment should be sustained if the note was a negotiable instrument. Appellant contends that the note was not a negotiable instrument because by its terms it was made payable "in United States gold coin," and because it contains an agreement that:

> "In case suit is instituted to collect this note or any portion thereof, we promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit."

Section 3088 of the Civil Code, as it was when said note was made, read as follows:

> "A negotiable instrument must be made payable in money only and without any condition not certain of fulfillment, except that it may provide for the payment of attorney's fees and costs of suit, in case suit be brought thereon to compel the payment thereof."

According to section 3087, Civil Code:

> "A negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer, in conformity to the provisions of this article."

[1-4] We are of the opinion that a note which is made payable in United States gold coin is a note payable in money only, notwithstanding the fact that the note prescribes a particular kind of money. Appellant claims that the negotiable character of the note is destroyed in that by its terms it does not provide for the payment of a sum certain. Conceding that the sum is not certain, it is none the less our duty to give full effect to the exception stated in section 3088, notwithstanding that the amendment which enacted that exception did not in direct terms amend section 3087. In legal effect, it necessarily modifies the definition of a negotiable instrument by leaving the amount of the attorney's fees uncertain. Even if the note had provided for attorney's fees in a stated sum, the amount would remain uncertain, since that would be only the maximum sum, and the court might allow only a smaller amount, if the sum stated in the note exceeded reasonable limits. This conclusion results from the fact that expenditures made for attorney fees in an action based upon a contract containing a stipulation for such fees are in the nature of special damages incidental to the breach of the contract and which, according to the terms of the contract, are to be compensated for in addition to recovery of the principal sum due. Prescott v. Grady, 91 Cal. 518, 27 Pac. 755. It cannot be said that from the nature of the case it would be impracticable or extremely difficult for the court, in the event of a breach of the contract and an action thereon, to fix the actual damage thus suffered by the holder of the note. Therefore an agreement attempting to determine the amount of such damage in anticipation of a breach of the obligation is not enforceable. Civ. Code, §§ 1670, 1671. The maximum sum to be thus recovered might be limited in the contract, only for the reason that in the absence of an agreement for attorney fees no such fees could be recovered at all.

We think that the note in question was a negotiable instrument, and therefore the judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

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35 Cal. App. 643

CREELY v. COHEN. (Civ. 2256.)

(District Court of Appeal, First District, California. Dec. 18, 1917. Rehearing Denied by Supreme Court Feb. 14, 1918.)

1. Attorney and Client 🔑130—Acting in Different Capacities—Attorney in Fact.
Compensation for services as attorney in fact may be recovered although plaintiff also acted as attorney for defendant.

2. Appeal and Error 🔑222—Reserving Grounds for Review—Reducing Judgment.
A defendant, failing to be represented at the time for hearing a new trial motion, cannot complain of an order then made reducing plaintiff's judgment.

3. Damages 🔑228—Verdict—Reduction.
A trial court may reduce a verdict to an amount justified by the evidence.

4. Appeal and Error 🔑1033(10)—Harmless Error—Reducing Verdict.
A defendant cannot complain that the trial court reduced a verdict against him.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by James H. Creely against E. G. Cohen. Judgment for plaintiff, and defendant appeals. Affirmed.

Jordan & Brann, of San Francisco, for appellant. George E. De Golia, of Oakland, for respondent.

LENNON, P. J. This is an action in which the plaintiff sought to recover from the defendant $10,569.66 for personal services alleged to have been rendered by him to said defendant in several capacities during a series of years. The complaint is in three counts, the first count averring an indebtedness amounting to $7,190 for the plaintiff's professional services as an attorney at law; the second count averring an indebtedness of $3,325.66 as a balance due for services in the nature of those performed by an attorney in fact in connection with the management, superintendence, and conduct of several properties of the defendant during the years from 1910 to 1914, inclusive; the third account for services and fees as a notary public aggregating the sum of $54. The answer put in issue all of the averments of the complaint, and also presented a plea of the statute of limitations as a bar to each and every item in the plaintiff's several counts. The trial was had before a jury, which returned a general verdict in the plaintiff's favor for the sum of $8,900, for which sum judgment was entered. The defendant moved for a new trial, which came on regularly to be heard, and upon the hearing of which the court made an order determining that the amount of the verdict and judgment should be reduced to $8,130, and providing that if the plaintiff should consent to reduction the motion for a new trial would be denied. The plaintiff duly filed his consent to such reduction of his judgment, and from such modified judgment and from the order denying her motion for a new trial the defendant prosecutes this appeal.

Upon the trial of the cause and upon this appeal the defendant has not disputed the reasonableness of the several charges for professional services alleged and proven to have been rendered by the plaintiff to the defendant under the first count in the complaint, but denies that such professional services were rendered to or on behalf of the plaintiff in a number of the cases and legal matters for which the plaintiff seeks to hold the defendant liable. And the defendant also at the trial sought and upon this appeal seeks to have the aggregate amount of the plaintiff's recovery upon his first alleged cause of action reduced by showing that as to all professional services rendered prior to the 11th day of November, 1910, the bar of the statute of limitations applies; second, that as to a number of specified cases the plaintiff at the trial waived any claim for fees; and, third, that in certain other cases the services for which the plaintiff claimed fees were not rendered to or on behalf of the defendant. As to the second count, the defendant contends that the plaintiff is seeking to recover as an attorney at law for services which are not in the nature of professional services, which it is urged he cannot do; and further contends that the plaintiff was never employed to perform any of the services for which he seeks to recover in his second count, and that if any such services were performed they were either for other persons than the defendant or were voluntary and without expectation or agreement as to compensation. As to the third count for notarial services and fees, the defendant merely seeks to minimize their amount. Finally the appellant claims that the action of the trial court in reducing the amount of the plaintiff's judgment on motion for a new trial was an unauthorized action on its part, undertaken in the absence of the defendant and for which no cause is shown, or basis of computation given, and which was therefore prejudicial.

[1] Taking up these several contentions of the appellant in their order, we find that it is true that as to the plaintiff's alleged legal services rendered prior to November 11, 1910, the plea of the statute of limitations applies; but we also find from an examination of the record that the plaintiff at the trial and in open court and in the presence of the jury expressly waived all compensation for services in lawsuits which were completed prior to November 11, 1910; and we further find that the plaintiff at the same time and place also expressly waived all claim for compensation for legal services rendered in certain specified cases aggregating the sum of $460, and that the plaintiff also then and there waived all compensation for services other than as an attorney at law rendered prior to November 11, 1910, and embraced in his second alleged cause of action; and that he also waived in the same manner all notary fees in excess of $21. But after taking into account these express admissions and waivers on the plaintiff's part, and deducting their aggregate from the plaintiff's claim under his several causes of action, we find from a somewhat careful and detailed review of the evidence that the plaintiff sufficiently made out a case for the recovery of an amount totaling $6,355 upon his first cause of action; as to the first objection which the appellant aims at the plaintiff's right to recover any sum at all upon his second cause of action we find no merit in it, for the reason that it is apparent upon the face of the plaintiff's complaint and from his testimony in support thereof that he is not seeking to recover by his second account for services rendered in the capacity of an attorney at law, but rather as an attorney in fact; and, since he has sufficiently shown that he rendered the services in question, it cannot be successfully maintained that the fact that the plaintiff is an attorney at law would debar him from a recovery for the reasonable value of services of the character of those detailed in his testimony.

The only contention of appellant having any semblance of merit with regard to the plaintiff's second alleged cause of action is that as to much of said services they were unauthorized by the defendant, and in a number of instances were performed for the apparent benefit of other persons than the defendant; but in this regard we think the evidence sufficiently shows that these services were performed in the main at the instance and request of W. G. Cohen, a son of the defendant, who was acting throughout the entire period of plaintiff's alleged service as her general agent and attorney in fact, having full authority to engage and direct the plaintiff in the performance of the services in question; and that whatever was done from time to time by the plaintiff under the said W. G. Cohen's direction was done for and on behalf of the defendant and for which she would be responsible to the extent of their reasonable value under such direction. The plaintiff and his witnesses testified that these miscellaneous services were reasonably worth the sum of $4,000. In his complaint and upon the trial the plaintiff admitted credits aggregating $2,186, leaving a balance due upon his second cause of action of $1,814; and this sum, with $21 testified as due for notary fees, added to the sum of $6,355 due upon the plaintiff's first cause of action, would amount to a total of $8,190, for which sum we think upon a fair review of the evidence he would have been entitled to a verdict. The jury actually rendered its verdict in plaintiff's favor for the sum of $8,900; and it was this verdict which the court upon motion for a new trial undertook to reduce to the proper amount by requiring the plaintiff to remit from his judgment all in excess of $8,130. The defendant complains that this action was taken by the trial court in the absence of her counsel, and further contends that the court had no power to thus reduce the amount of the original award.

[2-4] Neither of these contentions has any merit. The court's order reducing the amount of the plaintiff's judgment was made upon the day and hour to which the matter of the motion for a new trial had been regularly continued and set for decision; and if the defendant's counsel did not see fit to be present she cannot be heard to complain of the court's action in their absence. As to the power of the judge of the trial court over the verdict of the jury in the way of reducing such verdict to an amount justified by the evidence, such power is too well established in this state to require even the citation of authority. Besides, the defendant cannot complain of the action of the trial court in reducing the amount of its liability.

The defendant urges certain alleged errors of law committed by the court during the trial of the cause. Some of these are covered by what has heretofore been said; and as to the others we deem them of insufficient merit to warrant their separate consideration or to justify a reversal of the case.

Judgment and order affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

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35 Cal. App. 642

EDWARDS et al. v. GEAR et al. (Civ. 2279.)

(District Court of Appeal, First District, California. Dec. 15, 1917.)

COMPROMISE AND SETTLEMENT 🔑23(3)—SUIT TO SET ASIDE—EVIDENCE.

In a suit to set aside a settlement of an action on a promissory note in favor of an indorsee for collection merely and for an injunction, evidence *held* to sustain a finding that defendant in the suit on the note knew that plaintiff therein was not the true owner.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Suit by Le Roy M. Edwards and others against Lewis S. Gear and others, to set aside a settlement and for an injunction. Judgment for plaintiffs, and defendants appeal. Affirmed.

Edward R. Eliassen and De Lancey C. Smith, both of Oakland, for appellants. Le Roy M. Edwards, of Los Angeles, and L. R. Weinmann, of Alameda, for respondents.

LENNON, P. J. Lewis S. Gear, the defendant, gave his note on May 13, 1909, to Wilkie L. Edwards, who transferred the note to his sister, Lulu E. Chase, and his brother, Le Roy M. Edwards. Le Roy Edwards sent the note to the firm of Weinmann, Wood & Cunha of San Francisco for collection, and it was assigned to William F. Herron, a clerk in their office, solely for the purpose of collection. Suit was commenced in 1910 in the name of William F. Herron against Gear. Judgment went against Gear for the full amount of the note. Gear appealed, and pending the appeal offers of settlement by Gear were referred to Edwards and by him refused.

While the appeal was pending Gear and Herron met and entered into an agreement of settlement of the case on April 30, 1914, without the knowledge or consent of Edwards, Lulu Chase, or the counsel on either side. At the time of the settlement the judgment of the lower court, together with interest and costs, had grown to a sum in excess of $3,000. Gear settled with Herron for $1,000, but did not report the settlement or pay any of the proceeds thereof to Edwards and Chase, the owners of the note. The agreement of settlement was not placed of record. Herron appeared on November 20, 1914, before this court, and argued the case of Herron v. Gear, which seven months before had been settled. Gear appeared at the same time by his attorney, but no intimation was given that the case had been previously settled. The judgment was affirmed. On March 12, 1915, Chase and Edwards, having learned of the settlement, commenced an action to set aside the same upon the ground that it was procured and executed through the joint fraud of Herron and Gear. Injunctive relief was also sought by the complaint in the action to enjoin the satisfaction of the judgment in the case. The court below rendered and entered judgment for the plaintiffs, from which the defendant Lewis S. Gear and the defendants Ada P. Gear and Anna P. Linnell, who were sureties on the appeal bond in the original case, have appealed.

The only point made in support of the appeal worthy of discussion is the insufficiency of the evidence to support the judgment. In this behalf it is conceded that if the evidence shows that Gear knew, prior to his attempted settlement with Herron, of the judgment that the plaintiffs were the actual owners of the note, and that Herron held it only for the purpose of collection, then Gear's settlement with Herron was a fraud upon the plaintiffs and the judgment was proper.

A first reading of the transcript satisfies us that there was ample evidence adduced at the trial of the case to support the finding of the lower court that Gear knew that Chase and Edwards were the real owners of the note, and that Herron held the note for collection only.

A circumstance showing such knowledge by Gear was the deposition of Herron, taken and offered in evidence in the presence of Gear in the suit of Herron v. Gear on behalf of Gear, and before the settlement, in which Herron stated that Mrs. Chase was one of the parties in interest in the matter, and that the note had been assigned to him (Herron) merely for collection. It appears also from Herron's testimony that he in effect told Gear that Edwards was the owner of the note, and Edwards' testimony shows that Gear dealt with him as owner. It further appeared in evidence upon the trial of the present case that Gear himself, prior to the settlement in suit and to the trial of the case of Herron v. Gear, discussed with the attorney for Herron the latter's interest in the note, and that during that discussion Gear would not admit "that Herron was the owner of the note * * * except for collection."

It is true that Gear testified that he did not know that Herron was not the owner of the note, but this merely presents a conflict in the evidence. The lower court resolved that conflict against the defendant Gear, and therefore, under the well-settled rule, we will not interfere with the finding of the lower court.

Judgment affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

(35 Cal. App. 810)

HERRON v. GEAR. (Civ. 1767.)

(District Court of Appeal, First District, California. Dec. 15, 1917.)

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by William F. Herron against Lewis S. Gear. Judgment for plaintiff, and defendant appeals. Affirmed.

Edward R. Eliassen and De Lancey C. Smith, both of Oakland, for appellant. Leroy M. Edwards, of Los Angeles, and L. R. Weinmann, of Alameda, for respondent.

PER CURIAM. This is an appeal from an order denying the defendant's motion to compel the plaintiff to enter a satisfaction of the judgment originally entered in the court below and subsequently affirmed upon appeal to this court. Herron v. Gear, 26 Cal. App. 18, 145 Pac. 731.

The motion in question was made after the remittitur in the case of Herron v. Gear went down from this court and during the trial of the case of Le Roy M. Edwards et al. v. Lewis S. Gear et al., 170 Pac. 645, wherein judgment was rendered in favor of the plaintiffs and this day affirmed by this court. The trial of the latter case and the hearing of the motion now under consideration were heard jointly by the court below, and the motion was submitted upon the evidence adduced at the trial of that case.

It is now insisted that the evidence thus adduced not only warranted, but should have compelled, the granting of the motion. In this behalf the argument of counsel for the defendant and appellant is identical with the argument made against the sufficiency of the evidence to warrant and support the judgment in the case above referred to.

Our conclusion in that case was that the evidence amply supports the judgment, and, that being so, the court below was justified upon the same evidence in denying the motion to compel the plaintiff to satisfy the judgment.

The order appealed from is affirmed.

(35 Cal. App. 619)

STRECKER v. GAUL. (Civ. 1719.)

(District Court of Appeal, Third District, California. Dec. 17, 1917.)

1. DAMAGES 🔑40(1) — TORTS—PROSPECTIVE PROFITS.

Under Civ. Code, § 3333, as to damages from noncontractual breach of obligation, prospective profits are allowable as damages for tort, but they must be clear, proximate, and the natural results of the wrong, and must be confined to the principal thing complained of and to its naturally attendant consequences.

2. DAMAGES 🔑112 — MEASURE OF DAMAGES TO HAY CROP BY FLOODING.

In action for damages to hay crop by flooding, damages were the market value of the crop at plaintiff's river landing at harvest time, less the cost of cutting, baling and hauling the hay to the landing.

3. APPEAL AND ERROR 🔑1178(6)—DISPOSITION ON APPEAL.

On plaintiff's appeal from that part of judgment in his favor allowing only nominal damages because of insufficiency of evidence as to damages, the appellate court, determining there was sufficient evidence and uncontradicted, will not order new trial, but the judgment will be affirmed as to all except the part appealed from, and that part reversed, and the cause remanded, with directions to make findings on the issue of damages and to amend the judgment in accordance with such findings.

Appeal from Superior Court, San Joaquin County; Frank H. Smith and J. A. Plummer, Judges.

Action by Herman F. Strecker against A. Gaul. Judgment for plaintiff, and from order denying new trial plaintiff appeals. Judgment affirmed in part and reversed in part, and cause remanded with directions.

A. H. Ashley, of Stockton, for appellant. S. M. Spurrier, of Stockton, for respondent.

CHIPMAN, P. J. This action is brought by plaintiff for the abatement of a nuisance and judgment for damages caused by the erection of said nuisance. The court found that the obstruction complained of constituted a nuisance, and entered judgment for its abatement, but denied other than nominal damages of $1. Plaintiff appeals from the order denying his motion for a new trial, and brings the record here upon bill of exceptions.

It appears that plaintiff was, at the commencement of the action, the owner of certain farming lands situated on Roberts Island, San Joaquin county, and that Johanna F. Krenz was the owner of adjacent lands which she had leased to defendant Gaul, who was, prior to and at the time of the action in possession and under full control thereof, and defendant admitted at the trial that he was solely and exclusively responsible for all the acts complained of in the complaint.

The course of the proceedings in this action was somewhat unusual, and should be here stated. The complaint was filed March 21, 1908, and the answer June 3, 1908, and the action came on for trial October 19, 1909, before the Hon. C. W. Norton, as judge, and the testimony was completed November 22, 1909. It was thereafter ordered to be submitted on briefs. Frank D. Nicol, Esq., was the attorney for defendant, in sole charge of the action for him, and the intervening death of Mr. Nicol halted further proceedings until January 6, 1913, when the condition of the case was brought to the attention of the court, and Messrs. Nutter & Orr, successors to Nicol & Orr, disclaimed any further employment in the case, and the cause was set for retrial on February 6, 1913. On February 11, 1913, A. L. Levinsky, Esq., was substituted as attorney for defendant, and Hon. C. W. Norton, who presided as trial judge, being incapacitated by illness, on February 21, 1913—

> "a written stipulation for the submission of this cause for decision, signed by the attorneys for the plaintiff and the defendant, A. Gaul, was filed herein. Thereby it was stipulated that this action be submitted for decision to the undersigned judges, Frank H. Smith and J. A. Plummer, upon the pleadings, the record and files herein, and the evidence (including exhibits and stipulations) contained in, or identified by, the 239-page transcript of the evidence taken at said trial and thereafter transcribed by Court Reporter Edgar W. Butters (each party reserving and preserving all rights, objections, and exceptions as shown by said reporter's transcript); and upon briefs in behalf of the respective parties. Said stipulation further provided that said judges might go upon and view the lands and premises involved, in such manner and with such aid, as they deemed advisable, helpful, and just; and that said action should be dismissed as to the defendants sued herein by the fictitious names of Mary Moe and John Doe. The said two judges having gone upon and viewed said lands and premises, and considered the pleadings, records, and files herein, the reporter's transcript of said trial, the exhibits and the briefs of the counsel for the respective parties, and the cause being submitted, the court now makes, upon the issues presented by the pleadings, the following findings of facts."

The court found that at the times mentioned in the complaint there has been a natural way for seepage water and rainwater to pass through the lands of the plaintiff and through the lands of Johanna Krenz, mentioned in the complaint, in a general northwesterly direction and through the lands controlled by the defendant, Gaul; that said natural way of said seepage and rainwater so passing through the said lands of plaintiff and said lands controlled by defendant, Gaul, "was, in its natural condition, sufficient to conduct and carry away nearly all of the seepage waters and rainwaters that accumulated upon the lands of" certain owners (mentioning lands of various owners as stated in the complaint), "and the lands of plaintiff"; that by said natural way and depression, all of the said waters which so accumulated on said lands were naturally conducted and carried away from the lands of plaintiff except a small amount estimated at 34 acres, and was also conducted across a portion of the lands of said Johanna F. Krenz "and there remained until absorbed by the earth or evaporated"; that by means of said natural way, said seepage and rainwaters were prevented from accumulating and remaining on, and from flooding, said lands of the plaintiff other than said 34 acres; "that on March 22, 1907, and before the construction of the obstruction hereinafter mentioned, the San Joaquin river had so risen, and rainwater had so fallen, that seepage and rainwaters naturally accumulated in, and were flowing through, said natural waterway (and were thereby being drained upon the lands of plaintiff into said natural way), and from said lands of plaintiff were naturally flowing and naturally being drained to and upon said land of said Johanna F. Krenz controlled by said Gaul"; that on said day last mentioned, defendant constructed and ever since has kept maintained upon the lands of said Johanna F. Krenz "a dam or embankment across the bed and channel of said natural waterway, of sufficient height to stop and obstruct the natural or any flow of said seepage or rainwater in or through said natural waterway, and by the said embankment and dam, so constructed, kept, and maintained by said Gaul, the natural flow from said lands of plaintiff of said seepage and rainwater, in and through said natural waterway was stopped and obstructed," and was thereby "backed up, accumulated upon, and made to overflow and cover portions of plaintiff's lands in addition to and other than said 34 acres which was naturally, usually, and ordinarily overflowed and submerged by surface waters; that on the said portions of plaintiff's lands (shown by the evidence to be about 60 acres), other than said 34 acres, there was growing at such time, and there was, a valuable stand of clean-growing oats and clean-growing wheat; that by the said overflow, the said portions of plaintiff's lands, other than said 34 acres usually submerged, was so overflowed and kept wet for such a time and to such an extent that the said crop of oats and wheat growing on said portions of land were destroyed and damaged; that such damage to said growing crops was the direct and natural result of the said acts of said defendant, Gaul; * * * that thereby the plaintiff's said growing crop was damaged and thereby plaintiff sustained and sustains loss and damage; that the amount of plaintiff's said damage is (from a practical standpoint) unascertainable from the evidence—that is to say, it is absolutely impossible for this court to determine from the evidence the amount of such damages suffered by the plaintiff—that this court can only guess at the amount of such damage; that, while the plaintiff has been damaged, since the exact amount of the damages sustained by him is not definitely shown by the evidence, his damages must be found to be nominal." Further describing the situation at that time through the acts of the defendant, it was further found "that thereby the plaintiff was caused additional expense in harvesting on his own land his said crops of hay west of said natural waterway, and he was thereby prevented from handling said crops of hay west of said natural waterway with expedition, and thereby plaintiff sustained inconvenience, damage, and discomfort; that the evidence does not show, and the court from the evidence is unable to find, the amount of such expense or damage."

Finding X is as follows:

> "That the keeping and maintenance of each of said two dams or embankments by the defendant, Gaul, across said natural waterway was and is a nuisance and obstruction to the free use by the plaintiff of, and interferes with, his said lands, and with his comfortable and profitable use and enjoyment thereof; that such obstruction and interference have been, are, and will be, continuous, continuing, and against the will of the plaintiff, and will cause the plaintiff irreparable damage and irreparable injury, unless such nuisance be abated, or modified; that it is impossible from the evidence for the court to determine what was the height of the said two dams or embankments at the time of said trial, or at the time of the submission of this said cause; that in the view by the court of said dams, the same had apparently been washed down since the trial of this action in October and November, 1909; that the map (and the levels thereon) made by Engineer Henry B. Budd (a witness herein), satisfy the court that if said dams be so cut down that their height will be less than an elevation of 24 feet on said map, a sufficient waterway will be afforded for such waters, and that said dams so reduced in height will not hold back upon the lands of plaintiff any waters which would, without the existence of said dams, find their way off over the lands of the defendant."

As conclusions of law, the court found that plaintiff was entitled to judgment that the said two dams mentioned in his complaint be abated to the extent that they be cut down below an altitude of not exceeding 24 feet above the datum plane used by the surveyor in drawing said map, to wit, defendant's Exhibit No. 8; that plaintiff is entitled to recover from the defendant nominal damages in the sum of $1 and his costs of suit, including the cost of the view of said lands by the court; that plaintiff is entitled to no other or further judgment herein. Judgment was accordingly entered

Quoting from plaintiff's reply brief, we find:

> "The appellant attacks solely: (1) That portion of finding 6 * * * reading as follows: 'That the amount of plaintiff's said damage is (from a practical standpoint) unascertainable from the evidence—that is to say, it is absolutely impossible for this court to determine from the evidence, the amount of such damages suffered by the plaintiff—that this court can only guess at the amount of such damage; that, while the plaintiff has been damaged, since the exact amount of the damages sustained by him is not definitely shown by the evidence, his damages must be found to be nominal.' (2) The last sentence of finding 7 * * * reading as follows: 'That the evidence does not show, and the court from the evidence is unable to find, the amount of such expense or damage.' (3) The implied finding that plaintiff was not (shown by the evidence to be) damaged as to 64.74 acres of hay crop and in the sum of $2,209.25."

As the defendant does not appeal, and as the foregoing presents the only objection to the findings, the controversy is reduced to the single question whether there is sufficient evidence in the record to have justified the court in making a definite finding as to the damages suffered by the plaintiff. We have carefully examined the transcript with the view of ascertaining the evidence therein found upon this point. The plaintiff testified that the dam erected by defendant caused the water to overflow about 60 acres of his land, and which "drowned and killed this grain of mine. I cut and baled the remainder of the crop from that field on each side of the road," referring to the lands adjacent to the overflowed land. He further testified:

> "From this crop that was not drowned, I obtained an average of 3½ tons per acre, or a little better. I consider the crop that was drowned was on the best land I have. It was better soil than that where the crop was not drowned for these same character of crops. That drowned, was sown and cultivated by me in the same way as the other that I harvested. It was plowed, drilled in, harrowed—best attention given—like any farmer 'putting in' grain in good shape, just the same as the other. Prior to the time this water came upon it, it looked at least 34 per cent. better to me than the balance that was not drowned. In May, if this hay had been cut and baled and hauled to the landing, it would have brought $12 to $13 a ton. To bale and cut it would probably cost about $3 a ton; hauling it from the field to the landing would have cost about two bits a ton (a quarter of a dollar)."

Again, he testified:

> "Speaking of my particular crop in 1907, that which was drowned out, was drowned out after Gaul's first dam was put in. My grain was drowned, and I got nothing from the grain that was drowned on the land. * * *"

A. C. Feck, a witness for defendant, testified:

> "We cut hay commencing in May and harvest grain later on. We never harvest in the month of March or April. I had no oat hay in 1907, and do not know the price of oat hay. Good wheat hay was worth from $10 to $12 a ton in 1907."

Defendant Gaul testified:

> "I am familiar with the average production of lands of the quality and character of plaintiff's in that neighborhood in hay. A good crop on the average under most favorable conditions is from 2½ to 3 tons per acre. We har-

vest hay generally in the middle of May or the latter part. The market price of hay during the market season of 1907 in that neighborhood was from $10 to $12 after it was baled."

There was no evidence of the value of the growing crop as it stood March 22, 1907. There was evidence that the land adjoining the overflowed land produced from 3 to 3½ tons of oat and wheat hay per acre; that the overflowed land was, in fact, more productive than the adjacent land; that the crop had been put in by plaintiff in a proper way and by the same method in both the overflowed land and the land adjacent. Plaintiff testified that if the hay from this overflowed land had been cut in May, and baled and hauled to the landing, it would have brought $12 per ton, less $3 for cutting and baling and 25 cents for hauling to the landing. There was no evidence as to any intervening cause between March 22d and May to affect the maturing of the crop except as caused by the further overflowing. The court found that the crop was destroyed through the acts of defendant. It also found that he was materially damaged thereby, but that the court could find no evidence in the record upon which the value of the crop destroyed could be definitely ascertained. The measure of damages in cases of this character is found in section 3333, Civil Code, reading:

> "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

It was held in Smith v. Los Angeles & Pacific Railway Co., 98 Cal. 210–214, 33 Pac. 53, 54:

> "The detriment must be 'proximately caused' by the breach; that is, it must be the efficient cause, the one that necessarily sets the other causes in operation."

See Shoemaker v. Acker, 116 Cal. 239–244, 48 Pac. 62.

The findings leave no doubt that the detriment here shown was proximately caused by defendant's acts complained of.

[1] Prospective profits are allowable as damages for tort, but they must be clear, proximate, and the natural results of the wrong, and must be confined to the principal thing complained of and to its naturally attendant consequences. Martin v. Deetz, 102 Cal. 55–68, 36 Pac. 368, 41 Am. St. Rep. 151.

> "That which is the actual cause of the loss, whether operating directly, or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed." Hawthorne v. Siegel, 88 Cal. 159–167, 25 Pac. 1114, 1115, (22 Am. St. Rep. 291).

The question of the measure of damages in cases of this class arose in Teller v. Bay & River Dredging Co., 151 Cal. 209, 212, 90 Pac. 942, 943 (12 L. R. A. [N. S.] 267, 12 Ann. Cas. 779). It was there stated:

> "The true measure of damage for the total destruction of a growing or standing crop is the value of the crop in the condition it was at the time and place of destruction."

While the court states that this is the unquestioned rule, the court further stated:

> "The question thus turns upon the mode of ascertaining the value of a growing crop at the time of its destruction. * * * The true rule in arriving at the value at the time of destruction is that laid down by the trial court and abundantly supported by authority"—citing Lester v. Highland Boy Gold Min. Co., 27 Utah, 470, 76 Pac. 341, 101 Am. St. Rep. 988, 1 Ann. Cas. 761, and in approval of the rule there laid down, the following is quoted from that case: 'In cases of destruction of growing crops it is proper and important to introduce and admit evidence showing the kind of crops the land is capable of producing, the kind of crops destroyed, the average yield per acre of each kind on the land not destroyed and on other similar lands in the immediate neighborhood, cultivated in like manner, the stage of growth of the crops, at the time of injury or destruction, the expense of cultivating, harvesting, and marketing the crops, and the market value at the time of maturity, or within a reasonable time after the injury or destruction of the crops. And' * * * while all such evidence may be considered by the jury in determining the amount of damages, if any, still the true measure of compensation is the value of the crops in the condition they were in at the time of their injury or destruction."

The court then cites Shoemaker v. Acker, supra, and other authorities, stating that:

> "The introduction of such evidence as the means of arriving at value is distinctly approved, and the same proposition is recognized as containing the true element for determining damage in Ellis v. Tone, 58 Cal. 289."

This question was considered to a considerable extent in this court in an opinion written by Justice Hart in Dennis v. Crocker-Huffman Land & Water Co., 6 Cal. App. 58–65, 91 Pac. 425.

[2] The detriment proximately caused by the tort in this case under the rule above stated is to be measured by the market value at plaintiff's landing on the San Joaquin river at harvest time. From the evidence already quoted, it appears without conflict that plaintiff properly seeded the land, and that the crop had reached a stage justifying the attorney for defendant to state: "We will admit that the grain was in a fine condition." There remained, therefore, to determine the cost of cutting, baling, and hauling the hay to plaintiff's landing. These items should be deducted from the market value of the hay at the landing, and the balance, after such deduction, would constitute the damages to which plaintiff was entitled.

We think there is ample evidence to have justified the court in finding as to the quantity of hay that would have been produced on the flooded land and its value at the plaintiff's landing, the market place.

We think, therefore, that the finding "that the amount of plaintiff's said damage is (from a practical standpoint) unascertainable from the evidence—that is to say, it is absolutely impossible for this court to determine from the evidence the amount of such damages suffered by the plaintiff"—is not sustained, nor is the further finding "since the exact amount of the damages sustained by him is not definitely shown by the evidence, his damages must be found to be nominal."

[3] We do not think it necessary that a new trial be ordered, as the evidence is sufficient and is uncontradicted from which findings may be made upon the question of plaintiff's damages. Riverton Ferry Co. v. Bridge Co., 179 Pa. 466–470, 36 Atl. 186.

The judgment is affirmed in all respects except that portion adjudging the plaintiff to be entitled to nominal damages only, as to which the judgment is reversed. The cause is remanded, with directions to the court to make findings on the issue of damages in accordance with the rule in this opinion stated, and upon the evidence found in the record, and to amend the judgment in accordance with such findings.

We concur: BURNETT, J.; HART, J.

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35 Cal. App. 537

ALAMEDA COUNTY v. CHAMBERS, State Controller. (Civ. 1756.)

(District Court of Appeal, Third District, California. Dec. 11, 1917. Rehearing Denied by Supreme Court Feb. 7, 1918.)

1. STATES 🔑119—APPROPRIATIONS—PUBLIC PURPOSES.

St. 1917, p. 1668, appropriating $30,000 to pay claims of various persons and counties against the state for losses sustained by fire in the state agricultural society's pavilion, is not an appropriation for public purpose.

2. AGRICULTURE 🔑5—FAIRS—AID BY STATE.

In view of St. 1880, p. 49, § 5, providing that in no event shall the state be liable for premiums awarded or debt created by the board of agriculture for the state fair, the state could have made no valid contract for an exhibit by a county at the state fair, and therefore St. 1917, p. 1668, appropriating money to compensate persons and counties for exhibits lost by fire at the fair, was invalid.

3. STATES 🔑193—TORTS—LIABILITY.

In the discharge of governmental functions, no claim arises against the state in favor of an individual by reason of misfeasance, laches, or unauthorized exercise of powers by its officers or agents.

4. STATES 🔑119—APPROPRIATIONS—GIFTS.

St. 1917, p. 1668, appropriating money to compensate persons or counties for exhibits lost at the state fair by fire, is invalid, in view of Const. art. 4, § 31, providing that the Legislature shall have no power to make any gift to any individual, municipality, or other corporation, the inclusion of individuals invalidating the act, though such an act as to counties alone might have been valid.

Mandamus by the County of Alameda against John S. Chambers, as State Controller. Demurrer to the petition sustained.

W. H. L. Hynes, Dist. Atty., of Oakland, for petitioner. U. S. Webb, Atty. Gen., and Robert T. McKisick, Deputy Atty. Gen., for respondent.

BURNETT, J. Petitioner asks for a writ of mandate to compel the respondent, as controller, to issue his warrant for the sum of $4,603.96, under the provisions of an act of the Legislature (Stats. 1917, p. 1668), which reads as follows:

> "The sum of thirty thousand dollars, or so much thereof as may be proved to be due, is hereby appropriated out of any moneys in the state treasury not otherwise appropriated, to pay the claims of various persons and counties against the state of California for losses sustained by fire in the state agricultural society's pavilion at Sacramento, California, subject to the provisions of section six hundred sixty-three of the Political Code."

Section 663 of the Political Code, above referred to, provides that:

> "Every claim against the state for which an appropriation has been made or for which a state fund is available, must be presented to the board [of control] for its scrutiny before being paid."

The petition alleges that the county of Alameda is a body corporate and politic of the state, and a political subdivision thereof; that on the 3d of September, 1916, the state of California maintained in the city of Sacramento a state fair; that the county of Alameda, on said date, "was the owner of an exhibit suitable to be used for exhibition at fairs such as that maintained by said state; that said state fair was conducted by the state for the purpose of promoting the best interests and welfare of said state, and for the purpose of advertising and making known the resources and products thereof; that various counties of the state, of which the petitioner is one, for the purpose of aiding the said state in the conduct and maintenance of said fair, maintained exhibits thereat;" that, for the purposes aforesaid and at the request of the state, said county of Alameda placed its said exhibit in the charge of the state and its duly authorized officers conducting said fair, and that said exhibit was of the reasonable market value of $5,000; that on said 3d day of September, 1916, said exhibit was completely destroyed by fire; that it was negligently housed by the state and was permitted to be kept "in a building temporarily constructed of canvas and other imflammable material, not suitable or safe for the housing of such an exhibit." It is then alleged that on August 11, 1917, after scrutiny by the board of control, said claim was allowed and approved by said board for the sum of $4,603.96, and was sent to the respondent for the purpose of having him draw his warrant for said sum, which respondent has refused to do.

Respondent filed an answer denying specifically all the allegations of the petition above set forth, except that petitioner is a body corporate and politic. It is then alleged in the answer that petitioner "did, through its authorized officers, and prior to the 3d day of September, 1916, hire of and rent from the state of California a certain space in a building belonging to said state upon the state fair grounds, for the purpose of placing in said building * * * an exhibit for the purpose of advertising the products and resources of said county of Alameda, and that said county paid to said state for said exhibit space so rented a valuable consideration;" that petitioner placed said exhibit in said building in charge of its duly authorized agents, and that the building was properly constructed; that the fire referred to was not due to the fault of the state or any of its officers.

There is also an allegation in the answer that the petition does not state facts sufficient to constitute a cause of action, or to entitle petitioner to the relief prayed for.

The respondent declined to issue his warrant for the sum found by the board of control to be due petitioner on account of said loss, on the ground that the claim was repugnant to the provisions of section 31, article 4 of the Constitution, providing that:

> "The Legislature shall have no power * * * to make any gift, or authorize the making of any gift, or any public money or thing of value to any individual, municipal or other corporation whatever."

The position taken by petitioner in support of his contention that the writ should issue is (1) that the act is constitutional on its face, and therefore must be upheld, the court not being allowed to examine into extraneous questions of fact; (2) that the act does not make a gift within the constitutional inhibition but is an appropriation for a public purpose; and (3) that, conceding that the legislation in question does make a gift as that term is used in section 31 of article 4 of the Constitution, still the county is not a "corporation" as that term is used in said section.

In support of the contention that the act is constitutional on its face, petitioner cites Stevenson v. Colgan, 91 Cal. 649, 27 Pac. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230, and Rankin v. Colgan, 92 Cal. 606, 28 Pac. 673. Both of these cases occurred before 1893, in which year the Legislature passed an act permitting persons to sue the state for negligence, where their claims had been denied by the board of examiners. Stats. 1893, p. 57.

In Stevenson v. Colgan, the act in question provided:

> "The sum of $125 per month, payable monthly, for the period of 21 months, is hereby appropriated out of any moneys in the state treasury not otherwise appropriated, for the relief of Colonel Jonathan D. Stevenson; provided, however, that said appropriation shall cease upon the death of said Stevenson, if he shall die before said period has elapsed; the sums paid under the provisions of this act to be accepted by the said Stevenson in full payment and satisfaction of all claims of every kind and nature that he may have, or claim to have, against said state for services, or otherwise."

It was objected by the controller that as a matter of fact Stevenson had no claim against the state. The court held that the act was constitutional on its face, saying among other things:

> "The act in question does not show upon its face the nature of the claim which the petitioner made against the state."

In Rankin v. Colgan the act in question read:

> "The sum of $250 is hereby appropriated out of any moneys in the state treasury not otherwise appropriated, to pay James W. Rankin for services in the state treasurer's office during the period elapsing from November 13, 1884, to December 15, 1884, both dates inclusive, under appointment by Governor George Stoneman, on account of the delinquencies of Arthur January, deputy state treasurer."

The court relied on the Stevenson Case, saying, inter alia:

> "The nature of the services rendered under and by virtue of his appointment by Governor Stoneman does not appear."

[1] The foregoing cases would be in point and conclusive of the controversy here were it not for the recital in the appropriation of the purpose for which it was made, namely, "to pay the claims of various persons and counties against the state of California for losses sustained by fire in the state agricultural society's pavilion." In other words, if the act had simply provided that "the sum of $30,000 or so much thereof as may be proved to be due is hereby appropriated out of any moneys in the state treasury not otherwise appropriated to pay the claims of various persons and counties [enumerating them] against the state of California, subject to the provisions of section 663 of the Political Code," there would be an end to the inquiry after the board of control had allowed the claim of such person or county, and this for the reason stated in the Stevenson Case; but since the Legislature has seen fit to declare the nature of the claim, we are compelled to inquire whether it may be legally regarded as the basis of a debt or obligation on the part of the state. That it is an appropriation for a public purpose can hardly be successfully asserted. It provides for compensation for the loss of property, and manifestly the destruction of property does not contribute to the promotion of the public interest. The cases cited by petitioner as to this point are essentially different, as is readily apparent. In Daggett v. Colgan, 92 Cal. 53, 28 Pac. 51, 14 L. R. A. 474, 117 Am. St. Rep. 95, an act appropriating $300,000 for the purpose of erecting a building and exhibiting the state's products at the Chicago fair was attacked. It was held, however, that the appropriation was for a public purpose and for the promotion of the public welfare, the court, among other things, saying:

> "There is no difference, except in degree, between the appropriation contained in this act and those which for years have been made without any question as to their validity, for the support of the state agricultural fair, and the various district agricultural societies throughout the state."

The justification for such expenditure was based upon the proposition that the state has the general power to provide for the public welfare, "the limits of which are perhaps not capable of exact definition."

So in Board of Directors v. Nye, 8 Cal. App. 527, 97 Pac. 208, an appropriation for the relief and support of the Women's Relief Corps Association was upheld on substantially the same ground, it being clearly pointed out that the association constituted a state institution engaged in an important and patriotic public purpose.

The same principle is expounded and applied in the County of Sacramento v. Chambers, 164 Pac. 613, wherein was involved an appropriation by the state in aid of work for the relief of tuberculosis carried on by counties under the direction of the state authorities.

[2] If the appropriation here had been made for the purpose of paying expenses incurred in connection with the undertaking of making an exhibit of the state's resources, it could be said undoubtedly that it was for a public purpose, but that situation is not presented, at least not directly so.

But may we not assume that this appropriation was in recognition of an obligation of the state connected with and growing out of the promotion of such public purpose? In other words, may we not hold that the state may have made a contract with the county of Alameda to place said exhibits in the custody of the former in furtherance of the purposes of the state fair, and therefore became liable as bailee for the safekeeping of said property? If so, the case would fall under the rule announced in Chapman v. State, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158, wherein it was held that:

> "A cause of action for damages for the loss of coal received at a public wharf, under the jurisdiction of the state harbor commissioners, in consideration of wharfage and dockage paid to them, and which was agreed to be delivered on such wharf for removal therefrom, and which was lost by the breaking away of the wharf, through neglect of the harbor commissioners to keep the wharf in repair, is grounded in breach of contract, and not merely upon the negligence of the harbor commissioners; and the state is liable for the loss of the coal."

The decision was grounded upon the principle that a state is bound by the same rules as an individual in measuring its liability on a contract, and to that effect a quotation was made with approval from People v. Stephens, 71 N. Y. 549. The rule, though, necessarily presupposes a valid contract with the state. Melvin v. State, 121 Cal. 16, 53 Pac. 416. But the trouble with the supposition in the case here is that the state cannot make such contracts, and that it is not liable for any debts contracted in reference to the exhibits at the state fair. Section 5 of "An act to provide for the management and control of the state agricultural society of the state" (Stats. of 1880, p. 49) provides:

> "The state board of agriculture shall be charged with the exclusive management and control of the state agricultural society as a state institution; shall have possession and care of its property, and be intrusted with the direction of its entire business and financial affairs. * * * They shall provide for an annual fair or exhibition by the society of all the industries and industrial products of the state, at the city of Sacramento; provided that in no event shall the state be liable for any premium awarded or debt created by said board of agriculture."

It is thus to be seen that all such contracts must be made by said board, and that the state incurs no liability therefrom. The act was under consideration in the Melvin Case, supra, and it was held that said proviso "is to be construed as intended to hold the state free from liability for the obligations which the state board of agriculture might incur, calling directly or indirectly for the payment of money." The state, therefore, could not have incurred any liability for such exhibits by virtue of any contract, and hence no action could be maintained for damages for the violation of such contract.

[3] The question remains whether the state could be liable for a tort. As to this, in the Melvin Case, it is said:

> "The states are not suable except with their own consent. * * * No claim arises against any government in favor of an individual, by reason of the misfeasance, laches, or unauthorized exercise of powers by its officers or agents."

This is true, at least in the discharge of governmental functions, although the rule may be different where the government is exercising some proprietary right.

It has been furthermore decided that no additional right was conferred by the act of February 28, 1893, entitled "An act to authorize suits against the state, and regulating the procedure therein." This act has been regarded as simply affording a remedy where the corresponding right already exists. It is so held in Melvin v. State, supra.

In Molineaux v. State, 109 Cal. 378, 42 Pac. 34, 50 Am. St. Rep. 49, the effect of this act was considered as to its bearing upon the liability of the state to pay additional interest upon its war bonds. It was said:

> "Inasmuch as prior to the passage of the act there was no liability for interest on the part of the state, it was not competent for the Legislature to create such liability by the passage of the act."

To the same effect is Davis v. State, 121 Cal. 210, 53 Pac. 555, wherein it was said:

> "The act is a mere waiver within certain bounds of the state's sovereign prerogative not to be sued."

In Denning v. State, 123 Cal. 316, 55 Pac. 1000, it was declared that this act—

> "did not create any liability or cause of action against the state where none existed before, but merely gave an additional remedy to enforce such liability as would have existed if the statute had not been enacted."

That decision is also very instructive as to the question whether the state is liable for the tort of its officers. The plaintiff therein was employed by the board of harbor commissioners as a night deckhand upon its tugboat belonging to the state and used by said board. While engaged in said employment, plaintiff was injured, through the negligence, as he claimed, of the state acting by said harbor commissioners. It was conceded by the plaintiff that an action would not lie against the state for injuries caused by the negligence of its officers or agents in the discharge of a purely governmental duty, but it was claimed that the defendant was engaged in the discharge of a purely business function, and therefore it was liable for negligence. This phase of the subject was carefully considered, and the conclusion reached that while certain duties performed by said board would indicate a business for profit, the particular branch of the service in which the plaintiff was engaged, namely, the protection against or extinguishment of fires, constituted the exercise of a purely governmental function. As to this matter, it would seem no doubt could exist that anything done by the state as to the exhibits at the state fair must necessarily relate to the general public welfare and could not in any just sense be regarded as an act for the promotion of business for profit.

The said act of 1893 is also referred to in County of San Luis Obispo v. Gage, 139 Cal. 398, 73 Pac. 174, and Bickerdike v. State, 144 Cal. 681, 78 Pac. 270, but neither has any relation to the point herein involved.

In Union Trust Co. v. State of Calfornia, 154 Cal. 716, 99 Pac. 183, 24 L. R. A. (N. S.) 1111, the question involved was as to the liability of the state for the payment of certain "Montgomery Avenue bonds," and it was held that the officers whose duty it was to levy and collect the assessments necessary to discharge the bonds were agents of the state and were charged with governmental functions, and that the state was not liable for their negligence since they were engaged in discharging ordinary official duties pertaining to the administration of the government of the state.

The most recent decision of the Supreme Court involving a consideration of the difference between a private or proprietary and a governmental capacity in which a municipality or state may exercise its functions is Chafor v. City of Long Beach (Sup.) 163 Pac. 670. Therein it was held that a city in constructing and maintaining an auditorium was acting in its proprietary capacity, and was liable for damages to plaintiff caused by the negligent maintenance of the structure. That case is manifestly different from this in the nature of the enterprise and in the circumstance that it affected a municipality instead of the state.

We think it must be held that the appropriation is one based upon an implied liability that cannot legally exist either by virtue of a contract or by reason of the negligence of the officers of the state, since the tort if committed related to a governmental function instead of a proprietary business. It would seem therefore that the appropriation not being based upon any legal liability constitutes a gift within the contemplation of said constitutional provision, and cannot be maintained.

[4] There remains the other proposition that the county is but an agency of the state and not a "corporation" as the term is used in said section 31, article 4, of the Constitution. Hence it is contended that the inhibition against a "gift" does not apply to petitioner. The character of a county as an entity has been carefully considered in some of the cases cited herein, especially in County of Sacramento v. Chambers, supra, but the point, if well taken, cannot save the situation. The appropriation is of one lump sum for individuals and for counties, and it is quite apparent that the Legislature intended to treat such claims upon the same basis. There was no appropriation of a specific amount for the claims of individuals and a distinct appropriation for the counties. Upon the assumption, therefore, that the indivisible part of the appropriation for the claims of counties may be regarded as legal, it is impossible to determine what that portion is; in other words, how much or what portion of the act is valid and what invalid. They are so inseparably connected that the unconstitutional character of the appropriation for individuals permeates and vitiates the whole act. If it be not so, it would be difficult to conceive of a case for the application of the familiar rule for considering an act as an entirety where it was manifestly the intention of the Legislature to so regard it.

It is believed that the appropriation cannot stand, and the demurrer is therefore sustained and the order to show cause discharged.

We concur: CHIPMAN, P. J.; HART, J.

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35 Cal. App. 630

MUSHET v. DEPARTMENT OF PUBLIC SERVICE OF CITY OF LOS ANGELES et al. (Civ. 2445.)

(District Court of Appeal, Second District, California. Dec. 17, 1917.)

1. PLEADING 🔑350(3) — JUDGMENT ON THE PLEADINGS—ANSWER TAKEN AS TRUE.

An answer to the petition must be taken as true upon motion by plaintiff for judgment on the pleadings, and to grant the motion is error if the answer states a defense.

2. MANDAMUS 🔑23(1)—MUNICIPAL OFFICERS — INSPECTION OF BOOKS AND RECORDS — PARTY BENEFICIALLY INTERESTED.

In an action to compel officers of the city of Los Angeles to allow petitioner to inspect books and records, an answer stating that the petitioner is not the party beneficially interested, but seeks information for an electric company competing with the city, *held* to state a defense under Code Civ. Proc. § 1086, providing that writ of mandate "must be issued upon a verified petition of the party beneficially interested."

3. MANDAMUS 🔑23(1)—PARTY BENEFICIALLY INTERESTED.

The right of a private corporation to examine the books of the city through the petitioner as its agent can be determined only at the suit of the corporation itself.

4. RECORDS 🔑14 — MUNICIPAL — RIGHT OF INSPECTION—"OFFICIAL DOCUMENT."

The books of the city of Los Angeles relating to its electric system are not "official documents" within Civ. Code Proc. §§ 1888, 1894, providing for inspection of public records, but are the city's private property belonging to its business as a private "public utility corporation."

5. CORPORATIONS 🔑181(1)—RECORDS—RIGHT OF STOCKHOLDER TO INSPECT.

The right of a stockholder of an ordinary corporation to inspect its books existed at common law as an incident to his interest in the corporate enterprise.

6. RECORDS 🔑14 — RIGHT OF CITIZENS TO INSPECT.

At common law every interested person was entitled to the inspection of public records, including those of municipal corporations.

7. RECORDS 🔑14 — INSPECTION OF CITY'S PRIVATE RECORDS—RIGHTS OF CITIZENS.

A citizen has the right to inspect the books of the city of Los Angeles relating to its private business of owning and operating an electric plant as a public utility to the same extent a stockholder can inspect the books of a private corporation or a citizen can inspect public records.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Proceedings in mandamus by W. C. Mushet against the Department of Public Service of the City of Los Angeles, a municipal corporation, and others. Judgment on the pleadings for plaintiff, and defendants appeal. Reversed, with directions.

Albert Lee Stephens, City Atty., W. B. Mathews, Lewis E. Whitehead and Wm. B. Himrod, all of Los Angeles, for appellants. Delphin M. Delmas, of Los Angeles, for respondent.

WORKS, Judge pro tem. This action was commenced for the purpose of compelling appellants, by writ of mandate, to allow respondent to inspect and examine certain of the books of account, records, papers, and documents kept by appellants, under the claim that the same are public records. The petition for the writ alleges that respondent is a resident, citizen, and taxpayer of the city of Los Angeles, to the affairs of which the duties of appellants relate. The appellants answered the petition, and the respondent made a motion for judgment on the pleadings, which was granted, and judgment was rendered accordingly. It is from the judgment that the appeal is prosecuted.

[1] In ruling upon the motion for judgment on the pleadings, the trial judge took the allegations of the answer as true (Bradford Investment Co. v. Joost, 117 Cal. 204, 211, 48 Pac. 1083), and the points presented on this appeal turn on the question as to whether the answer states a defense. If it does, the motion for judgment on the pleadings was improperly granted.

[2] The answer specifically denies an allegation of the petition that petitioner "brings this action on behalf of himself and other citizens and taxpayers of the city of Los Angeles similarly situated." It is alleged affirmatively, in the answer, that appellants are managing and controlling an electric system which the city is constructing for the purpose of generating, transmitting, and distributing heat, light, and power, and that certain parts of the system are already completed and in beneficial operation; that the Los Angeles Gas & Electric Corporation is in the same kind of business, and is a competitor of the city in the business; and that it is and has been the policy of the Gas & Electric Corporation to ascertain the plans of the city for extending its electric system, and to anticipate the construction of such extensions by the municipality by installing its own lines in territory proposed to be occupied by the city, and thus prevent the city from securing or serving additional customers desired by it. The answer then proceeds:

> "That defendants are informed and believe, and therefore allege, that said Los Angeles Gas & Electric Corporation is the party beneficially interested in the bringing and prosecution of this proceeding, and that said W. C. Mushet, petitioner herein, is seeking, by means of this proceeding, to gain access to the records, books, papers, memoranda, and data concerning the municipal electric project of the city of Los Angeles, and mentioned in the petition herein, for the use and benefit of said Los Angeles Gas & Electric Corporation, in connection with the operation and extension of its own electric system in competition with the electric system of said city."

The Code of Civil Procedure provides (section 1086) that the writ of mandate "must be issued upon the verified petition of the party beneficially interested," and it has been held frequently that it will alone issue upon the petition of such party. People v. Pacheco, 29 Cal. 210; Fritts v. Charles, 145 Cal. 512, 78 Pac. 1057.

[3] The allegations of the answer show that the Los Angeles Gas & Electric Corporation is the party beneficially interested in this action, in that they show that Mushet desires to examine the records of appellants in a search for information for that corporation, and not for himself. If the corporation is entitled to examine the records, it can, of course, do so through Mushet as its agent; but whether Mushet, as its agent, may make the examination cannot be determined at his suit, but only at the suit of the principal, the corporation itself.

Our views upon this question necessitate a reversal of the judgment, but, as the action must now go to trial, it becomes incumbent upon us to pass upon other allegations of the answer which the trial court held insufficient in granting the motion for judgment on the pleadings. Let us, however, first briefly mention a claim of the appellants which we do not deem it necessary, or even proper, now to pass upon, for the reason that, considering what we have said above, it cannot again arise in the present action. The appellants contend that they cannot be compelled to open to a business competitor the books and records under their charge. If, after hearing the evidence upon the issue as to the beneficial interest of the Gas & Electric Corporation in the litigation, the trial court shall determine that such interest is actually in the corporation, and not in the petitioner, the action fails. If, on the other hand, the court shall resolve that question against the contention of the appellants and hold that Mushet is proceeding in his own right as a principal, the question as to the opening of the books to a business competitor cannot arise, for the reason that Mushet is not a competitor of the city.

[4] The appellants contend that the records, an examination of which is now sought, are not public records or writings subject to the inspection of either Mushet or the Gas & Electric Corporation, but that they are the private property of the city of Los Angeles. There are several sections of the Codes of this state which provide that citizens are entitled to an inspection and, upon demand, to certified copies, of public writings, and to these sections we are referred; but there seem to be but two sections which define, or determine what are, public writings. Section 1894 of the Code of Civil Procedure provides:

> "Public writings are divided into four classes: 1. Laws; 2. Judicial records; 3. Other official documents; 4. Public records, kept in this state, of private writings."

Section 1888 of the same Code follows:

> "Public writings are: 1. The written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial and executive, whether of this state, of the United States, of a sister state, or of a foreign country; 2. Public records, kept in this state, of private writings."

The books and papers which the petitioner seeks to examine, by means of this proceeding, are described in his petition as "all books of account, records, papers, and other documents and kept by the department of public service of the city of Los Angeles which would in any manner explain the items of expenditure, and for what the same were expended, by or under the authority of the board of public service commissioners, or otherwise, of any and all sums of money expended, or ordered or authorized to be expended, by said board of public service commissioners, or said department of public service, or either of them, from either of" two funds mentioned elsewhere in the petition as arising from certain bond elections in the city of Los Angeles, expenditures from which funds were under the control of appellants, and which expenditures were to have been made for the acquisition and construction of works for generating and distributing electricity for the inhabitants of the city. Returning to the language of sections 1894 and 1888 of the Code, it is plain that the books and papers mentioned in the petition are not described in either subdivisions 1, 2, or 4 of section 1894, or subdivision 2 of section 1888. If the sections cover them at all they must fall within the language of the one remaining subdivision of each; in other words, consolidating the language of those subdivisions, they must answer this description: They must be "official documents" other than laws or judicial records, and must be "the written acts or records of the acts * * * of official bodies" or "tribunals" or "of public officers, * * * of this state."

Leaving aside the question, as to which there might be some debate, whether the books and papers in question are written acts or records of acts, as those terms are used in the statute, we take up the question whether they are official documents. It is conceded by counsel for respondent, and the authorities are plainly to the effect, that, in handling the affairs to which these books and papers relate, the appellants are engaged in a private business of the city of Los Angeles. Marin Water & Power Co. v. Town of Sausalito, 168 Cal. 587, 595, 143 Pac. 767. In making the concession mentioned, counsel for respondent says:

> "I agree, of course, that, when engaged in 'the installation and operation of the municipal electric system,' the city is neither more nor less than a 'private public utility corporation.' It is, in other words, an electric corporation, and nothing more. Of the city of New York, when similarly engaged in the installation and operation of its municipal subway, the Court of Appeals said: 'The city owns the subway, and it is a railroad corporation, so far as the construction, operation, and leasing thereof is concerned. * * * In other words, the subway is a business enterprise of the city, through which money may be made or lost, the same as if it were owned by an ordinary railroad corporation. It was built by and belongs to the city as a proprietor, not as a sovereign.' In re Board of Rapid Transit Commissioners, 197 N. Y. 81, 90 N. E. 456 [36 L. R. A. (N. S.) 647, 18 Ann. Cas. 366]."

This is a fair statement of the law on the subject. The appellants contend that the books of account and the records, papers, and documents pertaining to expenditures made in connection with a business such as is described in the quotation just made from the New York decision cannot, in any sense, be viewed as public documents. It is contended that, as all of the properties and instrumentalities used in the conduct of the business are the private property of the city, the books of account, showing the conduct of the business by means of those instrumentalities, must also be its private property. This would seem to be a just estimate of the situation. At any rate, we are convinced that the books and papers in question are not public documents, as that term is used in the sections of the Code now under review. The appellants, it is true, are by the charter of Los Angeles made officers of the municipality; but the books and papers which respondent seeks to examine are not made official documents merely because they are kept under the direction of city officials. Their character is fixed by the considerations which we have already advanced.

[5-7] The respondent asserts that he occupies the same relation to the appellants and to the business conducted by them as a stockholder of an ordinary public utility corporation occupies toward such corporation. He argues that because the stockholder is entitled to access to the books and papers of his corporation, he, the respondent, is likewise entitled to access to the books and papers kept by appellants. The right of the stockholder of an ordinary corporation to open the books of his corporation is a right which existed at common law as an incident to his interest in the corporate enterprise. Hobbs v. Tom Reed Gold Min. Co., 164 Cal. 497, 501, 129 Pac. 781, 43 L. R. A. (N. S.) 1112. Before we proceed to consider the point made by respondent, let us state another rule of law, the appositeness of which does not now appear, but will immediately be shown to exist. At common law every interested person was entitled to the inspection of public records. 24 Am. & Eng. Ency. 182; People v. Cornell, 47 Barb. (N. Y.) 329; Brewer v. Watson, 71 Ala. 299, 46 Am. Rep. 318; State v. King, 154 Ind. 621, 57 N. E. 535; Clement v. Graham, 78 Vt. 290, 63 Atl. 146. Respondent invokes an analogy, in the matter of the right to inspect records, between the situation of a stockholder with reference to his corporation and the situation of respondent himself with relation to the appellants, and an analogy may also be claimed under the rule of the common law last stated. That analogy is between the situation of a citizen as to public records which he has not the right by statute to inspect and the situation, again, of respondent with relation to the books and papers of appellants. The principle behind the rule of the common law to the effect that a stockholder of an ordinary corporation has an inherent right to inspect the corporate books and papers also demands the extension of the same right to respondent in connection with the books and papers of appellants. The reason for the rule is the same in each case. In Hobbs v. Tom Reed Gold Min. Co., supra, the court said, at page 501 of 164 Cal., at page 782 of 129 Pac. (43 L. R. A. [N. S.] 1112), of the right of a stockholder of a corporation to inspect the corporate books:

> "The reasoning on which this rule is founded is that a stockholder has an interest in the assets and business of the corporation, and that such inspection may be necessary or proper for the protection of his interest or for his information as to the condition of the corporation and the value of his interests therein."

Likewise, the rule of the common law that an interested person may examine public records would seem, on principle, to apply to the right of respondent to examine the books and papers kept by appellants—although we have held that, strictly speaking, they are not public records—because the reason for the right is the same in both cases. In State v. King, supra, which was a controversy over the attempt of a citizen to enforce the right to inspect certain records, the Supreme Court of Indiana said:

> "Aside from the statute to which we have referred, we are of the opinion that the relator, under the facts presented by his petition, has shown such an interest in the matters to which the records and papers in the offices of the auditor and treasurer of his county relate as would entitle him to a general inspection thereof for the purpose which he has in view. These public records are the property of the county, and are not the property of the officer in whose custody they have been placed. The latter is but the mere custodian thereof. It is his imperative duty to keep them safe for the use and benefit of the office to which they belong, and also for the use and benefit of the public. * * * A county may be said to be an involuntary public corporation, organized by the state as an instrumentality in the furtherance of its government. The people residing therein are virtually the corporators. As taxpayers they contribute to the public revenue, and as voters they select the public officials who are to administer the county's affairs. Surely, under such circumstances, they retain or have a great interest in the proper management of the business and matters pertaining to their county, and therefore are entitled to know whether the public officials whom they have selected to represent them have properly used, disbursed, and accounted for the public funds which, under the law, have been confided to their custody and administration. The various county officials, in a political sense, are considered as the agents of the people in managing and conducting the business of the county. These officials are commonly denominated—and properly so—'public servants' and are directly responsible to the people who select them for the honest and faithful discharge of the duties and powers with which, under the law, they are invested. Under such conditions and circumstances, as they exist under the peculiar structure or genius of our government, it would certainly be a harsh interpretation of our laws, and one which would be, in our opinion, adverse to sound reason, to deny any taxpayer or citizen the right, subject to the reasonable rules and regulations previously mentioned, to inspect or examine the public records of his county in order to discover or ascertain whether the public officers had properly administered the funds of the county to which such taxpayer had been required to contribute. In fact there can be no sound reason advanced for depriving a citizen of this right; for it is evident that the exercise thereof, for the purpose in view in this case, will serve as a check upon dishonest public officials, and will in many respects conduce to the betterment of the public service."

In short, the analogy claimed by respondent is perfect. Reason requires the application of both of the stated rules of the common law to his relationship to the books and papers kept by appellants. Therefore, as the public ownership of utilities did not come into any considerable vogue in the British Isles until about 1835 (Dillon's Mun. Corp. [5th Ed.] § 1292), a time long after the promulgation of the two rules of the common law to which we have so often referred, we see, in the situation now before us, a new condition of affairs, uncontemplated at the time those rules sprang into being, but to which they must be held to have a distinct application. We have no doubt of our right to make this application. The rules of the common law will be applied to those cases which come within their reason and equity, even when such cases seem to be outside the strict letter of such rules as they are ordinarily stated. The terminology employed in the enunciation of the principles of the common law had its rise in conditions existing at the time of such enunciation. As new situations are discovered, strict terminology will be relaxed, and it will be determined, accordingly, that such situations either do or do not come within the rules, as their true spirit and equity may direct and require. These statements find general support in Katz v. Walkinshaw, 141 Cal. 116, 123, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; San Joaquin & Kings River Co. v. Fresno Flume Co., 158 Cal. 626, 629, 112 Pac. 182, 35 L. R. A. (N. S.) 832; Martin v. Superior Court, 168 Pac. 135, decided October 11, 1917. If it shall appear to the trial court upon the hearing of evidence under the issues presented by the pleadings, that the respondent is not acting for the Los Angeles Gas & Electric Corporation, but upon his own interest as a citizen, then application will be made of the rules of the common law to which we have adverted.

The judgment is reversed, with directions to the trial court to deny the motion for judgment on the pleadings.

We concur: CONREY, P. J.; JAMES, J.

35 Cal. App. 589

GALLWEY v. CASTELHUN. (Civ. 2170.)

(District Court of Appeal, First District, California. Dec. 14, 1917.)

1. Bills and Notes 🔑534—Actions—Attorney's Fee.

Allowance of $50 attorney's fee, on collection of note for $300 by suit in which considerable time was consumed trying the issue as to partial payment, was not excessive; the allowance of attorney's fees being within the discretion of the court.

2. Pleading 🔑398—Variance—Effect.

Where a defendant is misled to such an extent as to be unable properly to combat the charges of plaintiff, a variance between the proof and pleadings is fatal to the right of recovery.

3. Pleading 🔑424—Bill of Particulars—Objection to.

Where plaintiff sued on a note and to recover a balance on a mutual open and current account for moneys advanced and loaned, and a bill of particulars was furnished, showing that the second item was a charge for commissions on a real estate trade, the variance was not fatal in the absence of motion for an order excluding evidence as to such item and in the absence of objection on the trial thereto.

4. Account Stated 🔑3 — What Constitutes.

One essential of an account stated being a previous indebtedness, where the parties agreed to exchange property and that the rents, taxes, and interest should be adjusted pro rata as of the date when the transaction was consummated by the exchange of deeds, there was no account stated as to the rents, taxes, and interest, until the adjustment was made.

5. Contracts 🔑34—Execution—Parties.

A written agreement which consisted of a letter from defendant to a third person, authorizing it to act as his agent in exchanging property, and a letter by another company to an individual employed by the agency accepting a proposal of exchange, constituted a contract between the acceptor and the defendant.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by K. Gallwey against F. C. Castelhun. Judgment for plaintiff, and order denying motion for new trial, and defendant appeals. Affirmed.

F. J. Castelhun, of San Francisco, for appellant. Gerald C. Halsey, of San Francisco (C. Harold Caulfield, of counsel), for respondent.

LENNON, P. J. This is an appeal from the judgment in favor of plaintiff and from the order denying the defendant's motion for a new trial.

The complaint contained three counts, the first being upon a promissory note for $300 executed by defendant on the 27th day of April, 1914, to Eberhardt Estate Company and by it indorsed to J. W. Wright & Co. and by the latter indorsed to plaintiff. The second count is to recover a balance of $213.95 alleged to be due upon a mutual open and current account for moneys advanced and loaned to the defendant. The third count is on a written contract, in which it was agreed that all rent, taxes, interest, etc., on the respective properties to be exchanged were to be adjusted pro rata as of the date of exchanging of deeds. The third count then alleged that the exchange of properties was consummated on April 28, 1913, and that at the special instance and request of defendant, and pursuant to the said written agreement, defendant became indebted to said Shafter Realty Company in the sum of $287.08 as a balance due upon a mutual open and current account. Then the assignment of the indebtedness to plaintiff is pleaded.

In answer to the first count the defendant set forth two defenses to the note, viz.: (1) That the note was given in full satisfaction of the claim sued on in the second count; and (2) that the defendant should have been given credit for four payments of $50 each on account of the note. Upon this phase of the case the evidence is conflicting and therefore we need not further consider the contention that the trial court's finding concerning the payments made upon the note is contrary to the evidence.

[1] The court below found that plaintiff had employed an attorney to collect the note, and allowed $50 as a reasonable fee for the services of the attorney in collecting the note. Defendant objects to the allow-

ance as grossly excessive. The objection is without merit. While the execution of the note was admitted, the payments were disputed, and considerable time was consumed in trying the issue concerning these payments, and the amount to be allowed as attorney's fees being within the discretion of the court, obviously therefore the allowance of $50 as an attorney's fee was not unreasonable or excessive.

Defendant contends that an item of $400 sued for in the second count of the complaint should not have been rendered in the judgment, because it was shown to be not "money advanced" or "money loaned," but is, as alleged in the bill of particulars, a charge of $400 against the defendant for commissions upon a trade effected between the defendant and the Shafter Realty Company. In other words, defendant, it is claimed, is charged $400, not for money advanced to him nor for moneys loaned to him as pleaded, but for services rendered, and therefore there is a fatal variance between the allegations of the complaint and the proof.

[2, 3] Of course, where a defendant is misled to such an extent as to be unable to properly combat the charges of the plaintiff, a variance between the proof and the pleadings is fatal to plaintiff's right to recover. Nichols v. Randall, 136 Cal. 426, 69 Pac. 26. But in the case at bar defendant could not have been surprised or misled by the proof of this item of $400 because he demanded and received a bill of particulars in which that very item was set forth and labeled. The account and its various items, including this disputed one, was admitted in evidence without objection, and at no time during the trial did counsel for defendant object to its allowance, but in fact he himself introduced the bill of particulars in evidence. When a party receiving a bill of particulars, which is for any reason objectionable, proposes to object to the introduction of evidence thereunder, he may not wait until the trial, but previous to the trial must move for and obtain an order excluding the evidence. Conner v. Hutchinson, 17 Cal. 279; McCarthy v. Mt. Tecarte Land Co., 110 Cal. 687, 43 Pac. 391. No objection having been made to the introduction of the bill of particulars and no objection having been made at the trial of the cause to this item of $400, and defendant having been made aware of the same by the bill of particulars, he will not now be heard to complain.

[4] The third count is on a written contract to which the defendant pleads the statute of limitations, upon the theory that said count is one on an account stated. He argues that the bill of particulars states and shows that there was an adjustment between the parties, and that this adjustment constituted a stated account.

There was no account stated between the parties. One of the essentials of an account stated is a previous indebtedness. 1 R. C. L. p. 208. In the present case the items claimed to constitute an account stated were items arising out of a transaction wherein, as previously stated, two pieces of property were to be exchanged, and, pursuant to the exchange agreement, those items, namely, the rents, taxes, interest, etc., on the respective properties to be exchanged were to be adjusted pro rata as of the date when the transaction was consummated by the exchange of the deeds, and therefore until that time arrived there was no indebtedness.

[5] Defendant argues that the agreement admitted in evidence was not between the Shafter Realty Company and the defendant, but between the defendant and the J. W. Wright Company. The written agreement in question consisted of a letter from Castelhun to J. W. Wright & Co. authorizing it to act as the agent of Castelhun in the proposal of exchange of certain property, stating the terms and conditions, and a letter by the Shafter Realty Company to George Bew, accepting the proposal of exchange. It appears from the record that George Bew was a salesman for J. W. Wright & Co. and was also acting for the Shafter Realty Company in the negotiations between the Shafter Realty Company and Mr. Castelhun. The court found, and the evidence shows, that this written agreement was between the Shafter Realty Company and the defendant.

Judgment and order affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

35 Cal. App. 646

BROAD v. BROAD. (Civ. 1780.)

(District Court of Appeal, First District, California. Dec. 19, 1917. Rehearing Denied by Supreme Court Feb. 14, 1918.)

1. DIVORCE ⚿231 — ALLOWANCE FOR SUPPORT—DENIAL OF DIVORCE.

Civ. Code, § 136, providing that a husband may be required to support his wife although she be denied a divorce, authorizes a support allowance, while the parties are separated.

2. DIVORCE ⚿237 — DENIAL OF DIVORCE—ALLOWANCE FOR SUPPORT.

A support allowance under Civ. Code, § 136, authorizing such allowances though divorce be denied, *held* justified, where the husband had manifested his preference for the society of other women, etc., although the parties were separated and each had been denied a divorce.

Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Divorce action by Harriet F. Broad against Alfred F. Broad. From a judgment requiring defendant to pay a maintenance allowance, he appeals. Affirmed.

A. J. Treat and W. B. Kollmyer, both of San Francisco, for appellant. O'Gara & De Martini, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment in a divorce proceeding requiring the defendant to pay plaintiff monthly a certain sum of money as maintenance in an action in which each of the parties sought a divorce from the other on the ground of extreme cruelty, but which was denied both parties.

The sole question presented by the record is whether or not in the exercise of its sound discretion, under section 136 of the Civil Code, a court may, in an action wherein it finds that the wife is not entitled to a divorce, and she is living apart from her husband, make a decree that she be supported by him while such separation exists.

If a husband be guilty of conduct constituting any of the five grounds for divorce enumerated in section 92 of the Civil Code, his wife may institute an action for divorce, and in such action she may be awarded alimony; or, being entitled to a divorce, she may choose not to apply therefor, but may institute an action for permanent support (Civ. Code, § 137); or, in a divorce proceeding, although the divorce be denied, the court may provide for the maintenance by the husband of the wife and children of the marriage, or any of them (Civ. Code, § 136).

[1] Under the language of these sections it appears that in a proceeding for divorce or maintenance the wife, if entitled to a divorce, may be awarded permanent alimony; and on the other hand, even if a divorce be denied, still in the discretion of the trial court, if sound reason exist therefor, the husband may be compelled to provide for the support of his wife. Conditions may be such as not to entitle the wife to apply for a divorce, and yet the circumstances surrounding her marital life might be such as to render it obviously unjust to deny her all relief. Such, we think, might be the case where the wife was compelled to leave her home because of torment or insult suffered from her husband's relations living with them; or, if the husband had been guilty of all the grounds of divorce described in section 92 of the Civil Code except desertion, and upon a recriminatory plea in defense it was found that the wife had deserted him, and therefore could not be granted a divorce, the court could hardly send her back to live with her husband; and it would seem that under section 136, Civil Code, it might compel the husband to provide for her. Sweasey v. Sweasey, 126 Cal. 123, 128, 58 Pac. 456. We need not, however, rely upon imaginary cases for the application of this principle. In the case of Hagle v. Hagle, 68 Cal. 588, 9 Pac. 842, the court found that while the defendant was not guilty of anything amounting to legal cruelty, nevertheless his conduct as a husband was cold, harsh, and disagreeable, making it unpleasant for the plaintiff to live with him, but that her conduct was not free from blame, and that the marriage was unhappy from the beginning. Upon these facts the court applied the provisions of section 136 of the Civil Code, and held that, although a divorce must be denied to the wife, still the husband could be required to provide for her maintenance while she was living separate from him. See, also, Volkmar v. Volkmar, 147 Cal. 175, 176, 81 Pac. 413; Anderson v. Anderson, 124 Cal. 51, 56 Pac. 630, 57 Pac. 81, 71 Am. St. Rep. 17.

In answer to this position defendant's counsel claim that this section of our Code is adopted from the law of the state of New York, where it has been held under this section that the wife may be granted alimony only in the event that she is entitled to a decree of separation (Davis v. Davis, 75 N. Y. 221; Robinson v. Robinson, 146 App. Div. 533, 131 N. Y. Supp. 261; Waring v. Waring, 100 N. Y. 570, 3 N. E. 289; Palmer v. Palmer, 29 How. Prac. [N. Y.] 390; Douglas v. Douglas, 5 Hun [N. Y.] 143); and contend, therefore, that this construction should be given here, for the reason that when one of the states of the Union adopts a statute of another state, it is ordinarily adopted in the light of such judicial construction as has there been given to it. Estate of Moffitt, 153 Cal. 361, 95 Pac. 653, 1025, 20 L. R. A. (N. S.) 207. But an examination of this provision of the law of New York discloses that it was a part of a long section of a statute of that state specifying the particular circumstances under which a decree of separation from bed and board might be granted; and decisions construing this law have held that from a reading of the whole section it was clear that the court could provide for maintenance for the wife when no decree of separation was made only when she was entitled to such a decree and waived her right thereto. It as also held in one of these New York cases that the subsequent re-enactment of that section in several separate and additional sections would not be presumed as intended to enlarge the scope or purpose of the original enactment.

In this state section 137, Civil Code gives to the wife the right to maintenance where she has a cause for divorce but waives it; and section 136—which has stood alone since its passage—when construed in relation to section 137 and other cognate sections, seems clearly to contemplate relief in cases where the wife may not be entitled to a decree of divorce. To give the section the construction contended for by the appellant would be to treat it as a useless enactment adding nothing to the body of our law. Such an interpretation will not be given to an enactment of the Legislature if it can be reasonably avoided.

[2] In the case at bar it appears that while the wife was not guilty of extreme cruelty, nevertheless her conduct towards her husband had been cold and indifferent, but this attitude towards him was provoked by his

express preference for other women, and by his very friendly, although not immoral, relations with them, which conduct caused her great mental distress. It also appears that plaintiff and defendant are living apart, that they are estranged and cannot live together happily or harmoniously, and that it is necessary for the peace of mind and general well-being of each of the parties that they should live apart. The amount of alimony allowed the wife was not unreasonable. The court reserved the right to modify it upon good cause shown. We think the case fairly falls within the aim and purpose of section 136 of our Civil Code, and that the judgment should be affirmed.

It is so ordered.

We concur: LENNON, P. J.; RICHARDS, J.

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35 Cal. App. 553

WOODY v. PEAIRS, Judge. (Civ. 1747.)

(District Court of Appeal, Third District, California. Dec. 12, 1917.)

1. GRAND JURY 🔑36 — AUTHORITY TO APPOINT PERSON TO SEARCH FOR TESTIMONY AND SUBPŒNA WITNESSES.

The grand jury or the superior court is not authorized to designate or appoint or require any person other than the public officers charged by law with the performance of such duties to search for testimony and subpœna witnesses to be used by and before the grand jury as to matters legally under investigation by it; there being no such express authority, and it not coming within the inherent powers of the superior court.

2. COUNTIES 🔑204(2)—CLAIMS OR CHARGES AGAINST—PRESENTATION AND FILING—APPROVAL BY AUDITOR—STATUTES.

Unless there is some provision of law expressly authorizing a different course of procedure, all claims or charges against a county must be presented, filed, approved, and allowed as provided by Pol. Code, §§ 4075, 4076, 4091, 4173, 4307, in which cases alone the auditor is required to interpose his official approval as a prerequisite to the payment thereof by the treasurer.

3. CONTEMPT 🔑21—MANDAMUS 🔑101—VALIDITY OF ORDER—AUDIT OF CLAIM AGAINST COUNTY.

The superior court of a county had no inherent power to make an order requiring the county auditor to audit a claim against the county, the auditor not being an officer of the court, and not a party to the proceeding in which the order allowing the claim was made, the claimant's remedy as against the auditor's refusal to audit the claim being by mandate, the duty of the auditor to audit the claim being expressly enjoined on him by Code Civ. Proc. §§ 1085, 1086.

Petition for writ of prohibition by S. A. Woody against Howard A. Peairs, Judge of the Superior Court of the State of California in and for the County of Kern. Transferred to Supreme Court. Order of the Superior Court annulled, set aside, and vacated.

E. F. Brittan, of Bakersfield, for petitioner. E. L. Foster and Chas. A. Barnhart, both of Bakersfield, for respondent.

HART, J. Petitioner applied to the Supreme Court for a writ of prohibition to prevent respondent from punishing petitioner for contempt of court, and the proceeding was duly transferred to this court for hearing and decision.

From the petition and from the return of respondent, the following facts appear: The petitioner, at all times mentioned, was the duly elected, qualified, and acting auditor of Kern county. On the 3d day of June, 1915, one J. J. Deuel petitioned the superior court of Kern county for an order allowing his two certain claims for services, one in the sum of $240 and the other in the sum of $925, "under and by virtue of section 4307 of the Political Code"; and said court was asked to make an order requiring the auditor to draw his warrants for said sums and a further order requiring the treasurer to pay the same. After a hearing in the matter of said petitions, the court found the following facts: That from January 2, 1915, to and including April 9, 1915, said J. J. Deuel "was employed by the grand jury of the county of Kern in securing evidence and witnesses in the various investigations being conducted by and before said grand jury," that during said times said grand jury "was actually engaged in investigations into the conditions of affairs in the county of Kern, as provided by law." That said grand jury "was engaged in an effort to close up all houses of prostitution and prevent their operation, and to prevent felonies, and was further engaged in an effort to stop the illicit sale of intoxicating liquors, and that during all of the time there was a large number of matters of this kind and character being investigated by the said grand jury, and that * * * it became and was necessary for the said grand jury to employ special detectives for the reason that the sheriff of the county of Kern was unable to furnish sufficient officers who could assist the grand jury in their investigations and that the help and assistance provided by the district attorney of the county of Kern was inadequate, and that by reason of the facts above stated the grand jury was unable to procure the attendance of witnesses, material and necessary to investigations then and there being made by the said grand jury, and that by reason of the inadequacy, incompetency, and lack of moral support from the sheriff and inadequate help from the district attorney and the board of supervisors, it became and was necessary to appoint special officers as aforesaid, to assist and aid the grand jury in the proper administration of its duties, under the instructions given by the presiding judge, when the said grand jury was impaneled. That the said grand jury duly and regularly employed J. J. Deuel as a special detective, and authorized him to secure witnesses and evidence in matters being investigated by and before said grand jury." That said Deuel performed necessary and proper services for the county of Kern, "all of which services were in relation to criminal proceedings, for which no specific compensation is provided by law, and that a just and reasonable compensation for the services was, and is, the sum of $10 per day. That the nature and kind of services performed by the said Deuel was as follows: Subpœnaing and interviewing witnesses; securing information as to the character of various alleged houses of prostitution, and investigating the character and habits of the inmates thereof; investigating into the sale and disposition of liquors in cases of alleged violation of the law; and investigation of matters of criminal investigation, then being conducted by the said grand jury, and in relation thereto, subpœnaing of witnesses, and interviewing the same, and investigating the commission of felonies. That by reason of the said services, the county of Kern is indebted to J. J. Deuel in the sum of $925, which said sum is due, owing and unpaid." That said claim has been approved by the foreman and secretary of said grand jury and said sum is a reasonable compensation for the services rendered. The order of the court was that the auditor draw his warrant for said sum of $925 in favor of said Deuel and that the treasurer pay said warrant upon presentation.

Cotemporaneously with the filing of said petitions by said Deuel, one John Lang filed petitions alleging the same facts, the amount claimed by him being $523.65, which included an item of $19.65 for traveling expenses, and similar findings and orders were made and entered as in the matter of the Deuel petitions. Each of said orders was dated on the 26th day of June, 1915.

On the 2d day of July, 1915, a citation was issued to petitioner, Woody, requiring him to show cause, on the 8th day of July, why he had not complied with said orders above referred to. Upon said last-mentioned date, after hearing, the court adjudged said Woody guilty of a willful contempt of court in disobeying said orders and ordered that he be committed to the county jail of the county of Kern, "to be there imprisoned until he shall have obeyed said judgment, order and decree of this court by drawing and issuing" warrants as directed.

Petitioner contends that the said superior court, respondent, was without jurisdiction to make said orders, the respective claims not being county charges, and that there is no provision of law authorizing the foreman and secretary of the grand jury or the superior court to appoint any one to do special work for the grand jury as a detective.

We think the court exceeded its jurisdiction in adjudging petitioner guilty of contempt, and that the adjudication must therefore be set aside as null and void.

[1] In the first place, it is to be remarked that counsel for the respondent have not pointed to any law authorizing a grand jury or the superior court to designate or appoint or require any person other than the public officers charged by law with the performance of such duties to search for testimony and subpœna witnesses to be used by and before the grand jury as to matters legally under investigation by that body; and, unless there is some express authority for such a course either in the grand jury or the superior court, it is very doubtful whether such power may legally be exercised by either, for we do not believe that such authority comes within the inherent powers of the superior court.

The grand jury is clothed by law with certain specifically enumerated powers. See sections 915 and 928 of the Penal Code and section 4151 of the Political Code. In none of said sections is there any provision that the grand jury may employ any person other than the public officers whose duty it is to perform that service to gather testimony or subpœna witnesses. On the contrary, section 1328 of the Penal Code expressly provides that a peace officer (a sheriff or a constable, or, in certain cases, the coroner, or the deputy or deputies of either) must serve in his county any subpœna delivered to him for service, either on the part of the people or of the defendant, and must make a return of the service thereof, subscribed by him, stating the time and place of service.

There are, it is true, certain occasions on which a person not a public official and denominated an elisor may, by an order of the superior court, be designated and appointed to serve and execute legal processes or orders. This may occur where both the sheriff and the coroner are disqualified for any reason from performing that duty. See Pol. Code, § 4173. And it doubtless is correct to say that, in the cases mentioned by said section, an elisor, duly appointed as so provided, would be competent to serve in the county in which he resides subpœnas issued by the district attorney (Pen. Code, § 1326, subd. 1) for such witnesses as the grand jury, for the purposes of an investigation pending before them, may desire. But, in any case where the appointment of an elisor becomes necessary, there must be a showing made of the disqualification of the sheriff and the coroner to serve and execute processes and orders. There was no such showing made in this case.

[2] In the second place, if we assume that the grand jury, under the authority of the superior court, may legally employ persons to assist it in the investigation of crime or other matters coming within the legal competence of that body, and thereby bind the county to the payment of the expenses following from such employment, or if it be assumed that the expenses incurred in the employment of persons other than the public official charged with such duties to subpœna witnesses for the grand jury or gather testimony to be presented to that body may be considered as coming within the

expenses contemplated by subdivisions 2 and 3 of section 4307 of the Political Code, then it is very clear that the same cannot be allowed or paid until they shall have been presented and filed in the form and manner prescribed by section 4076 of the Political Code and thereupon considered, approved, and allowed as provided by section 4075 of said Code. Nor has the auditor authority to audit such claims until they are so presented and filed and approved and allowed. Pol. Code, § 4091. There are, it is true, some cases where claims against a county may be made upon an order of the judge of the superior court, or in a certain instance we have in mind (Pen. Code, § 869; McAllister v. Hamlin, 83 Cal. 361, 23 Pac. 357) by a magistrate. These cases, however, are exceptions to the general rule laid down upon the subject by the Legislature. In such cases, the law expressly confers upon the judge or magistrate the power to order the claims to be paid; and the judge or magistrate is then himself the auditor of the claim, the treasurer being required to pay the same upon the order of the judge and in the absence of the approval or auditing of the claim by the county auditor. But, unless there is some provision of law expressly authorizing a different course of procedure, all claims or charges against a county must be presented and filed and approved and allowed as provided by the sections of the Political Code above named, in which cases only is the auditor required to interpose his official approval as a prerequisite to the payment thereof by the treasurer. As was said by this court, in White v. Mathews, 29 Cal. App. 634, 156 Pac. 372:

> "We must look only to the statute to ascertain the extent of the authority of any tribunal to determine and fix the liability of the county for any claims that may be presented."

See, also, Ex parte Widber, 91 Cal. 367, 27 Pac. 733; Ex parte Truman, 124 Cal. 387, 57 Pac. 223; Murphy v. Madden, 130 Cal. 674, 63 Pac. 80; County of Yolo v. Joyce, 156 Cal. 429, 105 Pac. 125.

We have been cited to no law authorizing the judge of the superior court to fix the amount of, allow, and audit such a claim as the one involved herein, assuming that it constitutes the foundation for a valid charge against a county.

[3] But there is still another view to be taken of the question submitted here for decision, viz.: Conceding that the services rendered by the claimant to the grand jury constitute a legal charge against the county, and that it was legally required that the auditor rather than the judge of the superior court should audit the claim to authorize its payment by the treasurer, the remedy of the claimant as against the refusal of the auditor to audit the claim or demand would be by mandate; for in such case the duty of the auditor to audit the claim would be one expressly enjoined upon him by law. Code Civ. Proc. §§ 1085 and 1086. And in such case the auditor would be made and become a party to the action and accorded an opportunity to defend his position. If then the claim was determined to be a valid charge against the county and it had been regularly and duly allowed, and the auditor still refused to give it his official approval as prescribed by the law, he then might and probably would be subject to an adjudication of contempt of the court's mandate. In the present case, however, the auditor, who is not an officer of the court, was not a party to the proceeding in which the order allowing the claim was made, and the court certainly had no inherent power to make an order placing him in the perilous position of either auditing the demand or suffering imprisonment for contempt. Ex parte Widber, 91 Cal. 367, 370, 27 Pac. 733; Ex parte Truman, 124 Cal. 387, 57 Pac. 223.

We conclude: (1) That, if the claim in question constituted a legal charge against the county, it is not one of those the amount of which may be fixed and then allowed by the judge of the superior court, but is of that character of claims which must be presented and filed, and approved and allowed and audited as provided by sections 4075, 4076 and 4091 of the Political Code. (2) That, even if it be a claim which may be fixed and ordered paid by the judge of the superior court, the county auditor is not required to audit it to authorize its payment by the treasurer. (3) That, if it is a claim which cannot be paid without the official approval of the auditor, then mandate or some other appropriate proceeding, after the claim has been regularly passed upon and allowed, is the remedy to be resorted to against the auditor in case he refuses to audit the demand or claim.

It follows from the foregoing that the order adjudging petitioner guilty of contempt of court is absolutely void, and that the same must be annulled, set aside, and vacated. It is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

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35 Cal. App. 605

McCLELLAN v. STATE et al. (Civ. 2252.)

(District Court of Appeal, First District, California. Dec. 15, 1917. Rehearing Denied by Supreme Court Feb. 11, 1918.)

1. STATES ⟹191(2) — "SUITS AGAINST THE STATE"—RECOVERY OF TAXES PAID.

An assignee of a corporation cannot maintain an action without the consent of the state against the secretary of state and state treasurer to recover sums paid to them under the annual corporation license tax law; such a suit being one against the state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Suit against the State.]

2. STATES ⟹191(1) — SUITS AGAINST — CONSENT.

A state cannot be sued without its consent.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Clifford McClellan against the State of California, Frank C. Jordan, as Secretary of State, and another. Judgment for defendants, and plaintiff appeals. Affirmed.

McClellan & McClellan, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and Raymond Benjamin, Chief Deputy Atty. Gen., for respondents.

KERRIGAN, J. This action was brought by the plaintiff, as assignee of a large number of corporations, for the recovery of various amounts aggregating the sum of $71,680.50, paid by them to the secretary of state under the provisions of the annual corporation license tax law. Demurrers, both general and special, on behalf of the state and the other defendants were interposed, which demurrers were sustained by the trial court upon the ground that the court had no jurisdiction of the subject of the action, for the reason that the plaintiff could not maintain an action against the state without its consent. The defendants, Frank C. Jordan and Friend W. Richardson, are officers of and represent the state, and the state is the real party against whom the relief is sought; and, if the ruling of the trial court is correct, all of the defendants fall within the rule of prohibition.

[1] There is not now, nor has there ever been, any statute of this state authorizing any one to institute against the state, or any of its officers, an action for the recovery of any fee or sum of money of the character here involved. The only statute permitting the institution of such suits is the act of February 28, 1893 (Stats. 1893, p. 57). This statute authorizes actions against the state by "all persons who have, or shall hereafter have, claims on contract or for negligence against the state not allowed by the state board of examiners."

This action is admittedly neither an action on contract nor because of negligence, but counsel for appellant claims his right of action has foundation irrespective of any permissive act. The substance of his contention is that the rule that a state cannot be sued except with its consent is a common-law rule which originated in the minds of the kings of England in the Middle and Dark Ages, which would not permit the redress of a wrong against the king because of his divine sovereignty; and he argues that the rule has become antiquated and benighted, and has no place in these advanced and modern days; and he insists that an action against the state is no part of sovereignty, and intimates that rulings of courts based on that principle are old and antiquated, entirely erroneous, and that they should have no place in our modern scheme of advanced government and enlightened civilization.

This precise question arose in the early period of the history of our country, and engaged the minds of such publicists as Hamilton, Madison, and Marshall, and the doctrine was given full consideration by the Supreme Court of the United States in many cases. Various foundations for the principle upon which this exemption of liability from suit is based have been given, the broader reason being that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of public duties. In the important case of United States v. Lee, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171, Mr. Justice Miller considered the question of suability of a sovereign from an historical standpoint. See, also, Chisholm v. Georgia, 2 Dall. 419, 1 L. Ed. 440. The books abound with discussions and conclusions upon the subject. No useful purpose, however, would be served by a review of those authorities.

[2] Whatever the reason may be it is sufficient to say that it is an established principle of jurisprudence in all civilized nations that a state cannot be sued without its consent. This is a privilege of sovereignty, and the rule is universally enforced, and needs no citation of authority for its support. We see no reason why it should be changed. Plaintiff is not without relief, however. If there is merit in his claim, undoubtedly the Legislature will make suitable appropriation for its payment.

Judgment affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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35 Cal. App. 607

STODDARD et al. v. FISKE et al.

(Civ. 2229.)

(District Court of Appeal, First District, California. Dec. 17, 1917.)

1. Master and Servant 🔑301(1) — Automobile Driver—Relationship.

Where, when driver of a loaned automobile was arrested for speeding and taken to a police station, his friend riding with him took the automobile to go to the central police station to deposit bail and secure an order for the driver's release, and returning from such errand ran into and injured a woman, the arrested driver was not liable for the injury; there being no legal relation between him and his friend, but mere friendship.

2. Appeal and Error 🔑1050(2)—Harmless Error — Question Calling for Conclusion.

Allowing a question as to existence of relationship of servant and master between witness and another, over the objection that it calls for a conclusion, is not prejudicial error unless the question of employment is the material fact in issue and under investigation.

3. Evidence 🔑471(28)—Conclusions.

Where plaintiff's claim of defendant's employment of witness making defendant liable for witness' injury to plaintiff was based solely upon a certain conversation between witness and defendant, a question by the court whether prior to that conversation the relation of employer and employé or principal and agent had ever existed between witness and defendant was not objectionable as calling for a conclusion; the question of prior employment being immaterial, and plaintiffs being given full opportunity to show by further questioning of the witness if the fact of prior employment existed.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Addie Stoddard and another against E. A. Fiske and another. From judgment for defendant Bertram E. Nixon, plaintiffs appeal. Affirmed.

Elmer Westlake, of San Francisco, for appellants. Louis H. Ward, of San Francisco, for respondent Fiske. Ira S. Lillick, of San Francisco, for respondent Nixon.

RICHARDS, J. In an action brought by the plaintiffs, husband and wife, against the defendants for damages for personal injuries suffered by the wife, they recovered judgment against the defendant Fiske, but as to defendant Nixon judgment was rendered in his favor and against the plaintiffs. From that part of the judgment in favor of Nixon and against themselves the plaintiffs prosecute this appeal.

The facts of the case are substantially these: Some time in the month of September, 1913, three gentlemen, two of whom were Fiske and Nixon, the defendants in this action, were standing in front of the St. Francis Hotel with another gentleman, Mr. Travers, who was the president of the Taxicab Company of California at that time, a company which operated several automobiles in that region. One of the machines of that company was devoted to the personal use of its president and was standing in the street near the hotel. These three gentlemen were friends of Mr. Travers, apparently, and while they were standing there he asked them if they wished to take a ride. Evidently they did, and he told them, pointing to his machine, that it was at their disposal. Apparently he knew them well enough to know that both of these defendants knew how to operate the automobile, and his remarks were addressed, not to any one of them, but to all three of them. They all proceeded to the car, and Mr. Nixon, for the time being, took the wheel and drove the car. While they were riding about the city the party was stopped by a policeman, and Nixon, the driver of the car, was arrested for speeding, and the party taken to the Bush street police station. Nixon offered to give the arresting officer $20 for bail in order to secure his release, but the arresting officer informed him that he could not take the money or could not release him and that he must go to the Central station and make his deposit there in order to obtain his release. He declined to allow Nixon, however, to go there alone for that purpose, whereupon Fiske offered, or Nixon requested him—it is immaterial which—to go there, and accordingly he took the automobile and went. While he was returning from his errand, having secured the order for the release of Nixon, he ran into and injured Mrs. Stoddard, one of the plaintiffs in this case; Nixon at that time not being in the car but being at the Bush street police station awaiting the return of his friend. This action was brought, as we have said, by the plaintiffs to recover damages for the injuries suffered by Mrs. Stoddard in said collision. A motion for nonsuit in behalf of Nixon was made at the close of plaintiffs' case, which was denied; but at the conclusion of the entire testimony a motion was made for a directed verdict in favor of said defendant, and that motion the court, with all of the evidence in the case before it, granted, and directed a verdict in favor of Nixon. It is from that order and from the judgment in his favor thereupon made that the plaintiffs appeal, claiming that they were entitled to a verdict against Nixon, and that the court erred in taking the case in that manner from the jury.

There are two points made in the case: First, that the court erred in directing the finding of a verdict in favor of Nixon; and, second, that the court committed error in permitting the defendant Fiske to testify in response to questions that the relationship of employer and employé, or of principal and agent, did not exist between himself and Nixon at any time prior to the conversation at the Bush street police station already referred to.

[1] As to the first of these points, it is the appellants' contention that Fiske having undertaken the errand for the benefit of Nixon, either at his request or with his acquiescence, is to be considered the agent of Nixon, with the latter's resulting liability for the negligence of Fiske in the carrying out of his agency. Under the circumstances as detailed above we cannot agree that the legal situation contended for arose. There was no evidence of any employment of Fiske by Nixon, but it is clear that the latter undertook what he did in order to be of assistance to Nixon in his difficulty and as an act of friendship from one man to another. The doctrine of respondeat superior sought here to be invoked by the appellants must necessarily be based upon a relationship between two parties by which one has the legal right to direct the activities of the other and the latter the legal duty to submit to such direction. Such a relationship did not exist in the case at bar. If Fiske, after undertaking his mission, had abandoned it and left his friend in the lurch, he would have been guilty of no breach of legal duty although undoubtedly guilty of a most reprehensible breach of moral duty. In this case there was no such relation as that

of master and servant, of principal and agent, or employer and employé. In the performance of his errand Fiske was at liberty to proceed to its performance in any way he chose and was not amenable to the direction of Nixon. The latter therefore is not liable for the negligent act of Fiske in its performance, and the authorities cited by appellants sustaining the principle they contend for have no application to the facts of this case. On the other hand, the following authorities support the principle just stated: Koenitsky v. Matthews, 64 Misc. Rep. 167, 118 N. Y. Supp. 367; Fay v. German V. Soc., 163 Cal. 118, 124 Pac. 844; Cotter v. Lindgren, 106 Cal. 602, 39 Pac. 950, 46 Am. St. Rep. 255; Smith v. Belshaw, 89 Cal. 427, 431, 26 Pac. 834; City of Chicago v. Gathman, 236 Ill. 9, 86 N. E. 152, 19 L. R. A. (N. S.) 1178, 15 Ann. Cas. 830; Messmer v. Bell & Coggshall Co., 133 Ky. 19, 117 S. W. 346, 19 Ann. Cas. 1; Brady v. Ry. Co., 114 Fed. 100, 52 C. C. A. 48, 57 L. R. A. 712; Atwood v. Ry. Co. (C. C.) 72 Fed. 447; Singer Mfg. Co. v. Rahn, 132 U. S. 518, 10 Sup. Ct. 175, 33 L. Ed. 440.

It is also urged by the appellants that the court erred in permitting certain questions to be answered by the defendant Fiske while a witness. One of them was:

> "Before this incident on this particular day had the relation of employer and employé, or principal and agent, ever existed between you and Mr. Nixon?"

This question was objected to by the appellants on the ground that it called for a conclusion of the witness. The objection was overruled, and the witness answered: "Absolutely nothing." This question was asked by the court; and, apparently not satisfied with its precise wording the court then put to the witness the following:

> "Q. I say, before the conversation at the Bush street station, has the relation of employer and employé, or principal and agent, ever existed between you and Mr. Nixon?"

This question encountered the same objection that it called for a conclusion of the witness; and, the objection being overruled the witness answered, "No, sir."

In between these two questions defendants' counsel put a similar one, as follows:

> "Before this accident, Mr. Fiske, before this accident and at the time of the accident had Mr. Nixon employed you to do anything for him?"

This question was objected to as calling for the witness' conclusion. It remained unanswered, but the court, in adverting to it and in explanation of its own questions and to the limit of time to which they were pointed, made this statement:

> "As to your question, Mr. Lillick (defendants' counsel), I think it ought to be before that conversation. In other words, as I have previously ruled, whatever the relationship existing between these two defendants was on that day grew out of that conversation, or rather, as shown by what happened at the Bush street station, both you gentlemen should ask for the conversation."

[2] While it has been held that the bald statement by a witness that he was employed by a certain person or corporation may be a mere conclusion, it is also the rule that to permit the introduction of such evidence will not be held to be prejudicial error unless the question of employment is the material fact in issue and under investigation. Thus, in the case of Winslow v. Glendale Light & Power Co., 164 Cal. 688, 130 Pac. 427—a case cited by appellants in support of their contention—while it was held to be error to permit a witness to testify that he was "working for the Glendale Light & Power Company," where it appeared that this statement was merely the witness' conclusion, it was only so held because the very question in litigation was whether the work upon which the witness was employed as one of a crew of workmen was being done by the company named or by another person as an independent contractor. In such a case, says the learned author of the opinion:

> "The rule limits the testimony of the witness to a statement of the person by whom he was employed, the nature, terms, and surrounding circumstances of his employment. From these, with such other evidence as the case presents, must the conclusion be drawn as to who in fact was the responsible employer."

But in the same case it is also said:

> "In many instances, as where the agency or the ownership of the property is not in issue, it is permissible, for the purpose of curtailing the inquiry, to allow questions to be asked and answered, which questions and answers would be to the last degree improper were issue joined upon the question of agency or ownership. Instances come readily to mind, and, indeed, in the courts are of daily or even of hourly occurrence. If the ownership of a piece of land is not in issue, it is not objectionable to ask the witness who owns that land. If the agency or employment is not in question, it is equally permissible to ask the witness whose agent he was, or for whom he was working. It is but a time-saving method of presenting the truth upon a matter not controverted."

[3] In the case at bar the foregoing questions asked of the witness were not objectionable as calling for a conclusion. They were directed to a time prior to Fiske's undertaking the mission in the course of which the accident occurred, and called merely for information on the point as to whether any employment of any kind had ever up to that time existed—clearly under the circumstances an ultimate fact. The plaintiff had raised no issue of prior employment, but relied for the establishment of any relationship of principal and agent between Nixon and Fiske solely upon the episode between them at the Bush street station. The question of prior employment was, moreover, an immaterial one; and when it came to the proof of the conversation which resulted in Fiske undertaking his errand for Nixon counsel were confined to the strict rule of proof; and the appellants were given full opportunity to show by further questioning of the witness if the fact of prior employment existed. Un-

der the circumstances of this case we are clearly of the opinion that the questions were not objectionable on the ground urged.

For the reasons given, the portion of the judgment appealed from is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

35 Cal. App. 639

CALDWELL v. REGENTS OF UNIVERSITY OF CALIFORNIA et al. (Civ. 2232.)

(District Court of Appeal, First District, California. Dec. 18, 1917. Rehearing Denied by Supreme Court Feb. 14, 1918.)

1. Trial ⚷3—Discretion of Court—Separate Trials.

Granting separate trials between plaintiff and separate defendants rests in the trial court's discretion.

2. Appeal and Error ⚷964—Discretion of Court—Granting Separate Trials.

Granting separate trials between plaintiff and separate defendants will not be reversed on appeal, except for an abuse of discretion.

3. Trial ⚷3—Separate Trials—Partition Suit.

In a partition suit, the trial court did not abuse its discretion by requiring plaintiff to proceed as to certain defendants who claimed the entire title without waiting for service on other defendants who were not concerned in such issue.

4. Mortgages ⚷489—Foreclosure—Validity.

A mortgage foreclosure in which the property belonging to certain defendants was sold to an amount necessary to satisfy that portion of mortgage debt not outlawed as to them *held* valid.

5. Appeal and Error ⚷169 — Questions Reviewable—Points First Made on Oral Argument.

Points made for first time upon oral argument will not be considered.

Appeal from Superior Court, Alameda County; William H. Donohue, Judge.

Action by R. A. Caldwell against the Regents of the University of California and others. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Affirmed.

Frank W. Sawyer, of San Francisco, and Joseph K. Hawkins, of San Rafael, for appellant. Warren Olney, Jr., of San Francisco, and F. F. Thomas, of Berkeley, for respondents.

LENNON, P. J. This is an appeal by plaintiff from a judgment and order denying a new trial. The action is ostensibly an action for partition, but in reality so far as the defendant-respondents are concerned, it is an action to quiet title, and the sole issue in the action as between the plaintiff and these defendants is as to the title of the property in question.

The facts are as follows: The Regents of the University of California purchased the property in question at a foreclosure sale made under a foreclosure decree in a foreclosure action wherein the mortgagor was served with summons, appeared and answered. No appeal was taken, and upon the period of redemption expiring the regents took possession of the property, fenced it, and ever since have had possession. Just two days before the expiration of five years from the date of the foreclosure sale the mortgagor quitclaimed the property to the plaintiff, who, on the last day of the five years, filed a complaint against the regents to quiet title. The plaintiff never served summons in this action to quiet title, and after about twenty months it was dismissed for want of prosecution. The plaintiff appealed from the order of dismissal, and the order was affirmed. Shortly after the affirmance of the order of dismissal the plaintiff conveyed a half interest in the property to one Shea, and within a few days thereafter commenced the present suit for a partition between himself and Shea, making, however, over 100 persons other than Shea, and including the regents and their vendee, the Country Club Heights Company, parties defendant. The regents and the Country Club Heights Company answered, claiming to be the sole owners of the property. So far as the record shows, neither Shea nor any of the other defendants save the respondents were served with summons, and none of them appeared. The respondents moved to have the course set for trial for the determination of the issue of title between themselves and the plaintiff, and the plaintiff sought to have the trial postponed until the action should be at issue as to all the other defendants. However, the action was set for trial and tried, and judgment rendered in favor of the respondents.

[1-3] The plaintiff now claims that it was error on the part of the court below to proceed with the trial of the issues raised by the pleadings between the plaintiff and the defendants without awaiting for the appearance in the action of the remaining defendants. There is no merit in this contention. Manifestly the remaining defendants were not concerned with, and were not necessary parties to, a determination of the issue of title as joined between the plaintiff and the defendants here. It is a matter of discretion on the part of the trial court to grant separate trials as between the plaintiff and separate defendants, which discretion will not be interfered with on appeal except in the case of abuse which is not made manifest here.

[4] Plaintiff contends that the sale under foreclosure of mortgage by Knowles to the regents, by which sale the regents have the record title, is void for the alleged reason that the decree of foreclosure upon which the sale was based was void in this that it declared that the mortgage debt was barred as to any sum in excess of $10,000, and yet directed a sale to pay a sum in excess of this amount.

The findings, conclusions, and decree show the contrary. The trial court simply found that the mortgage debt was barred as to certain defendants as to any claim in excess of $10,000. The court then specifically found and designated the particular lots that were owned by these particular defendants, and as to which a part of the mortgage debt was barred, and accordingly ordered the sale of the various lots comprising the mortgaged property, directing that the sale was to proceed until the sum of $10,000, as to which the statute of limitations had not run as to any of the defendants, with interest and costs, had been realized, and that when this sum was realized the lots, specifically enumerating them, which belonged to the defendants as to whom the remainder of the mortgage debt was barred, should be withdrawn from the sale, which should continue only as to lots owned by defendants as to whom none of the mortgage debt was barred. It appears from the record that the sale followed these provisions of the foreclosure decree.

Upon the oral argument it was conceded by counsel for plaintiff that there was no merit in the contention made in the opening brief filed upon behalf of the plaintiff to the effect that the trial court had erred in making an amendment to the findings and judgment as originally made and rendered, and therefore that point need not now be discussed.

[5] This disposes of all of the points made in the printed brief of counsel for the plaintiff. We are not required and we will not discuss and decide points made for the first time upon oral argument.

Judgment affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

(35 Cal. App. 567)

HEPLER et al. v. WRIGHT et al. (Civ. 1407.)

(District Court of Appeal, Third District, California. Dec. 13, 1917.)

1. WATERS AND WATER COURSES 🔑152(8)—APPROPRIATION OF WATER — EVIDENCE — SUFFICIENCY.

In suit to enjoin interference with appropriation of water, evidence *held* insufficient to establish appropriation by defendant's predecessors in title.

2. APPEAL AND ERROR 🔑757(1) — SCOPE OF REVIEW—RECORD—SUFFICIENCY.

On appeal by the alternative method, where neither party complies with Code Civ. Proc. § 953c, requiring the printing in the briefs of such portions of the record as the parties desire to call to the attention of the court, where the record consisted of over 400 typewritten pages, the court will decline to inspect the record.

3. WATERS AND WATER COURSES 🔑152(10)—APPROPRIATION — ACTIONS — FINDINGS — SUFFICIENCY.

In suit to restrain interference with use of water for irrigation, a finding that defendant's predecessors in interest did not appropriate all the waters from a stream carrying 10.75 inches of water, and that plaintiffs' predecessors appropriated 6 inches of water, should have been more definite, though thereunder impliedly defendants were entitled to the difference between plaintiffs' appropriation and the total flow.

4. TRIAL 🔑391—FINDINGS OF COURT—REQUISITES.

While the general rule requires that there should be a finding on every material issue, it does not require a finding on an issue as to which there is no evidence.

5. APPEAL AND ERROR 🔑1071(1)—HARMLESS ERROR.

In suit to enjoin interference with use of water for irrigation, error, if any, in finding that defendants had not appropriated all the water of a stream carrying 10.75 inches, and that plaintiffs were entitled to 6 inches therefrom, was not injurious to defendants, where the evidence conclusively established plaintiffs' right to 6 inches of water.

6. ACTION 🔑50(10) — MISJOINDER — RESTRAINING APPROPRIATION—PARTIES.

Where two plaintiffs owned two lots jointly, and were jointly interested with a third plaintiff in a third lot, it was not necessary to bring two actions to restrain interference with the appropriation of water which it was alleged all the plaintiffs had jointly appropriated for the benefit in equal parts of all three lots.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Suit by Charles Y. Hepler and wife and another against C. E. Wright and A. C. Frohlich. From the judgment for plaintiffs, and order denying motion for new trial, defendants appeal by the alternative method. Affirmed.

H. B. Wolfe and L. N. Peter, both of Quincy, for appellants. M. C. Kerr, of Quincy, for respondents.

CHIPMAN, P. J. Plaintiffs bring the action to have their right determined to 6 inches of water measured under a 4-inch pressure, for an injunction restraining defendants from diverting the same or any part thereof and for damages in the sum of $500 for defendants' alleged interference therewith.

It is alleged in the second amended complaint: That plaintiffs Charles and Emma Hepler now are, and for more than 20 years last past have been, the owners of, and have occupied, used, and farmed certain lands, to wit: lots 2 and 3 of block 7 of the town of Crescent Mills, Plumas county, Cal. That the said plaintiffs last named and plaintiff Kelley are the owners, and for more than 20 years last past they and their predecessors in interest have been the owners in possession and occupying lot 1 of block 7 aforesaid. That plaintiffs Charles and Emma Hepler are in possession and entitled to the possession of said lot 1, and are farming the same under lease with their said co-owner, and are the owners of all the crops now grown on said lands or to be grown thereon. That plaintiff Kelley has no interest therein. "That all of said lands are agricultural in character, and irrigation is necessary on all of the said lands." That by means of irrigation, plaintiffs Charles and Emma Hepler, for more than 7 years last past, have raised and produced, and are now raising and producing on all of said lands, valuable crops of fruits, vegetables, hay, and other crops. That the irrigating season for said lands is from April 1st to and including October 1st of each year, and "irrigation is necessary on said lands during all of said time." "That a stream of water flows from what is generally known as and called the Green Mountain No. 6 tunnel * * * carrying during the irrigating season, about eleven inches of water, measured under a 4-inch pressure." It is then alleged: "That more than 20 years ago the predecessors in interest of the plaintiffs went into and upon said stream and appropriated 6 inches of water, measured under a 4-inch pressure, and erected dams across said stream and dug ditches leading from said stream to and upon the lands of plaintiffs herein, and by means of said dams and ditches diverted from said stream said 6 inches of water, measured as aforesaid, to and upon the lands of said plaintiffs as described in * * * this complaint. That said 6 inches of water was and now is divided and used upon said above-described lands in the following amounts and proportions: Upon lots 2 and 3 of block 7 of said town of Crescent Mills, hereinbefore described, 4 inches of water measured under a 4-inch pressure; upon lot 1 of said block No. 7 * * * 2 inches of water, measured under a 4-inch pressure. That all of said water was and is used on said lands for irrigating, for domestic use, and for watering stock, and said water and the whole thereof ever since has been, and now is, necessary for said purposes on said lands in the proportion and to the extent above set forth." That prior to the commencement of this action, and at the commencement of the action and ever since, Charles and Emma Hepler have been and now are entitled to the possession and the use of the flow of said waters to the extent aforesaid, and they are now using said water on said lands. That on or about April 23, 1913, defendants, acting in concert and with a common purpose, diverted all of the waters flowing in said stream away from the lands of the plaintiffs herein, and prevented any of the said waters from flowing to the plaintiffs' lands, except when such diversion was interfered with by plaintiffs, and defendants do now threaten to divert and conduct all of said waters away from plaintiffs' lands, and will do so unless restrained by this court. That the crops growing on said lands are in such a state of cultivation and growth that if the flow of water to plaintiffs' lands be interfered with by defendants and diverted from plaintiffs' lands, the said crops will be "stunted in growth and utterly destroyed, and the damage accruing to said plaintiffs * * * will be irreparable and of such a nature that the exact amount thereof cannot be accurately measured." Alleges the insolvency of defendants and their inability to respond in damages. Alleges that plaintiffs Charles and Emma Hepler, by reason of the said diversion of said waters by defendants, have been deprived of the beneficial use of the same, and have sustained damages thereby in the sum of $500, but that plaintiff Kelley "has no interest in any of the crops now upon said lands, and has not been damaged by said diversion and does not claim any damages therefor." It is further alleged: "That the defendants claim and assert some right or interest in and to the waters of said stream to the extent of 6 inches measured under a 4-inch pressure, so used and appropriated by plaintiffs and their predecessors in interest, adverse to said plaintiffs, but that said claims of said defendants are, and each of them is, without any right or title whatsoever."

The plaintiffs pray for an order of the court restraining defendants and their agents "from diverting from said stream any of the waters thereof to the extent of 6 inches, measured under a 4-inch pressure and to forthwith desist from diverting or attempting to divert any part of said 6 inches of water, measured as aforesaid, away from the lands of plaintiffs. * * * That plaintiffs have a judgment and decree of this court that they are the owners of, in the possession of, and entitled to the possession of, the aforesaid waters to the extent of 6 inches, measured under a 4-inch pressure, and measured and divided as set forth herein, and are entitled to have the same flow to, upon, and across plaintiffs' said lands, there to be used for irrigating, domestic purposes, and for watering stock; and that the defendants have no right or interest in and to said 6 inches of water, or any part thereof. That plaintiffs Charles Y. Hepler and Emma K. Hepler recover from the defendants the sum of $500 as damages," and to such other relief as is agreeable to equity.

A general and special demurrer to the second amended complaint was overruled, and fendants answered. They deny, either directly or upon information and belief, substantially all of the material averments of the complaint. Admit that on or about the 23d day of April, 1913, they, "with unity of purpose and by concerted action, diverted all the waters flowing in said stream away from the lands of plaintiffs herein." Admit that they did, at the date of the commencement of the action, threaten to divert and conduct all of said waters away from the lands of plaintiffs. Admit that defendants claim and assert right to and interest in the waters of said stream to the extent of 6 inches measured under 4-inch pressure, but deny that such amount was used or appropriated by plaintiffs or their predecessors or otherwise, but deny that claims of defendants are without right. "On the contrary, defendants allege that more than 25 years ago their predecessors in interest, under and by virtue of an agreement made and entered into to and with the Green Mountain Mining Company, the then owner of what is known as No. 6 tunnel, * * * constructed a ditch by means of which all of the water flowing from said tunnel was diverted away from said tunnel and to and on the lands of defendant Frohlich herein, and there and on other lands used for household, domestic, and irrigation purposes, and that such use on said other lands was with the consent of the predecessors of defendants and under an agreement with them."

It is alleged as a further defense that the predecessor in interest of defendant Frohlich, more than 25 years ago, and prior to any use of the waters hereinafter mentioned and described, by any person whomsoever for household or domestic uses, went in and upon said Green Mountain tunnel and constructed a ditch therefrom leading to and on certain lands situated as described in the answer, and there used the same for household, domestic, and irrigation purposes, and upon information and belief, it is alleged that each and every year since the date of the appropriation of said water as aforesaid and the construction of said ditch by defendant Frohlich's predecessor, said waters and the whole thereof, flowing from said No. 6 tunnel, has been conveyed through said ditch onto the lands of the predecessor of said defendant Frohlich and to other lands adjacent thereto, and there used for household, domestic and irrigation purposes. Alleges further that on information and belief plaintiffs Charles and Emma Hepler, for about 7 years last past, have been taking and using water from said ditch without the knowledge and consent of the predecessor of defendant Frohlich, and by stealth, and that at all times when the said defendant Frohlich's predecessor discovered such use by plaintiffs, he returned all of said water into said ditch, and stopped and prevented such use thereof. As a further defense, defendants allege that prior to April 22, 1913, and at a time when defendant Frohlich was negotiating the purchase of said water and said ditch and the whole thereof, together with certain land described, at the house of one Roedde, defendant Frohlich communicated to plaintiff Charles Hepler the fact of his said contemplated purchase, and said Hepler was then and there asked if he had any interest in the waters flowing in said ditch or from said lower No. 6 tunnel, or whether he claimed any interest in the same, and he, the said Hepler, then and there stated that he did not own or claim to own any interest in the waters flowing in said ditch or from said tunnel, and that he had a water right of his own for his said lands. That "thereafter defendant Frohlich purchased from and of W. F. Roedde said lands, together with said water right and said ditch line." And for a further defense, alleged on information and belief that neither of said plaintiffs has ever made any claim in any manner to W. F. Roedde of any right to divert any of the waters flowing from said No. 6 tunnel, and that plaintiffs have secured water for irrigation purposes on their said lands from springs situated within said lands, and "from what is known as the Dixie Canyon ditch leading from Dixie creek, over and across said lands." Defendants pray that plaintiffs take nothing by their action, "and for such other and further relief as to the court may seem meet."

The cause was tried by the court without a jury and the court found that substantially all of the averments of the complaint are true. The court found that the stream of water flows from the said Green Mountain tunnel, "carrying during the low stages water amounting to 10.75 inches, measured under a 4-inch pressure." That the predecessors in interest of plaintiffs more than 20 years ago appropriated 6 inches of water measured under a 4-inch pressure, flowing from said tunnel, and diverted and used the same to the extent of 6 inches as alleged in the complaint and in the proportions as therein mentioned, to wit, 4 inches upon lots 2 and 3, and 2 inches upon lot No. 1. That said water was used in the manner and for the purposes as alleged in the complaint, and that prior to the commencement of the action plaintiffs were and now are in peaceable possession of said waters to the extent of 6 inches measured under a 4-inch pressure "when the said water was flowing from said tunnel to the extent of 12 inches, and one-half of said water flowing from said tunnel when said flow is less than 12 inches measured under a 4-inch pressure." The court found that by reason of the diversion of said waters by the defendants as alleged in the complaint, the plaintiffs Charles and Emma Hepler have sustained damages to the extent of $100.

Attention is particularly called to finding 9 in the brief of defendants, which finding is as follows:

> "That defendants did not, nor their predecessors in interest did not, more than 25 years ago enter into an agreement with the Green Mountain Mining Company, the then owner of what is known as the Green Mountain No. 6 tunnel, for all of the waters of said tunnel, and did not by means of a ditch constructed convey all of the waters of said tunnel to and on the lands of defendant Frohlich herein; that said ditch constructed by the predecessors in interest of said defendant Frohlich was not of sufficient size to carry all of the water from said tunnel. That the predecessors in interest did go in and upon said Green Mountain tunnel and constructed a ditch therefrom to lands situate in section 24, township 26 north, range 9 east, M. D. M., and there used a portion of said water on said land for domestic, household and irrigation, but that said predecessors in interest did not appropriate and use all of said water and the said ditch was not of sufficient size to carry all of said water."

It is further found that the use of said water by said Heplers has been with the knowledge of the defendant Frohlich and not by stealth. That neither defendant Frohlich nor his predecessors in interest have at all times returned said water into defendants' ditch upon discovery of its use by said Heplers, but on the contrary, defendant Frohlich and his predecessors were at all times aware of the use of said water by the said Heplers. The court also found that at the time defendant Frohlich was negotiating the purchase of said water as mentioned in the answer at the house of said Roedde, plaintiff Charles Hepler did not state to said defendant Frohlich that he did not own or claim any waters flowing from said tunnel, nor did he state that he had a water right of his own for his lands other than the waters coming from said tunnel. The court found that plaintiffs had not secured water for irrigation purposes from springs situated within said lands, nor from what is known as Dixie Canyon ditch, as alleged in the answer, but that the water used on plaintiffs' said lands for irrigation has come from said tunnel aforesaid.

As conclusions of law, the court found:

> "That plaintiffs are entitled to judgment for 6 inches of water measured under a 4-inch pressure, flowing from Green Mountain No. 6 tunnel * * * when there is twice that amount, or more, flowing from said tunnel, and when there is less than 12 inches, so measured, flowing therefrom, to one-half thereof, the said amount to be divided as follows, to be used on lots 2 and 3 of block 7 of the town of Crescent Mills, owned by Charles Y. Hepler and Emma K. Hepler the extent of 4 inches of said water measured under a 4-inch pressure, and on lot No. 1 of said block 7 of said town of Crescent Mills, * * * to the extent of 2 inches of said water measured under a 4-inch pressure."

The court also found that plaintiffs were entitled to the injunction prayed for, and that plaintiffs, Charles and Emma Hepler, recover from the defendants the sum of $100 damages and costs of suit herein. Judgment was entered accordingly.

[1] The appeal is under the alternative method from the judgment and order denying defendants' motion for a new trial. There are over 400 typewritten pages of testimony, about an equal quantity of which was introduced by plaintiffs and defendants. In defendants' brief no part of the testimony on which they rely is given, and none referred to, except as will presently be noticed. In respondents' brief not a word of testimony is quoted, and the only reference to it is in the following form: "See testimony of" (the witness or witnesses)—but the page or folio of the transcript is not given. The only testimony quoted in defendants' brief relating to their alleged right to all the water of said tunnel consists of extracts from the testimony of one Roedde, referred to in the findings, through whom defendants claim title, as follows:

> "William Roedde, direct examination by Mr. Wolfe: Q. Then what was done concerning water for the Roedde place? A. My mother didn't know what to do about it, and so one day Mr. Rogers who was there himself at our place, he said they were having quite— Q. Were you present and heard the conversation? A. Yes, sir. Q. What was it? What was said at this time, you started to tell about Rogers being there, what was said concerning the water? A. He said they were getting quite a bunch of water in the tunnel, and if it was high enough we could have that water and take a survey around it from the tunnel. Q. What was done then? A. We did take a survey around with a straight edge. * * * Q. After that? A. It was plenty high enough. Q. What did you do then? A. I commenced digging the ditch. Q. When did you complete the ditch? A. I completed it—I don't understand that question quite. Q. After you commenced work on the ditch, was work kept up until it was completed, until you got it built? A. Yes, sir. Q. Where did you build the ditch to? From what point to what point? A. I dug it clear on around back behind the house and around on the far end of our place. Q. Where did you commence at, from what point? A. At the blacksmith shop. Q. Up at the Green Mountain tunnel, do you mean? A. Yes, sir. Q. You spoke of Charley Rogers, what was Charley Rogers doing, what connection, if any, did he have with the Green Mountain Company at that time? A. Well, he was superintendent and agent of the Green Mountain Company. Q. Was he in charge of the property and business and work of the company at that time? A. Yes, sir; he was. Q. After the completion of this ditch that you built, what did you do with reference to the water coming out of the Green Mountain tunnel, if anything? A. It was all turned in the ditch."

The only facts shown are that Rogers, the then superintendent of the Green Mountain mine, gave Roedde permission to use the waters escaping from said tunnel; that Roedde built a ditch from the tunnel to his place, and "all the water was turned into the ditch." He does not testify that the water was conveyed to his place, nor does he state where his place was, nor that he made any beneficial or other use of the water, nor when this was, nor how long he made any use of the ditch or the water. The brief states that these extracts from Roedde's testimony are in support of the issue that defendants, through their predecessors (Roedde), acquired title to all the water flowing from said tunnel. Obviously this testimony falls far short of establishing such issue.

[2] Defendants printed in their brief some extracts taken from disconnected parts of the testimony of both plaintiffs. This testimony in no wise aids defendants' contentions. On the contrary, it tends, so far as it can be understood without recourse to omitted portions, to establish plaintiffs' case. It appears from this testimony that plaintiffs took up their residence on what was called the "Leek place" in 1906; that prior to that time and at that time, water was brought from said tunnel to the Leek place and was used for domestic and irrigating purposes; that up to 1910, the water was first used at what was called the "Cornell boarding house" at the time, and on the lawn around the house, and what was not used passed to plaintiffs' ditch. In 1910 the boarding house burned, and the water continued as before to pass over the Cornell place, sank into the ground for a short distance and was picked up where it emerged and was conveyed to their land in plaintiffs' ditch. It is stated in respondents' brief, and

not denied by appellants, that after 1910 no further use was made of the water by the company. The condition of the case is this: Neither party has complied with the statute. Section 953c, Code of Civil Procedure, reads in part as follows:

> "* * * In filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court."

There are no portions of the record called to our attention in the way pointed out by the statute that can be of the slightest assistance to the court in determining whether or not the evidence is sufficient to support the findings. Under such circumstances, we must decline to explore these 400 and odd pages to sift out the wheat from the chaff. That we are fully justified in doing so, we refer to Cunnison v. Miller, 167 Pac. 890, decided July 6, 1917. The court said:

> "The appeal is taken under the so-called and most unsatisfactory 'alternative method,' but appellant has failed to follow the statute, in that no part of the record to which he desires to call attention is printed in his brief. Having omitted to comply with the direction of the statute in that regard, no duty is imposed upon this court to examine the typewritten transcript"—citing Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430; Wills v. Woolner, 21 Cal. App. 528, 132 Pac. 283; Miller v. Oliver et al., 163 Pac. 357; Pasadena Realty Co. v. Clune, 166 Pac. 1025; McKinnell v. Hansen et al., 167 Pac. 887.

In this state of the case we must presume that there was evidence sufficient to support the findings, and it is not contended that the findings do not support the judgment.

Defendants, however, present a question upon which they place special reliance. Plaintiffs have not claimed, and do not claim, and the court does not award them, more than 6 miner's inches of the water flowing from said tunnel when there is at least twice that amount flowing therefrom, or one-half when less than that quantity. The court found that about 10.75 miner's inches of water flow from said tunnel at low stage. Manifestly there is a quantity of water flowing from said tunnel which plaintiffs do not claim. Defendants, in their answer, claim all the water. The court on that issue made the findings above quoted, in effect, that defendants did not enter into the agreement alleged "for *all* of the waters of said tunnel," and did not "by means of a ditch convey all" of said waters, and that the ditch constructed by defendants "was not of sufficient size to carry *all*" of said water; that defendants did construct a ditch to certain land claimed by defendants from said tunnel, and "there used a portion of said water on said land, * * * but * * * did not appropriate and use *all* of said water, and the said ditch was not of sufficient size to carry *all* of said water." According to rules of logic, this is a finding that defendants constructed the ditch claimed by them of capacity to carry *some* water; that defendants did appropriate and use on their lands *some* water, and that the ditch had the capacity to carry whatever this amount so used was. Defendants in their answer do not ask for any affirmative relief; they simply pray that plaintiffs take nothing by their action and "for such further relief as to the court may seem meet."

[3-5] The plaintiffs in their complaint allege that defendants claim some right to 6 miner's inches of said water "adverse to said plaintiffs, but that said claims of said defendants are, and each of them is, without right or title whatsoever." We think the finding complained of should have been more definite, and had the evidence been sufficient to enable the court to find the amount of water to which defendants are entitled, and had defendants requested a finding on that subject, no doubt the court would have made it. Apparently defendants were content to rely upon the issue, as a complete defense to plaintiffs' action, that defendants were entitled to all the waters flowing from said tunnel. Plaintiffs insist that there was no evidence upon which the court could have made a finding of the definite quantity of water to which defendants were entitled, and hence the court could only find as it did in response to defendants' claim. Defendants have not called attention to any evidence that would have justified the court in making a specific finding as to defendants' right to any particular quantity of water. While the general rule requires that there should be a finding on every material issue, and while the finding in question is uncertain and evasive, the rule does not require a finding on an issue as to which there is no evidence. Furthermore, as between plaintiffs and defendants, it is conclusively established that of all the waters involved, plaintiffs are entitled at no time to exceed 6 inches measured under a 4-inch pressure. The balance of the water by implication, as between the parties, belongs to defendants, and we do not see that they are injured by the form in which the finding is couched.

[6] Defendants make the point that there is a misjoinder of causes of action, and that the demurrer should have been sustained on the ground that plaintiff Kelley had no interest in lots 2 and 3, and that it appears by the complaint that there are two separate and distinct appropriations and diversions of water for two separate parcels of land. The complaint alleged that plaintiffs were the owners of lots 2 and 3, and joint owners with Kelley in lot 1, and that the alleged appropriation of water was for the benefit of these three lots, 4 inches thereof belonging to lots 2 and 3, and 2 inches to lot 1. As the appropriation of the water was in part for the benefit of lot 1, in which all the plaintiffs had an interest, we think Kelley was properly joined as plaintiff, and that it was not necessary that two separate actions

should be brought to accomplish what readily could be attained in one action.

We can discover no ground for reversing the judgment or order, and they are therefore affirmed.

We concur: BURNETT, J.; HART, J.

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35 Cal. App. 597

GARDNER v. BOARD OF PARK DIRECTORS et al. (Civ. 2009.)

(District Court of Appeal, First District, California. Dec. 14, 1917. Rehearing Denied by Supreme Court Feb. 11, 1918.)

MUNICIPAL CORPORATIONS 🔑210—OFFICERS —PARK BOARD—DISCHARGE OF EMPLOYÉS— "COMMISSIONER."

Under Oakland Charter (St. 1911, p. 1551), providing a commission form of government for such city, and article 12 thereof, creating the board of park directors with exclusive control of parks and authorized to employ superintendents, laborers, gardeners, etc., the board has power to discharge a gardener employed by it, and such power does not rest in the mayor under article 7, § 29, subd. 1, giving him general supervision over all boards appointed by him, of which the park board is one, and article 13, § 81, making all persons in the classified civil service subject to suspension and removal by the commissioners in whose department they are employed, since the mayor is not a "commissioner," and an employé of the park board is not in the department of public affairs of which the mayor is the head.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Commissioner.]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Application for writ of mandate by Calberth B. Gardner against the Board of Park Directors of the City of Oakland and others. From a judgment and order sustaining a demurrer to the application, the applicant appeals. Affirmed.

Rodolph Hatfield, of Oakland, for appellant. Paul C. Morf, City Atty., and William H. O'Brien, Deputy City Atty., both of Oakland, for respondents. Harrison S. Robinson, of Oakland, as amicus curiæ, for Civil Service Board, City of Oakland. Charles A. Beardsley, of Oakland, as amicus curiæ, for Civil Service Employés' Ass'n.

KERRIGAN, J. This is an appeal from a judgment and order sustaining a demurrer to an application for a writ of mandate. The petitioner was originally appointed to the position of assistant gardener in the month of June, 1915, from the civil service classified list of the city of Oakland, under and in accordance with the civil service provisions of the charter of that city. The following December he was dismissed by the respondents the board of park directors, whereupon he filed his petition in the superior court of Alameda county praying for a writ of mandate directing the respondents to reinstate him in that position. In support of his claim to such relief the appellant contends that the power of removal is vested in the mayor of the city as commissioner of public affairs and not in the board of park directors, and therefore his removal was irregular and invalid.

For a complete understanding of the duties and powers of the various commissions and boards of the city of Oakland a review of its charter provisions becomes necessary.

Article 5, § 8, of that instrument (Stats. 1911, p. 1565) provides that the elective officers shall be a mayor, an auditor, who shall be ex officio assessor, four commissioners, and six school directors; also, that the council shall consist of the mayor and the four commissioners above specified. It further provides that candidates for commissioner shall be designated as commissioner No. 1, or No. 2, or No. 3, or No. 4. Throughout the charter there is a clear distinction made between the mayor and these four commissioners. In several sections they are distinguished one from the other, and in no section is the mayor referred to expressly or by implication as a "commissioner." See article 5, §§ 8, 9, 10, 12, 14, 15, 17, and 19. In article 6, § 21, the mayor is made chief executive officer of the city, and he "shall see that all the ordinances, resolutions and laws thereof are duly enforced. He shall be charged with the general oversight of the several departments of the municipal government." Article 7 defines these different departments, which are five in number. Section 27 of that article provides that:

> "The executive and administrative powers, authority and duties of the city, not otherwise provided for, shall be divided into five general departments, as follows: (1) Department of public affairs, which shall be under the supervision of the mayor. (2) Department of revenue and finance, which shall be under the supervision of the commissioner of revenue and finance. (3) Department of public health and safety, which shall be under the supervision of the commissioner of public health and safety. (4) Department of public works, which shall be under the supervision of the commissioner of public works. (5) Department of streets, which shall be under the supervision of the commissioner of streets."

Under this section there is a specific designation of four commissioners who are elected by the people. By section 28, article 7, it is provided that the council shall designate and assign one of its members, not the mayor, to be a commissioner of revenue and finance, one to be a commissioner of public health and safety, one to be a commissioner of public works, and one to be a commissioner of streets. Here again there is a clear distinction made between the four commissioners and their departments, and the mayor who has "supervision" over the department of public affairs. The department of public affairs in turn is given "general supervision" over all boards appointed by the mayor. Article 7, § 29, subd. 1.

It thus appears that the intention of the framers of the charter was to vest in some one department a general supervisory control and check over the different boards appointed by the mayor. The charter further particularly specified the authority, powers, and duties of these four different departments presided over by the four commissioners. In subdivision 1, § 30, art. 7, provision is made for the appointive chief officials, which are: City attorney; treasurer, who shall be ex officio tax collector; a city clerk; a city engineer; a chief of police; a chief of the fire department; a street superintendent; a health officer; and a superintendent of the electrical department. Some of these are appointed by the city council, and others by the different members of the four named commissioners. The council itself is the governing body of the municipality. In addition to the above-named appointive officials, the charter also provides for certain other appointive boards by the mayor, subject to confirmation by the council. They are as follows: (1) The board of library directors; (2) the board of playground directors; (3) the board of park directors; (4) the civil service board. Articles 10, 11, 12, and 13. With the exception of the civil service board, each of these last-described boards serves without compensation. It appears to us plain that these boards appointed by the mayor, subject to confirmation by the council, are intended by the charter to consist of persons particularly qualified to render services of a special character and without reference to political considerations.

Recapitulating the above analysis of the charter, it appears that there are twelve elective officials, i. e., the mayor, the auditor, the four commissioners, and the six school directors. The mayor and the four commissioners are ex officio members of and constitute the council. On the other hand, the appointive officials are certain officers designated as "chief officials," such as the city attorney, treasurer, city clerk, etc., and the four boards appointed by the mayor, who are assumed to have special knowledge for the proper administration of the libraries, the playgrounds, the parks, and the department of civil service. Each of the four elective commissioners is placed in charge of one of the general departments. The fifth general department, the department of public affairs, is placed under the supervision of the mayor. Subdivision 1, § 27, art. 7. Here it would appear is a carefully planned segregation, division, and balancing of powers. The mayor has general supervision of all the departments. The department of public affairs itself has a general supervisory control over all boards appointed by the mayor. Each of the other four general departments is under the general supervision of an elective commissioner, and each of the appointed boards has the control of a certain part of the municipal government, and is responsible for its proper conduct, just as each of the appointive public officials is responsible for the proper conduct of his office.

Coming now particularly to the board of park directors, it is provided that:

> They, among other powers, "shall have the complete and exclusive control, management and direction of the said parks, squares and grounds. * * * Said directors may employ and appoint superintendents, laborers, surveyors, gardeners, engineers and other officers and assistants, and prescribe and fix their duties, authority and compensation. They shall have the exclusive management and disposal of all funds legally apportioned or received from any source for the support of said parks, squares, and grounds. The board shall establish rules and regulations for the conduct of its officers and employés and may require adequate bonds from all or any of them, except laborers, for the faithful performance of their duties in such sums as may be fixed by it." Article 12, § 65.

It is conceded that the fundamental rule that the power to appoint includes by implication the power to remove should apply to the board of park directors unless something is found elsewhere in the charter making the rule inapplicable. The language of section 81 of article 13 is relied upon by appellant as showing that the rule does not here apply. This section provides that:

> "All persons holding positions in the classified civil service shall be subject to suspension, fine and also to removal from office or employment, by the commissioner in whose department they are employed."

It is contended by the appellant that the commissioner here referred to is the mayor, for the reason that the mayor is given general supervision over all the boards appointed by the mayor. Article 7, § 29, subd. 1. From this the appellant argues that this supervision is by the department of public affairs, and that the mayor having supervision over the department of public affairs, is in fact the commissioner over that department, and that as such commissioner he alone has the power to remove the appellant from that department.

The provisions of the charter do not warrant such a construction. The mayor is not in any sense a commissioner. He is the chief executive of the city, and as such is very properly given the supervision over the department of public affairs, which in turn has a general supervision over appointed boards. And it is clear that it was never intended by this general supervision to make an employé of the park board one under the department of public affairs. Manifestly, particular control of the parks and of the employés of the park board is given to the park board itself, and all that is intended by the other sections of the charter is to give a general supervision to the department of public affairs, and to the mayor as chief executive of the city, over the park board, as well as over the other three appointed boards. In this way only can an intelligent and working scheme be found in the charter as adopted. Any other construction would lead to confusion and to a limitation upon the authority of the park directors and other appointed boards which is clearly intended to be vested in them so that they may be held responsible for the proper management and control of the affairs of the municipality placed under their jurisdiction.

It is urged in the briefs filed by the respondents board of park directors that the civil service provisions of the charter do not apply at all to the park employés. Meritorious as we think this contention is, still in view of what we have said we do not consider it necessary to pass upon that particular question. Whether the civil service provisions apply or not, the power of a motion is placed by the charter in the park board; and, as it is not claimed that any of the civil service provisions of the charter were violated as to the mode followed in removing appellant, it follows that the order of the trial court should be sustained.

It is ordered that the order appealed from is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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35 Cal. App. 549

BURMESTER et ux. v. HORN. (Civ. 2239.)

(District Court of Appeal, First District, California. Dec. 12, 1917.)

1. VENDOR AND PURCHASER ⚷334(3)—RESCISSION—RIGHTS OF PARTIES.
Where the purchasers under installment contract were in default, and the vendor served notice of cancellation and thereafter with the consent of the purchasers took possession, there was a rescission which entitled the purchasers to recover from the vendor the amounts paid by them on the contract.

2. VENDOR AND PURCHASER ⚷187—INSTALLMENT CONTRACTS—WAIVER OF PAYMENT.
Where purchasers under installment contract of which time was of the essence were constantly in default for seven or eight months, and the vendor did not demand exact performance, the right to strict forfeiture provided for by the contract was waived by his acceptance of payments after their due dates.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Suit by Otto Burmester and wife against John W. Horn. From a judgment for defendant, plaintiffs appeal. Reversed.

G. P. Hall, of Petaluma (E. J. Dole, of Petaluma, of counsel), for appellants. F. A. Meyer, of Petaluma, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of defendant in an action brought to recover from him a sum of money paid by the plaintiffs on account of the purchase price of real and personal property situated in Sonoma county.

A brief account of the facts of the case is as follows: On January 14, 1913, Antonia Brandt, being the owner of the real property described in the complaint and of certain personal property, made a bill of sale and deed thereof to John W. Horn, the defendant, in consideration of which Horn entered into an agreement with her whereby within 30 days he was to pay her the sum of $1,500, to be derived from a mortgage upon the property, and thereafter the sum of $25 per month without interest for the period of 76 months if she lived during that period, otherwise the payments to cease at her death. Time was not made of the essence of the contract, nor did it provide, as is quite usual in similar contracts, for a forfeiture of the vendee's rights in case the installment payments were not punctually made.

Thereafter, on February 3, 1913, Horn agreed in writing to sell and convey to Otto Burmester and Cora Burmester, the plaintiffs herein, the same land and personal property for the sum of $6,000, $900 of which was to be paid upon the execution of the agreement, and the balance at the rate of $50 or more a month, beginning March 1, 1913, together with interest on the deferred payments at the rate of 6 per cent. per annum compounded quarterly. This contract further provided that, in the event of a failure to comply with any of its terms, the unpaid balance should at once become due and payable, and that Horn should be privileged to terminate all the right, title, or interest of the Burmesters in the property, and to retain as liquidated damages the payments already made thereon. Time was made of the essence of this contract. The Burmesters were let into possession, and at the time this action was brought they had paid in all on account of the contract the sum of $1,365.82.

On May 6, 1913, Antonia Brandt brought a suit against Horn to set aside her deed to and contract with Horn, on the ground that they had been obtained from her through fraud and undue influence; she alleging in this behalf in part that at the time those instruments were made she had recently lost her husband, that she was old and infirm in body and mind, that she spoke and understood the English language with difficulty, that she was inexperienced in and practically knew nothing about business affairs, and that Horn took advantage of her condition and made certain false and fraudulent promises and representations with the purpose and intention of defrauding her of the property so conveyed.

On January 19, 1914, the Burmesters were in default in their payments to the amount of $392.83, and on that day Horn notified them in writing that they being in default he, in pursuance of the terms of their contract, "canceled, annulled and set aside" the same; and on the following day Horn appeared in open court, and in the suit brought against him by Antonia Brandt consented that judgment be entered against him annulling and canceling the deed and bill of sale made by her to him. Thereafter, on February 6, 1914, with the consent of the Burmesters, Horn took possession of the property, real and personal, and turned it back to his grantor. Other facts will be stated in the course of the opinion.

[1, 2] It will be observed that the defendant did not in his letter of January 19, 1914, as he might have done, attempt to terminate the plaintiffs' rights under their contract with him, but simply notified them that the contract itself was annulled, canceled, and set aside. In the evidence the contract was continually referred to as having been terminated and rescinded, and it is so pleaded in the complaint, admitted in the answer and found by the court. The effect of a rescission by the parties was to entitle the plaintiffs to recover from Horn the amounts paid by them on account of the contract. The rule is that, where a contract has been abandoned or rescinded by the parties, the vendee although in default, may recover back installments paid on the purchase price, less actual damages to the vendor occasioned by the vendee's breach of contract, although it was stipulated that such payments should be forfeited upon default. Cleary v. Folger, 84 Cal. 316, 24 Pac. 280, 18 Am. St. Rep. 187; Drew v. Pedlar, 87 Cal. 443, 25 Pac. 749, 22 Am. St. Rep. 257; Phelps v. Brown, 95 Cal. 572, 30 Pac. 774; Shively v. Semi-Tropic Co., 99 Cal. 259, 33 Pac. 848; Heilig v. Parlin, 134 Cal. 99, 66 Pac. 186. Besides this, we are of the opinion that Horn was in no position to claim the strict forfeiture provided for under the terms of his contract, for whatever default was suffered by the Burmesters thereunder was waived by the acts of Horn. It appears from the evidence that no one of the seven or eight monthly payments was ever made by the Burmesters in accordance with the terms of their contract. In one instance several months had elapsed between two of the payments, and the Burmesters were always in arrears as to part of the amount due from the very inception of their contract. Under such circumstances, where, as here, time is of the essence of the contract, the vendor is deemed to have waived strict compliance with its terms as regards time of payment, and he cannot thereafter rescind or forfeit the contract without first notifying the vendee of his intention to require a strict compliance with the conditions of the agreement, and allowing him a reasonable time to make good the existing default. Where, says the Supreme Court of this state, time is made of the essence of the contract for the payment of money, and this covenant has been waived by the acceptance of payments after they are due, with knowledge of the facts, such conduct will be regarded as creating such a temporary suspension of the right of forfeiture as could only be restored by giving a definite and specific notice of an intention to enforce it. Boone v. Templeman, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126; Stevinson v. Joy, 164 Cal. 279, 285, 128 Pac. 751; Pearson v. Brown, 27 Cal. App. 125, 148 Pac. 956.

In the case at bar this notice was never given. The default of the Burmesters having been waived by the repeated acceptance of payments after their due date, no right existed in Horn to terminate their rights under the contract and to declare forfeited the payments already made; and when he undertook to terminate the contract by his notice of January 19th the Burmesters were entitled to acquiesce in such action and to recover from Horn the amounts paid to him under the contract.

The judgment is reversed.

We concur: LENNON, P. J.; RICHARDS, J.

35 Cal. App. 578

KENDRICK v. HANSEN. (Civ. 1726.)

(District Court of Appeal, Third District, California. Dec. 13, 1917.)

1. Brokers 🔑86(2)—Commissions—Actions—Evidence—Sufficiency.

In broker's action for commissions, evidence *held* insufficient to establish allegations of defendant that the agency had been terminated before sale of the land.

2. Witnesses 🔑270(2)—Cross-Examination—Immaterial Matters.

In an action for broker's commission by one member of firm to whom other members assigned their claims, conversations between the members at the time of the assignment were immaterial.

3. Evidence 🔑398—Parol Testimony Varying Writings—Admissibility.

In action on a broker's written contract for commissions, conversations of a broker with defendant at the time of entering into the agreement were inadmissible.

4. Appeal and Error 🔑1058(2)—Harmless Error—Excluding Evidence.

In action for broker's commission due under written contract, conceding error in sustaining objection to conversations at the time of making the contract where fraud in the contract is alleged, the error was harmless, where the witness was later permitted to testify to the alleged representation and to state that he relied thereon.

5. Brokers 🔑9 — Right to Commission — Dissolution of Firm.

Dissolution of a firm of brokers did not terminate a contract giving them the right to sell land for a commission, where their dissolution agreement expressly continued the business as to the contract involved.

6. Trial 🔑252(16)—Actions—Instructions—Evidence—Admissions.

In action for broker's commission on sale of realty, where defendant admitted signing the contract agreeing to pay a commission, and further admitted that it had never been revoked in writing, and the contract showed on its face that it could not be revoked without consent of the broker until a certain date, an instruction, "It is admitted in this case" that defendant executed the contract, and that the contract had not been revoked in writing at the time defendant sold the land, but it could have been revoked even without the broker's consent under its terms after the date therein specified, was proper.

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by J. K. Kendrick against Charles Hansen. Judgment for plaintiff and order denying motion for new trial, and defendant appeals. Affirmed.

Duard F. Geis, of Willows, for appellant. Frank Freeman, of Willows, for respondent.

CHIPMAN, P. J. Plaintiff brings the action to recover commissions on the sale of certain real estate alleged to belong to defendant. It is alleged that at all the times mentioned in the complaint the plaintiff, M. E. Jacoby, and E. E. Avery were copartners doing business "under the firm name and style of Kendrick, Jacoby & Avery, in the county of Glenn," and were engaged in the business of buying and selling real estate; that on June 7, 1912, the said copartners entered into a certain contract in writing with defendant, a copy of which is appended to the complaint and made part thereof. By the terms of this agreement this firm was employed as "the sole and exclusive agents to sell" for defendant certain real property described in the agreement, and defendant agreed to convey said property, alleged as consisting of 2,159 acres, "to any purchaser or purchasers obtained by the said Kendrick, Jacoby & Avery, for the sum of $40 per acre, or for any less sum hereafter agreed upon" by defendant. The agreement, among others, contained the following provision:

> "This employment and authorization shall continue for a period of four months from the date hereof, and during said time is irrevocable, and shall continue after said time until withdrawn by me by ten days' notice in writing; and I agree to pay to the said Kendrick, Jacoby & Avery, in the event of the sale of said property by said agents, or by any one else, or by myself, while this contract is in force, a commission of seven and one-half (7½) per cent. on the above-named amount as said agent's compensation to service herein, and I further agree that any sum obtained by the said Kendrick, Jacoby & Avery for said lands over and above the amount herein stated may be divided equally between the said Kendrick, Jacoby & Avery and myself. Terms $25,000.00 cash, balance one, two and three years at 6 per cent. In witness whereof I have hereunto set my hand and seal this 7th day of June, 1912. [Signed] Chas. Hansen."

It is alleged in the complaint that the said firm "spent a great deal of time and much money in an endeavor to secure a purchaser for the said property, and in the course of the endeavors of said copartnership referred many prospective purchasers to defendant herein"; that on or about May 24, 1913, defendant "personally sold the real property hereinabove described, together with the improvements thereon, as plaintiff is informed and believes, for the sum of $107,950, and the purchaser was one who became interested in the purchase of said property through the instrumentality of the said copartnership"; that prior to the commencement of this action for a valuable consideration the said M. E. Jacoby and the said E. E. Avery sold, assigned, and transferred to plaintiff all their right, title, and interest in and to said contract and the proceeds thereof, and the plaintiff is now the owner and holder of said contract; that at the time of the sale above referred to the contract herein set forth between the said copartnership and defendant was in full force and effect, and the same has never been withdrawn. It is then alleged that the commission due plaintiff under the said contract amounts to the sum of $17,262; that plaintiff has demanded payment of the same from defendant, but defendant has refused and still refuses to pay the same or any part thereof.

A general demurrer was overruled, and defendant answered; on information and belief denied the existence of the alleged copartnership, and denied that it was engaged in the business alleged in the complaint; there is an allegation in the answer that the name of the alleged copartnership was fictitious and does not disclose the name or names of the persons interested in said business, and alleged other facts apparently with the view of making the defense that neither the said firm nor the plaintiff, as assignee thereof, could maintain the action; this issue seems to have been abandoned, and need not be further noticed; denied that he entered into the contract set out in plaintiff's complaint; denied on information and belief that the said firm, or any of them, "did a great deal or any work, or spent a great deal or any time or money in an endeavor to secure a purchaser for the property described in said complaint"; denied that he, on the 24th day of May, 1913, or at any time personally or otherwise, sold the said real property described in plaintiff's complaint for any sum or sums greater than $45 per acre, and alleges the fact to be that on said date he sold the said real property for the sum of $45 per acre, "and out of which said sum so received by the said defendant the said defendant received from said sale a sum net to him of $88,458.34 for the said land, and no more"; denied the alleged assignment of said contract by said copartners to plaintiff; denied that at the time of said sale the said contract was in force or effect or at all, and denied that the said contract had not been withdrawn, and alleged in relation thereto that at the time of the sale of said property there was no contract of any kind existing between the said firm, as copartners, individuals, or otherwise, and this defendant, wherein the said copartners or either of them was or were in any way "authorized to sell or to in any way enter into negotiations for the sale of the said land or any part thereof," and denied that the purchaser of said real estate was one who became interested in the purchase thereof through the instrumentality of said alleged copartners; denied that there is any commission due plaintiff; and alleged that there is no commission due of any kind to any one under said contract.

The averments of the answer hereafter to be stated appear as part of the original answer, but it appears by stipulation in connection therewith that in fact these averments were an amendment to the original answer made by leave of court at the time of the trial. By these averments it is alleged that on June 7, 1912, defendant "did authorize the said Kendrick, Jacoby & Avery to sell for the said defendant [then follows a description of the property containing 2,159 acres, more or less], wherein the said defendant agreed to convey the said property," etc., for the sum of $40 per acre setting forth thereafter the provisions of the said contract, and alleging that there was indorsed on said contract as a part thereof, the following: "Expires October 7, 1912"; alleged that during the life of said authorization the said copartnership "waived that portion of the said authorization wherein it was provided that the same should continue after the period of four months until withdrawn by defendant by ten days' notice in writing, and the said defendant agreed to and accepted said waiver, and which said waiver was so made and accepted long prior to the time of the sale of the said land made by the defendant herein, to wit, long prior to the 24th day of May, 1913"; alleged that after the signing of said authorization for the sale of said land, and during the life of the said authorization, the said Kendrick, Jacoby & Avery "did rescind that portion of said authorization providing for the continuance of said authorization, after four months from the date of said authorization 'until withdrawn by defendant by ten days' notice in writing,' and notified this defendant that the said authorization, so made by said defendant to the said Kendrick, Jacoby & Avery for the sale of said land, expired on the 7th day of October, 1912, which said rescission so made was accepted by defendant and so acted upon by defendant with full knowledge on the part of said Kendrick, Jacoby & Avery long prior to the sale of said land by the defendant"; that after the said waiver and rescission above referred to the said Kendrick, Jacoby & Avery "sought to secure of and from the said defendant another authorization for the sale of the said land which the said defendant refused, and has at no time given"; alleged that at the time of said sale by defendant neither of the said partners nor either of them had any contract of any kind for the sale of said lands, and that the only authorization of any kind ever given by defendant to them or either of them for the sale of said land expired on October 7, 1912.

For further answer and as a further defense defendant alleged that at the time the said contract was presented to defendant for his signature he stated to plaintiff that he would not give a longer time than four months within which the said firm would be authorized to sell the said lands, and refused to sign the said agreement because it contained the clause "and shall continue after said time until withdrawn by me by ten days' notice in writing"; that plaintiff represented to defendant that the form of contract presented was one adopted by the members of the real estate association, "and then and there falsely, fraudulently, and for the purpose of deceiving, defrauding, and inducing this defendant to sign the said agreement in form as presented, represented and stated to this defendant that they, Kendrick, Jacoby & Avery only wanted and intended the said agreement to be, and that the said agreement would be, operative for the period of four months from said date, and no longer; that they then had a purchaser for the lands, and if they did not make a sale of said lands within the four months, they would quit and the said agreement was at an end"; alleged that at the time of the making of said statement, plaintiff "had no intention whatever of carrying the same out"; that, relying upon said representations, defendant signed the said agreement but would not have done so if said false and fraudulent statements had not been made; that said false and fraudulent statements were so made by the plaintiff for the purpose of defrauding defendant "and to cause this defendant to rely thereon and for the purpose of having the said agreement extended, in its operation, beyond the said period of four months, and as in the said agreement provided, without the knowledge of this defendant; that by reason of the false and fraudulent representations and statements so made by said plaintiff to this defendant, and in thus securing this defendant to sign and deliver the said agreement as herein set out, the said plaintiff intended to and did perpetrate a fraud upon this defendant, and this defendant was and is defrauded thereby." Wherefore defendant prays that plaintiff take nothing by the action.

The cause was tried by the court with a jury, and a verdict was rendered in favor of plaintiff for $6,477, and judgment was accordingly entered by the court. Defendant appeals from the judgment and from the order denying defendant's motion for a new trial.

There was evidence sufficient to justify the jury in finding that the contract set out in the complaint was executed by defendant and delivered to the parties therein named as contractees, and that they were then copartners doing business in buying and selling lands as real estate agents; that they were actively engaged from the date of said contract in an endeavor to find a purchaser for said land, and continued their efforts to that end until January or February, 1913; that the copartnership was dissolved as to its business generally about February, 1913, but that the partnership continued, and there were reserved as still part of its unfinished business certain contracts in which each of the partners retained an equal interest, including the contract with defendant; that defendant at no time gave the firm or any of its members written notice that he had withdrawn or desired to terminate said contract, and that on May 24, 1913, he personally sold the land for the consideration of $45 per acre, and, as he alleged in his answer, "out of which sum * * * the defendant received from said sale a net sum to him of $88,458.34, and no more"; that prior to the commencement of the action Jacoby and Avery assigned all their right to and interest in said contract to plaintiff. The defense on which defendant relies arises out of matters set forth in the answer as follows: That the contract bore an indorsement, "and as a part thereof the following, expires 'October 7th, 1912' "; that Kendrick, Jacoby & Avery waived that portion of said contract reading "that the same should continue after the period of four months until withdrawn by defendant by ten days' notice in writing"; that defendant "agreed to and accepted said waiver, which said waiver was so made and accepted long prior to the time of the sale of the said land made by defendant herein, to wit, long prior to the 24th day of May, 1913"; that said Kendrick, Jacoby & Avery rescinded that portion of said contract above referred to during the life of said contract; that after said waiver and rescission and said acceptance the said Kendrick, Jacoby & Avery sought from defendant "another authorization for the sale of said land, which the said defendant refused"; that when said sale was made by defendant said parties had no contract "of any kind for the sale of said lands"; and that the only contract for said sale given to them expired October 7, 1912. The foregoing, together with the special defense added to the answer at the trial, alleging fraud in procuring said contract as hereinbefore set forth, constituted the matters on which defendant relied.

The indorsement on said contract, "expires October 7th, 1912," was explained by the witness Emma C. Harder, who testified:

> "I was clerk in the office, and just put it on as a record for my office work."

It formed no part of the contract. The alleged waiver and rescission rest upon the testimony of defendant as to a conversation which took place between him and Mr. Jacoby by telephone. Defendant testified:

> "I had a conversation with Mr. Jacoby about the 7th or 8th of October, 1912, and he asked me if they came over to see me if I would give them a new contract. He stated that their contract had expired, that they had spent considerable time and money in trying to sell the land, and said to me, 'Will you give us a new contract?' and I replied, 'Mr. Jacoby, I will not give a new contract; I do not want to tie it up any more on those terms.' "

He also testified to a conversation he had with Kendrick and Jacoby at the city of Willows on June 18, 1913, following a letter he had received from Mr. Kendrick of date June 17, 1913, in which the writer referred to the sale defendant had made of the land, and, among other things, it was stated:

> "We are entitled under our contract to full commission upon this sale and request that you make an accounting as to this sale and payment to us for commission without further delay."

Defendant's testimony was that when he met these men the next day Mr. Jacoby said:

> "We don't feel like we are entitled to the full commission, but we feel like we are entitled to something. * * * I said, 'Mr. Jacoby, you admitted to me that that contract expired last fall, and you know you asked me for a new contract, and I refused to give it to you,' or something to that effect."

The testimony of Jacoby and Kendrick was that the renewal referred to in their conversation with defendant, testified to by him, had reference to the four months' clause only.

At the taking of a deposition given by defendant prior to the trial he was shown the contract, copy of which is attached to the complaint, and testified that he recognized it as the contract he had signed; that he read it at that time and was given what purported to be a copy, but "was not an exact copy." He testified at the trial:

> That in his copy the contract stated, "if I found a buyer myself during the four months and made a sale, they should receive only half of that commission; my contract had that in it."

He testified:

> That when he verified his first answer, in which he "admitted the execution of the contract sued on in the exact form as the contract," he overlooked the fact "that they had told me at the time I signed the contract that, if they didn't make a sale within four months, they would quit, and didn't tell my attorney about it. I did not have a copy, and to the best of my knowledge I burned it up after the contract expired. I mean after the 7th day of October."

The testimony of Kendrick and Jacoby was that, when the contract was signed by defendant, there was nothing said about their quitting unless they made a sale in four months. Kendrick testified that, to the best of his recollection, no copy was given to defendant at the time, and Jacoby testified:

> "I don't think there was a copy made. * * * I am almost sure there was no copy. There were no provisions made as to the nonenforcement of the ten days' notice involved in that contract. It wasn't mentioned. There was nothing said with reference to our accepting one-half of the commission if the land was sold by Mr. Hansen during the life of that contract. I was present at the conversation of June 8th in front of the post office, between Mr. Kendrick and Mr. Hansen and myself. I don't think there was anything said at that time about our not being entitled to all of the commission."

As to the conversation over the phone about October 7, 1912, Jacoby testified that all that was said at that time by him, and the reply of defendant was as follows:

> "I called him up and asked him if he would renew the contract, and he said he would not, and I said, 'Why don't you want to sell?' and he said: 'Yes; but I won't renew it at this time,' and I said, 'If that's the case, that is all,' and I

hung up. There was nothing said about my coming over there at that time."

[1] Upon all the points relied on by defendant the evidence was conflicting, and there was sufficient to justify the jury in finding that defendant had failed to support the issues presented by his answer above noted.

[2] The assignment of the contract to plaintiff was shown by a written instrument signed by Jacoby and Avery and bears date July 8, 1913. On cross-examination plaintiff testified that he did not remember the date. He testified:

> "The date is on it and shows for itself;" that he talked it over with his partners, and they said "they didn't want to go into this suit." "Q. Then what did you say? (Objected to as irrelevant, immaterial, and incompetent, and not cross-examination.) Q. What was said, Mr. Kendrick, by you to your associates relative to this assignment? Same objection. The Court: Same ruling."

We cannot see the materiality of the question. The conversation between the partners at the time the assignment was made was a matter of no concern to defendant. The witness was permitted to testify that the consideration paid by him was $10 each to Jacoby and Avery. No issue was raised as to the bona fides of the assignment, and it was not competent on cross-examination of the witness to show otherwise.

[3] Quite a number of questions were put to witness Kendrick on cross-examination by which it was sought to show what conversation the witness had with defendant at the time the contract was entered into. The court sustained plaintiff's objection thereto, made on the grounds of immateriality, irrelevancy, and incompetency, and not cross-examination. The trial court properly held that conversations had at the time the contract was signed were inadmissible, as also was parol testimony varying the terms of the contract. The effect of the questions was to be determined by their form, and not by defendant's avowal of his intention in asking them.

Defendant's assignment of error No. 10 involves the same principle. The question was on cross-examination of plaintiff, and went to a conversation between him and defendant at the time the contract was entered into. If it was also designed to bring out some fact in support of defendant's averment of fraud, it was not competent to establish it by the cross-examination of plaintiff.

[4] Defendant was a witness in his own behalf. He was asked a number of questions for the purpose of showing what was said by the parties during their negotiations at the time of the making of the contract as to what was told the witness to the effect that, "if they did not make a sale of the land within the period of four months, they would quit, and the agreement would be at an end." Conceding error in sustaining the objection in view of the charge of fraud, it was without prejudice, since the witness afterward was permitted to testify that such statement was made to him, and that he acted on it, and would not have signed the contract had it not been made. On cross-examination also the facts were fully brought out. We have examined the other assignments of error in the admission and rejection of evidence, and have discovered no ruling which we deem prejudicial.

[5] It is contended that the dissolution of the partnership terminated the contract. As the agency created by the contract contemplated that the defendant was entitled to the services of all the partners, the point would have force but for the fact that in the dissolution it was expressly agreed by the partners that the partnership was to continue with respect to certain contracts, among which was the one here involved, and this relation as to it was not changed until the contract was assigned to plaintiff some time after defendant had sold the property.

Error is assigned in giving and refusing certain instructions. By the instruction marked III the jury were told that "the defense of fraud set up by defendant consists of four elements, and you must find, and it is your duty before you can find for defendant on this defense, that each and every of the said four elements must be found in favor of said defendant": (1) That plaintiff, or Jacoby, on behalf of the partners, promised that, if they did not sell the lands within four months from the date of the contract, they would quit and the contract would end; (2) that defendant acted on this promise when he signed the contract; (3) that defendant was induced by reason of the promises alleged to have been made to execute and deliver the contract; (4) that plaintiff has not performed, and had no intention of performing. The objection urged is that the instruction necessarily eliminates any element of fraud other than the four mentioned, whereas it was alleged in the answer that plaintiff and his partners represented to defendant "that they only wanted and intended said agreement to be operative for the period of four months from its date." This very point is fully covered in instructions IV and V, and by other instructions the statutory definition of actual fraud was fully given.

The court instructed the jury that, if they found for plaintiff, their verdict must be for $6,477. It is objected that the instruction "deprived the jury from rendering a judgment for a lesser sum, and deprived the jury from considering evidence before them bearing upon the amount of the verdict." There were 2,159 acres of land in the tract. The agreement was that defendant would pay 7½ per cent. on the sum of $40 per acre. The land sold for more. At $40 per acre, it brought $86,360, and 7½ per cent. of that amount is the sum of $6,477. We think the court intended by the instruction, and that the jury so regarded it, that to find for the plaintiff meant that defendant was liable under the contract sued upon, and in that view no other verdict would have responded to the finding.

[6] The court instructed the jury as follows:

"It is admitted in this case that defendant executed and delivered to plaintiff here for Kendrick, Jacoby & Avery the contract involved here, plaintiff's Exhibit II, and that said contract has not been revoked or withdrawn in writing, as provided in said contract, prior to the sale by the defendant of the property described in said contract, and such contract could have been revoked without the consent of Kendrick, Jacoby & Avery by such notice in writing at any time after October 7, 1912, but prior to that time said contract could not be withdrawn or revoked by such notice unless accepted by Kendrick, Jacoby & Avery."

The error assigned is that:

"It instructs the jury generally as to admissions by the language, 'It is admitted in this case,' * * * but, as applicable to defendant, we contend it is erroneous."

Defendant admitted signing the contract when shown him on the witness stand, and he also admitted that it had never been revoked in writing at any time prior to the sale, and the contract shows on its face it could not be revoked prior to October 7, 1912, without the consent of the contractees, but could have been revoked in writing after that date without their consent. We discover no error in the instruction.

The court instructed the jury that no confidential relations existed between defendant and the other parties to the contract when it was made. This conforms to the evidence. The parties dealt at arm's length.

Error is assigned in the court's refusing certain instructions requested by defendant. Instructions XII and XIII, given by the court, we think, fully responded to the instructions refused. Taken in their entirety, the instructions seem to give defendant the benefit of a correct statement of the law upon all involved issues.

The judgment and the order are affirmed.

We concur: HART, J.; BURNETT, J.

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35 Cal. App. 518

NUTTING v. CITY OF LOS ANGELES et al.
(Civ. 2391.)

(District Court of Appeal, Second District, California. Dec. 10, 1917. Rehearing Denied by Supreme Court Feb. 7, 1918.)

1. Municipal Corporations 🔑513(7)—Proceeding for Assessment—Review—Evidence Admissible.

Where street opening proceedings were commenced by ordinance, pursuant to Street Opening Act 1903 (St. 1903, p. 376), evidence of proceedings prior to such ordinance would be inadmissible in a suit to have the assessment declared void, unless such evidence tended to establish in connection with other facts proved that the city council willfully and fraudulently overassessed the property of plaintiff.

2. Municipal Corporations 🔑513(7)—Assessments—Review.

An assessment must be sustained, unless it be proved that the city council refused to decide, upon the merits, objections urged against it, and instead thereof willfully based its order upon illegal considerations inconsistent with an assessment in proportion to benefits, in view of Street Opening Act 1903, § 19, declaring that the action of the city council upon objections to assessments shall be final and conclusive.

3. Municipal Corporations 🔑513(7) — Street Improvements — Assessments — Validity—Evidence.

In action to have assessment for expenses of street opening proceeding declared void, enjoin collection, etc., *held* plaintiff wholly failed to establish that officers of defendant city acted wrongfully and illegally, or that assessment resulted from anything but an honest attempt to make it in proportion to benefits.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by E. M. Nutting against the City of Los Angeles and others. Judgment for plaintiff, and defendants appeal. Reversed.

Albert Lee Stephens, City Atty., and Charles S. Burnell, Asst. City Atty., both of Los Angeles (Arthur M. Ellis, of Los Angeles, of counsel), for appellants. E. M. Nutting, of Los Angeles, in pro. per.

CONREY, P. J. Appeal by the defendants from the judgment. By his action the plaintiff seeks to have it determined that an assessment levied against his property to pay expenses of a street-opening proceeding is void, to enjoin the defendants from proceeding to enforce the assessment, and to quiet his title against said assessment. The prayer of his complaint further demands that under and by virtue of section 26a of the Street Opening Act of 1903, as amended (St. 1913, p. 433, § 5), being the act under which the proposed street opening has been conducted, the defendant city of Los Angeles and its officers be directed to prepare and levy a reassessment upon the property within the assessment district, and to levy against the plaintiff's property, known as parcel 39 in said assessment, a total assessment not exceeding the sum of $15,000. The court below determined that the assessment was void, and ordered a reassessment to be made in accordance with certain directions which are contained in the decree.

After the board of public works had reported to the city council its assessment, the plaintiff and others filed their protests, which were duly brought on for hearing before the council. The complaint in this action alleged, and the court found it to be true, that at said hearing the attitude of said council and its members was not fair and impartial, but was biased and prejudiced; that each of the members of the council was then already determined to confirm and ratify the assessment without regard to what protests, evidence, or arguments might be offered at any hearing thereof. The complaint further alleged that prior to the hearing of said protests each and all of the members of the city council and of the members of the board of public works and the clerk of the board of public works had discussed with each other said assessment and the several assessments of the parcels within the assessment district, and had agreed and determined upon "the unjust and unlawful apportionment constituting the said assessment," as the same was thereafter confirmed by the council. Upon this allegation the findings are silent.

The proceedings in question are for the opening, from Tenth street southerly to Eleventh street and from Twelfth street southerly to Pico street, of the street known as Broadway in the city of Los Angeles. Prior to the commencement of these street-opening proceedings, Broadway had been opened as a street from Eleventh street to Twelfth street, and also existed as a principal business street of the city, extending for a long distance northerly from Tenth street. There was also an extension of Broadway from Tenth street southerly to Main street. The proposed new extension of Broadway from Tenth street to Eleventh street forms an acute angle at its northerly end with said pre-existing extension of Broadway connecting with Main street. Main street is a north and south street, one block east of Broadway, which runs approximately parallel to Broadway. The assessment district of these street-opening proceedings includes property on both sides of the proposed new Broadway extension from Tenth to Eleventh and from Twelfth to Pico streets, and also includes lands on each side of Broadway from Eleventh to Twelfth street. Assessments numbered 15 to 37, which are the assessments of the lots fronting on Broadway between Eleventh and Twelfth, charged against those properties an aggregate sum much less in proportion to area and much less in actual amount than the assessments levied against the other portions of the assessment district. Respondent claims that by reason of such underassessment the remaining portions of the district were greatly overassessed.

In conformity with allegations of the complaint, the court found that the parcels 15 to 37 were grossly underassessed; that they were not assessed in proportion to the benefits to be derived from the opening of Broadway; and that each and all of said parcels have been assessed in amounts much less than they would have been respectively assessed if the assessment had been made in proportion to the benefits to be derived by said respective parcels from the opening of Broadway; that parcel No. 39 (property of the plaintiff) as shown on said assessment diagram is not assessed in proportion to the benefit to be derived by it from said opening of Broadway, but is grossly overassessed, and is assessed in said proceeding an amount much in excess of the amount which said parcel 39 would have been assessed had said assessment been made upon each parcel of property in said assessment district in proportion to the benefits to be derived from said opening of Broadway.

All of the foregoing allegations of the complaint referring to the alleged wrongful methods of assessment and the alleged bias, prejudice, and predetermination on the part of the city officers, were denied by the answer of the defendants. The defendants claim here that there is no evidence to sustain the findings as to those issues.

These street-opening proceedings were commenced by an ordinance adopted by the city council on May 27, 1913, whereby the council declared its intention to order the opening of the street between the limits described and to proceed with the matter of said improvement under the provisions of the Street Opening Act of 1903. At the trial of this action the plaintiff was permitted, over the objection of the defendants, to introduce in evidence certain portions of the minutes and records of the city council prior to May 27, 1913. The objection presented was that such minutes and records prior to that date were incompetent, irrelevant, and immaterial, for the reason that, under the express provisions of the Street Opening Act of 1903, the proceedings are initiated by the adoption of an ordinance of intention, and that nothing done prior to that time is part of those proceedings. By the evidence thus received it was shown that on April 1, 1913, the city council ordered that the city attorney and engineer prepare the necessary ordinance for the opening of Broadway from Tenth to Eleventh street and from Twelfth to Pico street, and that the assessment district should be all the property which would face on the proposed opening between the streets named. On the 15th day of April, 1913, the city council received and referred to the streets and boulevards committee a certain petition, No. 772, which was a petition purporting to be signed by or on behalf of certain owners of property facing on Broadway between Eleventh and Twelfth streets, and wherein the petitioners made the following statement:

> "In the matter of the assessment district to be assessed for the condemnation of land necessary for the proposed opening of Broadway between Tenth and Eleventh streets, and Twelfth and Pico streets, we beg to advise you that we are of the opinion that the property facing on Broadway between Eleventh and Twelfth streets which is dedicated for street purposes by map No. 2289, should be included within the assessment district. We are of the opinion, however, that the assessment which would be levied against the property fronting on said Broadway between Eleventh and Twelfth streets should not bear the same proportion of assessment as that between Tenth and Eleventh, or between Twelfth and Pico, we having dedicated said street to the city free of all incumbrances, and we consider that in making this suggestion that your honorable body will take into consideration this fact when the assessment for the condemnation of said land is being made."

On April 22, 1913, the streets and boulevards committee reported to the council concerning said petition 772, and recommended that the instructions theretofore given the city engineer and city attorney to prepare the necessary ordinances for the opening of Broadway between Tenth and Pico streets be rescinded, and that there be prepared and presented to the council the necessary ordinance of intention for the opening of Broadway from Tenth to Eleventh street and from Twelfth to Pico street in one proceeding; and "that the board of public works in preparing the assessment shall take into consideration the prayer of the petitioners and shall levy the assessment according to petition No. 772." The minutes show that this report as read was adopted, and the "map of the assessment district" was approved. The context shows that this map was merely a map of the proposed assessment district which had been presented with another petition (numbered 789) of property owners within the proposed district.

[1] It should be kept in mind that all of these proceedings which occurred in April, 1913, preceded the ordinance of May 27, 1913, and therefore are not a part of the procedure legally necessary and pertaining to the proceedings under the Street Opening Act of 1903 and upon which the validity of the assessment must depend. The evidence of such preliminary action on the part of the council cannot have any bearing upon the merits of this case, unless it can be maintained that in connection with other facts alleged and proved, it tended to establish the fact that the city council willfully and fraudulently refused to assess property in accordance with benefits received, and that it did willfully and fraudulently overassess the property of the plaintiff in order that it might give credit to other property owners because those owners had previously dedicated for street purposes that portion of Broadway between Eleventh and Twelfth streets. The record is destitute of evidence that petition No. 772 and the approval thereof by the council was ever relied upon or used in any manner by the board of public works or city council in their proceedings conducted pursuant to the ordinance of May 27, 1913, unless it be true that the assessment itself as finally approved by the council furnishes evidence sufficient to establish that it was made and intended to be made upon the basis of such petition and recommendation.

The assessment was made by the board of public works as the law requires. There is no evidence that the board of public works or any person connected with it ever knew anything about petition No. 772 or the recommendations or orders of the city council concerning that petition, to which we have referred. Neither was the board bound to take notice thereof. Viewing the assessment as made by the board of public works, it stands before us the same as if said preliminary proceedings had not existed, and it must be regarded as wholly uninfluenced thereby. When in due time the assessment as made by the board of public works and the protests of the plaintiff and other property owners came on for hearing before the city council, the record shows that the protestants were given a complete hearing. Thereupon the assessment as made by the board of public works was approved by the council without changes, except for the correction of some minor errors which may here be disregarded.

Section 19 of the Street Opening Act of 1903 (Deering's 1915, Gen. Laws, Act No. 3928), which provides for a hearing by the council of objections to the assessment, declares that "the action of the council upon such objections and assessment shall be final and conclusive in the premises." Similar provisions are contained in other street assessment statutes which have been the subject of judicial investigation, wherein the courts of this state have given full recognition to the power of the city council to render "final and conclusive" judgment concerning street assessments. Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661, related to an assessment under the street improvement law commonly known as the Vrooman Act. The proceeding in that case was for grading, graveling, and other street work. Referring to the refusal of the trial court to admit evidence offered for the purpose of proving that the benefits accruing from the improvement of the street were not in excess of the damages caused thereby and also not in excess of the assessment against the lots for the expenses of the improvement, the Supreme Court said:

> "It is true that local assessments are said to be imposed on the theory that the property adjacent to the improvement receives special benefit therefrom. But this is a matter which is for the determination of the legislative authority of the state, acting through its established agencies for the government of political subdivisions, or directly by the Legislature of the state, as that body may see fit. It is enough for the local property owner that he has a right to be heard before the city council upon the question, by filing a petition of remonstrance in the proceeding prescribed by law, setting forth his reasons why the improvement should not be made. Upon this the council must decide the question, and its decision is final."

In United Real Estate Co. v. Barnes, 159 Cal. 243, 113 Pac. 167, the proceeding in question was under the act of March 6, 1889 (Stats. 1889, p. 70), providing for the opening of streets. It was held that the decision made by the council was conclusive upon the plaintiff, and Duncan v. Ramish, supra, was quoted as authority for the decision. Referring to Duncan v. Ramish, the court said:

> "This case, it is true, arose under the Vrooman Act in a proceeding for paving or macadamizing a street, and not under the Street Opening Act. But the legislative power of the state, exercised in both instances by the city council, is the same

in one case as in the other, the provisions of the statute as to the proceedings in the council and the conclusive effect of its decisions are substantially the same, and the same principles must apply."

In Cake v. City of Los Angeles, 164 Cal. 705, 130 Pac. 723, the action was one to recover moneys paid by the plaintiff under protest, her contention being that the assessment was void, and also that she was compelled to pay a sum greater than that for which she was legally liable. That proceeding was under the Street Opening Act of 1903. The plaintiff had filed objections to the assessments, which objections were overruled by the city council. Judgment against the plaintiff was affirmed by the Supreme Court. In its decision that court said:

> "Plaintiff's allegation that the assessments upon her two lots were inequitable was a matter upon which she had the right to be heard, and was heard before the council. She makes no charge of fraud in connection with the assessment of her property, and, without such a charge, the determination of the council is final."

Section 26a of the Street Opening Act of 1903 (as added by St. 1913, p. 433, § 5), does not, in our opinion, change the rule, which, as elsewhere stated in that statute, makes the council's decision, when acting within its jurisdiction, "final and conclusive."

[2] It is the necessary effect of these decisions that the assessment challenged in the present case must be sustained unless the facts alleged and proved show that the city council refused to decide upon the merits the objections urged against the assessment, and that instead thereof it willfully based its order upon illegal considerations which were inconsistent with making an assessment in proportion to the benefits to be derived from the improvement, and which in effect amounted to a fraud upon the rights of the plaintiff. It is the contention of the plaintiff, and it is the theory of his action, that these elements of fraud are presented and established in this case, and that in fact there was no "assessment" made, but only an arbitrary imposition. Spring Street Co. v. City of Los Angeles, 170 Cal. 24, 148 Pac. 217, is relied upon as sustaining this contention. That was a proceeding for the widening of Eighth street in the city of Los Angeles. After the board of public works had filed its assessment, protests were entered against it by certain property owners. Upon the hearing of those protests the council ordered that the board of public works file a new assessment, and that a report made to the council by the streets and boulevards committee with reference to the assessment be referred to the board of public works for consideration in making the new assessment. The committee report had recommended "that the lots fronting on Eighth street be assessed the same amount as allowed for land taken, and that the balance of the amount to be raised be assessed equally per front foot on the land fronting on Eighth street." The reference to "amount as allowed for land taken" was to the awards which (in the condemnation suit which had been instituted in connection with the proceedings, as provided by the statute) had been made to the owners of the lots fronting on Eighth street. Thereafter the board of public works prepared the assessment in accordance with the instructions thus received, but presented with such new assessment a report in which it said:

> "We are, however, still of the opinion that the original assessment as made by this board is proper and correct, and beg leave to invite the attention of the honorable council to the several assessments on lots situated in the middle of blocks, and which have been assessed a comparatively small amount in this new assessment, because the amount allowed for land taken was small, whereas these inside lots are benefited more in proportion to the lots on the corners, as they only have the Eighth street frontage."

Protests were filed to this so-called new assessment, urging that it was arbitrary, unjust, excessive, and illegal, but, after hearing, the council confirmed it in toto. In making its decision reversing a judgment which had affirmed the validity of this assessment, the Supreme Court said:

> "The effect of the assessment so made is not and may not be questioned. It canceled every dollar of the $226,000 awarded by the court in the condemnation proceedings for the taking of this private property for a public use, under an implied omnibus finding that the property of every person whose lands fronted on Eighth street was benefited at least to the amount of his award in the condemnation proceedings for the taking of his property, and was also benefited just a little more, that little being the property owner's proportionate share of the expense of the city in the matter of its condemnation proceeding, which additional amount is contemplated by the suggestion contained in the report of the streets and boulevards committee 'that the balance of the amount to be raised be assessed equally per front foot on the land fronting on Eighth street.'"

The Supreme Court held that:

> The assessment was apparently made "in an effort to see just how far the legislative agents and mandatories might go in their taking of private property without compensation, until told by the court that they had passed the outermost bound of law and reason. That bound has been reached and passed by the assessment in this case. It bears upon the face of the record, as here presented, convincing and conclusive evidence that no effort at all was made by the council to assess in proportion to benefits. It is impossible that under the exercise of any discretion in the matter it could be found that in every case the damage awarded by the court for the taking of the property was exactly or more than covered by the benefit which would accrue to the remaining property by the widening of the street. And it is also impossible that those separate pieces of property were, in addition, each one of them, benefited to the exact added amount which it cost the city to take the condemned land. It is to strain credulity beyond the breaking point to ask that any such belief be for a moment entertained. * * * We believe the assessment here in question to be so manifestly and so grossly unjust upon the face of this record as to call for no extended argument for its condemnation. It was not even the quasi judicial act of the board intrusted with the

duty of making the assessment, the board of public works. That board apparently entered upon the performance of its duty with a due sense of responsibility justly pertaining to its judicial character. If the communication of the city council to them was a command, they felt compelled to obey it in the matter of the new assessment, and did so under formal protest. If it was not a command, but merely a suggestion, then it was a suggestion of which their judgment did not approve, and their disapproval of which they formally expressed. * * * We hold that the record here presented furnishes convincing evidence that the assessment was ordered prepared without the slightest exercise of judicial discretion, and so unwarrantedly, arbitrarily, and unjustly as to work a confiscation of the property, and to be, therefore, in no legal sense an assessment at all."

We have examined in detail the many items of assessment shown by the record in this case and the extended arguments thereon by respondent, wherein he contends that the amounts of the several assessments as compared with each other are so extremely and absurdly unreasonable as to compel the conclusion that the council did not exercise judgment according to law upon the matters presented for its consideration, and that instead thereof, the council willfully based its decision upon illegal grounds. So far as the merits of the assessment are concerned, it may be that, if the justices of this court were authorized to act as a court of direct appeal, they would order that the assessment be modified in some of the instances presented. But it is not enough that we might differ with the members of the city council, or that the judge of the trial court did so differ, as to the reasonableness of some of the items in question. Those are matters about which the minds of reasonable men might reasonably differ. That being so, the court may not interfere with that judgment of the city council which the law has declared to be "final and conclusive."

One or two instances will further illustrate the nature of plaintiff's contentions. The total amount of the assessment is $1,210,038.00. Of this large sum $299.544.00 are charged against the south block, $702.968.45 against the north block, and $207,525.55 against the middle block. The several assessments in the middle block are exactly equal to each other for each and every foot of frontage in that block. The assessments in the two other blocks bear to each other no such relation of equality with respect to frontage. Can there be reasons which in the minds of fair and reasonable men might justify these diversities in amounts of assessment as between the owners of the middle block fronting upon a section of Broadway as already established and the owners of the two other blocks which are to receive new street frontage by the opening of Broadway? Undoubtedly the assessing officers had the right to take into consideration the fact that one block will not, and that the remaining blocks will, receive an entirely new street frontage; that the benefit to the middle block must arise merely from the development of the entire thoroughfare by reason of the new extension thereof; that no new corner lots are created in the middle block, and that the lots in that block are of equal depth. Many diversities of condition apparently affect the other blocks which do not exist in the middle block. Conceding, as we readily may, that the owners of the middle block were not entitled to have their assessments reduced on account of any previous dedication of land which they may have made for street purposes, the evidence produced to the court was insufficient to prove that such illegal credit was given in the assessments as made.

The record in this case cannot be paralleled with the Spring Street Co. Case, supra, as constituting an attempt to absorb by assessment charges the awards of damage which had been made to the several parties for portions of land condemned for Broadway street purposes. It is true that some of the assessments are for amounts exceeding the awards made, but there is such diversity in the amounts charged and in the reasonably possible causes in operation, that the amounts of the assessments furnish no evidence of a sinister purpose to enlarge assessments so as to overcome large awards of damages. Assessment No. 5, in the south block, against Anna M. Murphy, is 12 times the amount of damages awarded to her. Assessment No. 7, against Fitzwilliams, is less than twice his damages awarded. Assessments 47 to 50, against the Rindge Company are only one-third of that company's damages awarded. Assessment No. 39, against the plaintiff in this action, amounts to nearly 2½ times the award allowed for taking of the owner's adjoining property and for damages to this assessed property. These differences may be accounted for by a variety of possible reasons having reference to areas, frontages, values, and relative situations of the several parcels. The actual reasons which guided the minds of the assessors in reaching their conclusions upon the question of benefits received are beyond our range of inquiry. It is enough that, with regard to the relation between assessments and awards, the court may not say here, as was said under the facts shown in the Spring Street Co. Case, that the process of assessment was vitiated by a deliberate purpose to assess according to damages awarded, and not in proportion to the benefits to be derived from the opening of the street.

[3] According to our opinion, the record wholly fails to establish the charge that the officers of the city acted in these matters wrongfully and illegally in their proceedings, or that the assessment has resulted from anything other than an honest and fair attempt on their part to make the assess-

ment in proportion to the benefits received and as the law requires.

The judgment is reversed.

We concur: JAMES, J.; SHAW, J.

35 Cal. App. 807

FITZWILLIAM v. CITY OF LOS ANGELES et al. (Civ. 2425.)

(District Court of Appeal, Second District, California. Dec. 10, 1917. Rehearing Denied by Supreme Court Feb. 7, 1918.)

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Patrick Fitzwilliam against the City of Los Angeles and others. Judgment for plaintiff, and defendants appeal. Reversed.

Albert Lee Stephens, City Atty., and Charles S. Burnell, Asst. City Atty., both of Los Angeles (Arthur M. Ellis, of Los Angeles, of counsel), for appellants. Stephens & Stephens, of Los Angeles, for respondent.

PER CURIAM. This action was tried together with No. 2391, Nutting v. City of Los Angeles et al., 170 Pac. 680, in which the decision of this court was filed to-day; the two cases being tried upon the same evidence. The opinion written in the Nutting Case covers all of the questions which we find it necessary to determine in this case. Upon the authority of that decision, the judgment appealed from herein is reversed.

35 Cal. App. 808

MURPHY et al. v. CITY OF LOS ANGELES et al. (Civ. 2467.)

(District Court of Appeal, Second District, California. Dec. 10, 1917. Rehearing Denied by Supreme Court Feb. 7, 1918.)

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Alvina M. Murphy and another against the City of Los Angeles and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Albert Lee Stephens, City Atty., and Charles S. Burnell, Asst. City Atty., both of Los Angeles (Arthur M. Ellis, of Los Angeles, of counsel), for appellants. Hanson, Hackler & Heath, of Los Angeles, for respondents.

PER CURIAM. This action was tried together with No. 2391, Nutting v. City of Los Angeles et al., 170 Pac. 680, in which the decision of this court was filed to-day; the two cases being tried upon the same evidence. The opinion written in the Nutting Case covers all of the questions which we find it necessary to determine in this case. Upon the authority of that decision, the judgment appealed from herein is reversed.

35 Cal. App. 809

RINDGE CO. v. CITY OF LOS ANGELES et al. (Civ. 2468.)

(District Court of Appeal, Second District, California. Dec. 10, 1917. Rehearing Denied by Supreme Court Feb. 7, 1918.)

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by the Rindge Company against the City of Los Angeles and others. Judgment for plaintiff, and defendants appeal. Reversed.

Albert Lee Stephens, City Atty., and Charles S. Burnell, Asst. City Atty., both of Los Angeles (Arthur M. Ellis, of Los Angeles, of counsel), for appellants. Edw. F. Wehrle, of Los Angeles, for respondent.

PER CURIAM. This action was tried together with No. 2391, Nutting v. City of Los Angeles et al., 170 Pac. 680, in which the decision of this court was filed to-day; the two cases being tried upon the same evidence. The opinion written in the Nutting Case covers all of the questions which we find it necessary to determine in this case. Upon the authority of that decision, the judgment appealed from herein is reversed.

177 Cal. 404

PEOPLE v. MILLER. (Cr. 2100.)

(Supreme Court of California. Feb. 1, 1918. Rehearing Denied Feb. 28, 1918.)

1. Criminal Law 🔑231—Failure to Read Formal Parts of Complaint—Reversible Error.

Where in compliance with Pen. Code, § 864, the committing magistrate read the whole charging part of a complaint to defendant at the preliminary hearing, that the formal parts thereof, as well as the name of accused, were not read, could not prejudice any substantial rights of accused.

2. Jury 🔑108—Qualifications—Scruples against Death Penalty.

In a prosecution for murder in the first degree, the state's challenge to a juror having conscientious scruples against inflicting the death penalty and who stated that he would not vote to convict, if conviction was to be followed by the death penalty, was properly granted.

3. Criminal Law 🔑1035(3) — Appeal — Remarks of Court Not Objected to.

That the court, during the questioning of a juror on voir dire, expressed doubt as to the propriety of questioning as to whether the fact that defendant was colored would affect the juror's judgment, and remarked that he was not absolutely clear whether, when other things are absolutely equal, color should not be permitted to weigh, will not be considered on appeal, where defendant made no objection to the remark or request for admonition to the veniremen present to disregard remark.

4. Criminal Law 🔑1166½(12)—Remarks of Judge—Cure by Instructions.

The alleged prejudicial effect of such remark, if any, was cured by an instruction of the court that: "The law knows no creed or condition, no color, no nationality; every defendant, whatever his race, color or condition, whether he be rich or poor, high or low, stands equal before the law and should be tried with perfect impartiality."

5. Criminal Law 🔑823(14)—Instruction—Reasonable Doubt.

Where the court instructed that the jury must be satisfied beyond a reasonable doubt of defendant's guilt, and fully explained the meaning of the term reasonable doubt, no prejudice could result from an instruction to the effect that defendant's guilt might be established by proof of facts and circumstances from which it might be reasonably and satisfactorily inferred.

6. Homicide 🔑340(2) — Instructions Not Applicable—Harmless Error.

An instruction that, "when the killing is proved, it devolves upon the defendant to show any circumstances in mitigation to excuse or justify the homicide by evidence on his part," conformed to Pen. Code, § 1105, and, although inapplicable because the killing was denied and no mitigating circumstances were shown or suggested no possible injury could result to defendant from the giving thereof.

7. Criminal Law 🔑625 — Submission of Question of Insanity.

Where no affidavits were offered in support of motion after trial for an order inquiring into accused's insanity, and no evidence was introduced at the trial in support of a defense based on insanity, the motion was properly denied under Pen. Code, § 1368, providing that, if doubt arises as to the insanity of defendant, the court must order the matter submitted to the jury and suspend the pronouncement of judgment until the question is determined.

8. Criminal Law 🔑404(3) — Weapon — Admissibility.

The admissibility of a gun found at or near the place designated by accused was unaffected by failure to establish that the bullets causing decedent's death corresponded to the caliber of the gun.

9. Homicide 🔑253(1) — First Degree Murder—Sufficiency of Evidence.

Evidence *held* sufficient to sustain conviction for first degree murder.

In Bank. Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Fred Miller was convicted of first degree murder and appeals from the judgment and an order denying his motion for new trial. Affirmed.

Orr & Gardner, of Ventura, for appellant. Don G. Bowker, of Ventura, U. S. Webb, Atty. Gen., Robert M. Clarke, Asst. Atty. Gen., and Robert B. Camarillo, of Los Angeles, for the People.

VICTOR E. SHAW, Judge pro tem. Following defendant's conviction upon an information charging him with the crime of murder in the first degree he was sentenced to execution as provided by law. From the judgment so pronounced and an order denying his motion for a new trial he appeals.

In the summer of 1915 defendant, who is a colored man, went to the village of Simi in Ventura county, where he was employed as a laborer, and for some time lived in a tent adjoining the home of a young girl named Josephine Rodrigues who lived with her grandmother, Adela Rodrigues, and a younger sister. In February, 1917, he was employed upon highway work, during which time he lived alone in a tent located some eight miles distant from Simi at a place called Hassan. On March 10th, while living at Hassan, he wrote a letter to Josephine Rodrigues, then 16 years of age, and gave it to a boy instructing him to deliver it to her. In this letter, which, however, never reached Josephine, he expressed a strong affection for her and stated that he had heard she was going to marry another person and therein made veiled threats of bodily injury to her if she married any one other than himself. On the night of March 10th Josephine, her sister, and her grandmother, Adela Rodrigues, all of whom occupied one bedroom in their home, retired, leaving, as was their custom, a lighted lamp turned low. Soon after 12 o'clock that night Adela was awakened by a noise in the room and discovered a man with a cloth mask over his face standing near her bed. Receiving no reply to her call "Who are you?" she grasped the mask, pulled it down from his face to a point, as she states, below his nose, at which time the wearer thereof, using a razor, cut her hand and also her face, and then, turning from her to the bed occupied by Josephine, he fired three shots from a pistol, two of which entered her head, causing her death and then left the house. The cries of the grandmother aroused the neighbors, who, upon information given by her as to the identity of the perpetrator of the crime, proceeded in an auto to defendant's camp at Hassan, eight miles distant, arriving there approximately at 2:30 a. m. They found no one at the tent occupied by defendant and received no response to the calls made for him in the vicinity. A short time thereafter another party seeking his apprehension arrived and found defendant in the tent. His shoes and clothes were damp and covered with mud, indicating that he had recently been walking in the wet grass and weeds. During the time that defendant lived in the tent adjoining the home of Adela Rodrigues she had often seen him pass the house, and in positive and unequivocal terms she identified him as the man who entered her room, assaulted her with the razor, and fired the shots which killed Josephine.

No evidence whatsoever was offered by defendant in response to that adduced by the prosecution, thus unerringly pointing to him as the perpetrator of the atrocious deed. Nevertheless, we are asked to reverse the judgment upon the ground of alleged errors whereby it is claimed the accused was prejudiced in his substantial rights.

1. At the preliminary examination the magistrate, in reading the complaint upon which the warrant of arrest was made, as required by section 864 of the Penal Code, omitted the formal parts thereof, as well as the name of the complainant. Supported by such fact defendant moved the court to set aside the information upon the ground that he had not been legally committed. The denial of the motion is assigned as error. It appears that enough of the complaint was read to fully inform defendant of the charge against him, all the details thereof as stated in the complaint—the whole charging part of the complaint being read.

[1] Clearly, it cannot be held under these circumstances that the omission to more precisely comply with the requirements of the section in any way prejudiced any substantial right of the defendant.

[2] 2. It appeared from the testimony of F. W. Burnell, called for examination as a juror, that he had conscientious scruples against inflicting the death penalty, because in his opinion no sane man would take the life of a fellow being, and, even though as a juror convinced that defendant committed the murder as charged, he would not vote to convict if his conviction was to be followed by judgment of death. The showing made on his voir dire disclosed that Burnell was clearly disqualified to act as a juror, since he had conscientious scruples against following the plain mandate of the law. The challenge interposed by the prosecution was properly granted.

[3, 4] 3. While questioning a proposed juror on his voir dire, counsel for defendant inquired of him whether the fact that defendant was of the colored race would in any way affect his judgment in passing upon his guilt or innocence. Thereupon the court expressed doubt as to the propriety of the question and as to the weight to be accorded conflicting evidence between a white and a colored witness and said:

> "Where all other things are equal, the jury has to decide one way or the other on the question of credibility. If every other thing is absolutely equal, he has to decide one way or the other, and I am not altogether clear that in such a case the shadow of color should not be permitted to weigh."

Defendant claims that this remark was prejudicial because made in the presence of other veniremen. Such fact, however, is not disclosed. Conceding the impropriety of the statement and that it was made, as claimed by defendant, in the presence of those thereafter called as jurors, no objection was made thereto, and no request made by appellant to admonish the veniremen present to disregard the remark. As stated in People v. Kramer, 117 Cal. 651, 49 Pac. 842:

> "The defendant cannot remain silent and take the chance of a favorable issue, and, losing, urge as ground for reversal an error, which, but for his silence, might never have found its way into the case."

Moreover, the alleged error and the prejudicial effect thereof, if any existed, was cured by an instruction to the jury as follows:

> "You are further instructed, gentlemen, that the law knows no creed or condition, no color, no nationality; every defendant, whatever his race, color, or condition, whether he be rich or poor, high or low, stands equal before the law, and should be tried with perfect impartiality."

[5] 4. The court instructed the jury to the effect that they must be satisfied beyond a reasonable doubt of defendant's guilt, and thoroughly and fully explained to the jury the meaning of the term "reasonable doubt," and hence no prejudice could have resulted from an instruction to the effect that defendant's guilt might be established by proof of facts and circumstances from which it may be reasonably and satisfactorily inferred.

[6] 5. Complaint is made that the court erred in instructing the jury with reference to evidence of circumstances in mitigation of the offense, and particularly in stating to the jury that:

> "When the killing is proved it devolves upon the defendant to show any circumstances in mitigation to excuse or justify the homicide by evidence on his part."

The instruction clearly conforms to the provision contained in section 1105, Penal Code. People v. Wilt, 173 Cal. 483, 160 Pac. 561. While inapplicable to the case for the reason that no circumstances of mitigation or excuse are shown or even suggested, the defense being a denial of the killing by the accused, no possible injury therefrom could result to defendant. People v. Tapia, 131 Cal. 647, 63 Pac. 1001.

6. The giving of two instructions complained of, one of which is identical with that given in People v. Rogers, 163 Cal. 476, and set forth on page 483 of said volume (126 Pac. 143), and the other a copy of an instruction given in People v. Valencia, 32 Cal. App. 631, and found on page 633 of said volume (103 Pac. 865), were therein fully considered and approved. No purpose can be served by reiterating what is said upon the subject in the opinions referred to. Suffice it to say the court did not err in so instructing the jury.

7. And, likewise, what is said by this court in People v. Worden, 113 Cal. 574, 45 Pac. 844, is a complete answer to appellant's contention that the failure of the court to give to the jury a form of verdict finding the defendant guilty of murder in the second degree was prejudicial error. Here, as there, the case was tried upon the theory that the defendant did not commit the acts with which he was charged. Here, as there, the court properly instructed the jury as to what constituted murder in the second degree. Here, as there, the court failed to give the jury such form of verdict and in neither case was any request made therefor by the defendant.

8. In the light of the entire evidence we have carefully examined lengthy instructions requested by defendant, and in so far as they embodied proper questions for the consideration of the jury the subjects thereof are fully covered by instructions elsewhere given.

[7] 9. It is next claimed that the court should have granted defendant's motion made after trial for an order inquiring into the sanity of the defendant. No affidavits were offered in support of the motion, and no evidence was introduced on the trial in support of a defense based upon the insanity of defendant. Section 1368 of the Penal Code provides that if a doubt arises as to the sanity of the defendant the court must order the question submitted to a jury and suspend the pronouncing of judgment until the question is determined. There is nothing disclosed by the record showing any doubt in the mind of the court, nor indeed is there anything which could be deemed calculated to raise such doubt as to defendant's sanity, in the absence of which no reason existed requiring the court to submit the question to a jury. People v. Hettick, 126 Cal. 425, 58 Pac. 918; People v. Pico, 62 Cal. 60; People v. Kirby, 15 Cal. App. 269, 114 Pac. 794.

10. Upon the ground that it was involuntarily made, the court excluded from evidence a purported confession of the defendant made on March 12th. Over defendant's objection upon the ground that it was sought thereby to elicit evidence of an admission not voluntarily made but obtained as the result of persistent questioning of the defendant on the preceding day, when the confession so excluded was made, the undersheriff was permitted to testify that on the morning of March 13th, he met the defendant and asked him what he did with the gun after the shooting, to which defendant replied that he—

> "put the gun on the other side of the bridge at Simi about halfway between the bridge and the culvert down on the right-hand side on a sloping bank in some weeds."

It further appeared that a gun was found at or near the place described by the defendant, which, over defendant's objection that it was not shown to have any connection with the crime, was received in evidence. The two rulings are assigned as error. The action of the court in permitting the answer of defendant was based upon the fact that the persistent interrogating of defendant the preceding day, the purpose of which, as shown by the record, was to ascertain why he committed the crime, did not then operate upon his mind or influence him in telling where he placed the gun after the shooting. In other words, there was no causal connection between the answer given to the undersheriff and the means which on the preceding day induced the making of the confession, the nature of which is not shown. If defendant, on March 13th, in making the answer to the undersheriff, was free from any influence due to the persistent interrogation on the preceding day, the statement was voluntary. The trial court so determined, and there is nothing in the record upon which we can say it erred in so doing.

[8] As to whether the revolver received in evidence was the one with which the killing was done admits of doubt, but the objection to its reception in evidence goes to the weight of such evidence rather than to its admissibility. Conceding that if such was the fact and the proof at hand it should have been shown that the bullets causing decedent's death corresponded to the caliber of the gun, nevertheless, the admissibility thereof in evidence is unaffected by the failure to establish such fact.

[9] The record discloses no prejudicial misconduct on the part of the district attorney. The rulings of the court were eminently fair, and the uncontradicted evidence, both direct and circumstantial, were such that it is impossible to conceive of a verdict other than that rendered by the jury.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; SLOSS, J.; RICHARDS, Judge pro tem.

177 Cal. 341

SALINE VALLEY SALT CO. et al. v. WHITE et al. (L. A. 5364.)

(Supreme Court of California. Jan. 28, 1918.)

TIME 🔑10(1) — STOCKHOLDERS' ANNUAL MEETING—TIME OF HOLDING—BY-LAW AND STATUTE — HOLIDAYS — "PROVIDED TO BE DONE."

An annual meeting of a corporation fixed by its by-laws for a certain day is something "provided to be done" on that day, within Civ. Code Ariz. 1913, par. 3287, providing that whenever anything of a secular nature is provided or agreed to be done on a day named, and the day falls on a holiday, it may be performed on the next ensuing business day with like effect as though performed on the appointed day; so that such day falling on Sunday, a meeting on the following Monday, in pursuance of a notice by the secretary, acting on the president's order, and attended by nineteen-twentieths of the stockholders, should be considered the lawful regular annual meeting, rather than a meeting secretly held on the Sunday, though the by-law providing that all stockholders' meetings shall be regularly called by the secretary, provides that failure to give notice of the regular annual meeting shall not invalidate its proceedings.

In Bank. Original proceedings by the Saline Valley Salt Company and others against John D. White and others for writ of mandate. Writ granted by District Court of Appeal, and case transferred to Supreme Court. Writ denied.

George J. Denis, Oliver O. Clark, and Claud B. Andrews, all of Los Angeles, for petitioners. Fred N. Arnoldy and J. W. Hocker, both of Los Angeles, for respondents.

PER CURIAM. An original application for a writ of mandate was made to the District Court of Appeal of the Second Appellate District, and after a hearing a peremptory writ was granted in accordance with the prayer of the petition. Afterwards the matter was transferred to this court.

In the opinion of the learned District Court of Appeal the essential facts and one of the principal questions are set forth as follows:

"In this proceeding the petitioners seek to compel the delivery to them by the respondents of the papers and records of petitioner corporation. The controversy is between rival sets of persons asserting, respectively, that they are the officers and directors of the corporation. The petitioners other than the corporation claim to have been elected directors at a meeting of the stockholders held June 10, 1917. At the time of the meeting the outstanding capital stock of the corporation was 1,000,000 shares and the presence of the holders of a majority of the shares, either in person or by proxy, was necessary to constitute a quorum for the transaction of business. At the meeting there were present 97,381 shares by their owners and 480,408 shares by proxy, or a total of 577,789 shares. At the time all the proxies were issued, the holders of which were at the meeting, the by-laws of the corporation provided that 'stockholders may vote at all meetings either in person or by proxy appointed by instrument in writing subscribed by the stockholder or his duly authorized attorney, and granted not more than thirty days before the meeting, which shall be named therein.' Proxy holders at the meeting held proxies then more than thirty days old representing 286,652 shares. If these proxies had expired, the number of shares present at the meeting was 291,137, instead of 577,789; the meeting was not a legal one, for lack of a quorum, and the petitioners have no standing in this proceeding. The petitioner corporation is a creature of the laws of Arizona, and the Constitution of that state guarantees to stockholders the right to be represented by proxy at corporate meetings. The petitioners concede that an Arizona corporation may by its by-laws regulate the exercise of the right to vote by proxy, but contend that a by-law limiting the life of proxies to a period of thirty days is not a regulation, but, in effect, a destruction of the right."

Upon this question the court agreed with the contention of the petitioners, basing that conclusion upon the authority of People's Bank v. Superior Court, 104 Cal. 649, 38 Pac. 452, 29 L. R. A. 844, 43 Am. St. Rep. 147, wherein a by-law which provided that no proxy should be voted by any one not a stockholder was held to declare an unreasonable rule and one of no force. Upon the analogy of that decision it was decided that the by-law here considered was unjust and void; the court saying:

"To limit the life of a proxy to thirty days is unreasonable. Such a limitation serves to disfranchise a stockholder sojourning abroad and it might even have such an effect upon one traveling from place to place in this country. Under such a rule a tourist stockholder would be bound not only to mail from the antipodes, if he happened to be there, separate proxies for all stated meetings of the stockholders of his corporation, but he might very easily be deprived of the right to vote at special meetings held on hurried call as occasion for them might from time to time arise. If there exist a right to fix the life of a proxy through by-law provision at all, that life cannot be fixed at so short a period as thirty days."

Without giving our assent to this conclusion but for the purposes of this opinion conceding its correctness, nevertheless we feel compelled to disagree with our Brethren of the District Court of Appeal in the conclusion reached by them regarding the regularity of this meeting. The principal facts relating to the meetings are well stated in the opinion of the District Court of Appeal as follows:

"The meeting at which the petitioner directors claim to have been elected was held on Sunday, June 10, 1917. The by-laws of the petitioner corporation contain the following provisions: 'The annual meeting of the stockholders, after the year 1903, shall be held on the 10th day of June in each year at 10 o'clock a. m., and the secretary shall give notice thereof without being specially requested so to do. * * * Special meetings of the stockholders shall be called by the secrtary at the written request of the president, or two directors, or of stockholders of record owning a third of the stock issued and outstanding. All stockholders' meetings, whether annual or special, shall be called by the secretary by mailing a printed or written notice thereof, stating the day, hour and place of the meeting; and, in case of special meetings, the general nature of the business to be transacted, to each stockholder of record at his last-known post office address, postage prepaid, at least five days, exclusive of the day of mailing, before the date of the meeting. * * * A failure to give the notice for the regular annual meeting shall not invalidate the proceedings of the meeting. * * *' The respondents claim to be directors and officers of petitioner corporation by virtue of an election had at a meeting of the stockholders held Monday, June 11, 1917, at the same place at which the meeting of Sunday, June 10th, convened. There is no law of Arizona which prohibits the holding of stockholders' meetings on Sundays, but paragraph 3287 of the Civil Code of that state provides: 'Whenever anything of a secular nature other than a work of necessity or charity, is provided or agreed to be done upon a day named, or within a time named, and the day or the last day thereof falls on a holiday, it may be performed on the next ensuing business day with like effect as though performed on the appointed day.' On May 8, 1917, the secretary of petitioner corporation, acting at the request of its president, mailed to the stockholders a notice calling the annual meeting for June 11th. The notice stated that the by-laws required the meeting to be held on June 10th, recited the fact that the day would fall on a Sunday, and stated that on that account and 'in accordance with the law of Arizona provided in such instances,' the meeting would be held on the 11th."

The by-laws, although providing that the failure of the secretary to call a regular meeting shall not prevent the holding of such a meeting, also provide that, "All stockholders' meetings, whether annual or special, shall be called by the secretary." Learning that the regular date of the annual meeting would fall on a Sunday the secretary conferred with four of the directors, and was by them advised to make the call for Monday instead of Sunday. One of his advisers was Mr. Penn, now one of the petitioners in this proceeding, who after so assenting to the call of a regular meeting on Monday instead of Sunday afterwards met on June 10th with three other stockholders, without notice to the secretary and under circumstances indicating a wish that their actions should not become known to other stockholders not in sympathy with their ambitions. It is shown that these men stood by and without protest permitted the secretary to send out notices as prescribed by the by-ways calling the regular meeting for the 11th instead of the 10th. It is shown by the affidavit of the secretary that petitioner Penn not only advised the calling of the meeting on Monday, but approved a copy of the call for that meeting which was submitted to him by the secretary. It is a principle of corporation law that participation by an officer in issuing the call is a waiver by him of informalities in such call. Cook on Corporations, § 599. Therefore as to Mr. Penn in any view of the matter it may be said that he is not in a position to complain of the actions of the secretary nor the action of the stockholders at the called meeting. It is also a rule that only a stockholder whose rights have been infringed and who is equitably entitled to complain may question an election. Cook on Corporations, § 620. Generally speaking, the annual stockholders' meeting for the election of officers need not be held on the day named in the by-laws, but may be held on a later day. Cook on Corporations, § 595; People ex rel. Miller v. Cummings, 72 N. Y. 433; Hughes v. Parker, 20 N. H. 58.

All of the stockholders now petitioning took part in the meeting on the 11th of June and in the election there held. Some of them took part in the organization of that meeting. The minutes show the following proceedings at the very opening of the meeting of Monday:

"By Mr. Smith: I move that Mr. Penn act as chairman of the annual meeting of the Saline Valley Salt Company in the absence of the president, and Mr. White Smith as temporary secretary.

"The motion, being seconded by J. A. Foote, was put and declared to be unanimously carried."

All of the acts of the petitioners in the premises were inconsistent with good faith and fair dealing toward their associates, and we are convinced that this court should not contribute to the success of their purported election, unless convinced that they were acting within their clear rights under the law. Petitioners insist that they were so acting, and rely principally upon the authority of Cheney v. Canfield, 158 Cal. 342, 111 Pac. 92, 32 L. R. A. (N. S.) 16, for support of their contention in that behalf. It was decided in that case that section 11 of the Civil Code of California does not apply to a meeting of a board of directors, the time whereof is fixed by the by-laws of a corporation. But that case is not controlling as to the effect of section 3287 of the Civil Code of Arizona on the same subject. The decision in Cheney v. Canfield was based on the proposition that by-laws of a corporation do not come within the designation of the term "law or contract," as used in section 11 of the Civil Code. That section provides that:

"Whenever any act of a secular nature * * * is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, it may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed."

It may be conceded for the purposes of the case that that decision is correct in holding that the by-laws of a corporation do not constitute a contract in the meaning of section 11. The general rule is that such by-laws do constitute a contract between the stockholders of the corporation. Riverside Land Co. v. Jarvis, 163 Pac. 59; Lum v. American Wheel, etc., Co., 165 Cal. 661, 133 Pac. 303, Ann. Cas. 1915A, 816. But however this may be, the Arizona statute does not use the words "law or contract." It declares:

"Whenever anything of a secular nature other than a work of necessity or charity is provided, or agreed to be done upon a day named, or within a time named, and the day or the last day thereof falls on a holiday, it may be performed on the next ensuing business day with like effect as though performed on the appointed day."

It will be seen that this rule applies to all cases where anything of a secular nature, not a work of necessity or charity, is provided or agreed to be done upon a day named, regardless of the manner in which the time is fixed. Certainly a meeting fixed by the bylaws of a corporation for a certain day was something "provided to be done" on the day fixed, and could therefore be lawfully done on the following day if the day fixed were a holiday. This being the case, the meeting of June 11th, held as it was in pursuance of a notice by the secretary, acting on the president's order, that the regular day was a holiday, and that therefore the meeting would be held on the following day, and attended as it was by the holders of more than nineteen-twentieths of the stock, should be considered in law as the lawful, regular annual meeting of the stockholders. Therefore the petitioners have no ground for the mandate prayed for.

The writ is denied.

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177 Cal. 378

SOUTHERN PAC. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

(S. F. 8418.)

(Supreme Court of California. Jan. 30, 1918. Rehearing Denied Feb. 28, 1918.)

1. MASTER AND SERVANT ⚷405(4) — WORKMEN'S COMPENSATION ACT—WORK IN SCOPE OF EMPLOYMENT — SUFFICIENCY OF EVIDENCE.

In proceedings under the Workmen's Compensation Act (St. 1913, p. 279) for death of an employé of a rolling mill, evidence *held* to show that the work of the employé and another, in getting suitable rock out of a car when there was none in the bin in which it was commonly stored for their use, was within the scope of his duty under his employment, as the rolling mill, through its agents, had permitted that duty to be made known to him.

2. MASTER AND SERVANT ⚷417(7) — WORKMEN'S COMPENSATION ACT — REVIEW OF AWARD BY SUPREME COURT.

The Supreme Court, in reviewing an award of the Industrial Accident Commission, is not acting as a court of appeal, and has no power to weigh the effect of positive evidence, but must assume that the commission believed all the evidence given which tends to sustain the award.

3. MASTER AND SERVANT ⚷417(7) — WORKMEN'S COMPENSATION ACT — REVIEW OF AWARD BY SUPREME COURT—INCONSISTENCY IN FINDINGS.

The Supreme Court, in reviewing awards of the Industrial Accident Commission, has no power to annul an award because the findings are inconsistent; and, if there are findings which sustain the award, other findings inconsistent therewith, and which, if taken alone, might serve to annul it, will not be available for that purpose.

4. MASTER AND SERVANT ⚷417(7) — WORKMEN'S COMPENSATION ACT — REVIEW OF AWARD BY SUPREME COURT—FINDINGS.

Under Workmen's Compensation Act, § 84, authorizing the Supreme Court to annul an award of the Industrial Accident Commission only when the commission acted without or beyond its powers, or when the award was procured by fraud, or is unreasonable, or when the findings of fact do not support it, the findings of the commission are not subject to review, except in so far as they may have been made without any evidence whatever in support.

In Bank. Proceedings under the Workmen's Compensation Act by Alice A. Hunt, for compensation for the death of William M. Hunt, the employé, opposed by the Southern Pacific Company, the employer. Compensation was awarded by the Industrial Accident Commission, and, to review the award, the employer applies for writ of review. Writ discharged, and proceeding dismissed.

Henley C. Booth and A. L. Clark, both of San Francisco, for petitioner. C. M. Bradley, of San Francisco, for respondents.

SHAW, J. This is a proceeding to review an award of the Industrial Accident Commission allowing compensation to Alice A. Hunt for the death of William M. Hunt, a fireman employed by petitioner. It is claimed that the accident which caused the death of Hunt did not arise out of his employment or occur while he was engaged therein.

The petitioner was operating a rolling mill at Sacramento. In that work it was necessary to heat pieces of iron preparatory to rolling the same. This was done in a furnace, and to keep the iron in proper place for the application of the heat, rock was piled in the bottom of the furnace and the iron was placed thereon. The rock for this purpose was kept in a bin just outside the rolling mill. Adjacent to this bin, but outside of the rolling mill yard, was a railroad track, used for the purpose of carrying the rock to the bin. Between the railroad track and the bin there was a fence 5½ feet high, inclosing the rolling mill yard. The duty of Hunt under his employment was to take a sufficient amount of rock out of the bin and put it into the furnace, in order that the iron might be placed on the rock while it was being heated. He was a night workman. On the night of his death he was engaged in his work, and it was found that the rock then in the bin was too small to be suitable for the purpose. A carload of rock stood upon the track outside ready for unloading into the bin. It was not usually the duty of Hunt to unload this rock into the bin, or to go outside of the yard and get the rock out of the cars. On this occasion, however, he and the other man working with him, finding no suitable rock in the bin, went upon the car and threw the rock from it into the bin, preparatory to carrying it into the furnace. While so engaged, a runaway car came down the track, collided with the car containing the rock, with the result that Hunt was thrown to the ground and killed.

The commission made findings and an award after hearing the evidence. Finding 2 states that the injury to Hunt occurred while he was "performing service growing out of and incidental" to his employment, and while he was engaged in taking rock from the car on the track adjoining the mill for the purpose of using the same in the line of his duty. Finding 3 states that it was a part of the duty of Hunt to procure the rock and place the same in the furnace as a bed therein; that it was not the usual or habitual duty of Hunt and those engaged with him to unload rock from the car into the bin or to procure rock except from the bin, or to go upon a car containing the rock and unload the same; that at the time of the injury there was not a sufficient quantity of suitable rock in the bin, and there was such rock in the car alongside, ready to be unloaded into the bin; that Hunt and his associates, to avoid delay in the work, got upon the car for the purpose of procuring suitable rock to keep the furnace going, and threw off pieces of rock therefrom into the bin, and that the injury occurred while he was so doing; that under similar circumstances firemen had unloaded such rock from the cars; that there was no specific rule against the same, and that under the circumstances and in the emergency the act of Hunt in procuring rock from the car was a reasonable and proper act and was within the course of his employment.

[1] There was evidence by a witness named Merino, to the effect that for several weeks before the accident he was engaged on the premises as an employé of the petitioner, and that during that time, whenever there was not sufficient suitable rock in the bin, and there was good rock in the cars ready for unloading into the bin, it was the custom of the workmen to take the rock from the car to be placed in the furnace; that they did it right along whenever they needed big rock, and that this custom was known to the foreman in charge of the work. This clearly shows that the work of Hunt and his associate in getting suitable rock out of the car when there was none in the bin was within the scope of his duty under his employment, as the petitioner, through its agents in charge of the work, had permitted that duty to be made known to Hunt. It is amply sufficient to sustain the award of the commission on this point.

[2-4] This court, in reviewing awards of the commission, is not acting as a court of appeal. It has no power to weigh the effect of positive evidence. It must assume that the commission believed all the evidence given which tends to sustain the award made. Likewise the court has no power to annul an award because the findings are inconsistent. If there are findings which sustain the award, the fact that there are other findings inconsistent therewith which, if taken alone, might serve to annul it, will not be available for that purpose. Section 84, of the Workmen's Compensation Act, which gives us the power we are now exercising over this award of the commission, authorizes us to annul an award only when the commission acted without or beyond its powers, or when the award was procured by fraud, or is unreasonable, or when the findings of fact do not support it. The findings are not subject to review except in so far as they may have been made without any evidence whatever in support thereof. The review of the findings, even in such cases, is not based on the theory that they are not supported by the evidence, and that we are weighing evidence to determine that proposition, but upon the theory that the commission has no jurisdiction to make a finding where there is no evidence to support it. We find no cause in the record before us which would justify an annulment of the award.

The writ is discharged and the proceeding dismissed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LAWLER, J.

177 Cal. 388

Ex parte SUMIDA. (Cr. 2121.)

(Supreme Court of California. Jan. 30, 1918.)

1. MUNICIPAL CORPORATIONS 🔑111(7)—ORDINANCES—VALIDITY.

An ordinance of a city cannot be declared invalid because of bad motives in its enactment.

2. MUNICIPAL CORPORATIONS 🔑111(7)—ORDINANCES—VALIDITY.

Motives permitting the enactment of a municipal ordinance cannot be inquired into in habeas corpus to secure the release of one prosecuted for violation of the ordinance.

3. SUNDAY 🔑2 — ORDINANCES — VALIDITY —POLICE POWER.

Ordinances, regulating businesses which may remain open on Sunday, are within the police power and valid.

4. CONSTITUTIONAL LAW 🔑87, 240(1), 296 (1)—SUNDAY 🔑2—ORDINANCES—VALIDITY —POLICE POWER.

If an ordinance, regulating business remaining open on Sunday and prohibiting certain occupations on that day, is a valid exercise of the police power, it is not invalid as an unlawful or unauthorized invasion of the right of property, or as taking property without due process of law, or as depriving persons of the equal protection of the laws contrary to Const. U. S. Amend. 14.

5. STATUTES 🔑72—"SPECIAL LEGISLATION."

Legislation, applying generally to all persons within the territory to which the legislative power extends who come within the classification of the law, is not "special legislation" within Const. art. 4, § 25, if the classification is allowable under article 1, § 21, prohibiting special privileges.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Special Law.]

6. CONSTITUTIONAL LAW 🔑208(11) — CLASS LEGISLATION.

Fowler ordinance prohibiting the keeping open on Sunday of stores, workshops, banking houses, or other places of business, or public dance halls, pool or billiard halls, skating rinks, theaters or any places of public amusement, and excepting from the ordinance hotels, boarding houses, lodging houses, restaurants, bakeries, livery stables, retail drug stores, confectionery stores, ice cream parlors, garages, transfer, railroad, telephone, telegraph or express offices, fruit packing houses and newspaper or periodical agencies, is not invalid as class legislation, but is a reasonable enactment within the police power.

7. SUNDAY 🔑2—CLASS LEGISLATION.

Fowler ordinance prohibiting certain businesses from remaining open on Sunday and exempting from its operation other businesses, and requiring that where both classes of business are conducted in the same building, the business allowed to be open on Sunday shall be separated from the other by a partition not over five feet high, is not rendered invalid by the requirement of the partition.

In Bank. Habeas corpus on the relation of H. Sumida. Writ discharged, and petitioner remanded to custody.

Frank Kauke, of Fresno, for petitioner. Arthur Allyn and M. G. Gallaher, both of Fresno, for respondent.

SHAW, J. The petitioner by means of this application seeks a decision of this court declaring that a certain ordinance of the town of Fowler is invalid. Fowler is a town of the sixth class. The ordinance purports to forbid the carrying on of certain occupations within said town on Sundays. Section 1 is as follows:

"That it shall be unlawful for any person, firm, corporation or association to keep open within the corporate limits of the town of Fowler, upon or on any Sunday, any store, workshop, banking house or other place of business or any public dance hall, pool or billiard hall, skating rink, theater or any place of public amusement."

Section 3 is as follows:

"The provisions of section 1 hereof shall not apply or be construed to apply to persons, firms, corporations or associations who on Sunday keep open bona fide hotels, boarding houses, lodging houses, restaurants, bakeries, livery stables, retail drug stores, confectionery stores, ice cream parlors, garages, transfer, railroad, telephone, telegraph or express office, dried or green fruit packing houses, newspaper or periodical agencies for the legitimate business of each. Provided, that in case one or more of the excepted businesses is carried on in the same room with any business coming within the operation of this ordinance and required thereby to be kept closed on Sunday, that the part of the room in which said excepted business is carried on, shall be separated and set apart from the said business coming under the operation of this ordinance as aforesaid by a permanent partition or screen not less than five feet in height, and which said permanent partition or screen shall inclose and separate said place where said excepted business is carried on, from the remaining part of the room wherein the business coming under the operation of this act is operated as aforesaid."

Section 5 declares a violation of the ordinance a misdemeanor and provides for the punishment thereof.

H. Sumida has been arrested and is imprisoned upon a charge of violating said ordinance by keeping open within said town on a certain Sunday a general merchandise store for the purpose of doing business therein.

The petitioner claims that the ordinance is contrary to section 1 of article 1 of the Constitution, declaring that every person is entitled to acquire and possess property, section 21 of the same article declaring that no citizen or class of citizens shall be granted privileges or immunities which, on the same terms, shall not be granted to all citizens, and section 25 of article 4, which forbids special laws upon any subject other than those specifically enumerated therein.

[1-4] The title of the ordinance declares, and its terms show, that its purpose was to provide a day of rest one day in the week for those pursuing the occupations forbidden to be carried on upon Sunday. There may have been other designs in the minds of the board of trustees of the town in adopting the ordinance. But that question cannot be inquired into in this manner, nor can an ordinance be declared invalid because of the bad motives of the members of the legislative body which enacted it. It is the established law of this state that such regulations come within the police power, and are therefore lawful acts of the legislative bodies which possess that power. Ex parte Andrews, 18 Cal. 683. Dissenting opinion of Field, J., in Ex parte Newman, 9 Cal. 521, approved in Ex parte Andrews, Ex parte Koser, 60 Cal. 188; Ex parte Moynier, 65 Cal. 34. The court must hold the ordinance lawful if it can be done upon any rational theory. As the securing of a day of rest for the persons so engaged may have been one of its objects, and as that object would have been within the scope of the police power of the state, delegated to the board of trustees of the municipality by section 11 of article 11 of the Constitution, the ordinance must be upheld as an exercise of the police power, unless it appears that it is unreasonable in its operation, or that it constitutes special legislation on a subject forbidden by the Constitution, or class legislation of the kind forbidden by section 21 of article 1, aforesaid. If it is a legitimate exercise of the police power in these particulars, it cannot be condemned as invalid on the ground that it is an unlawful or unauthorized invasion of the right of property, or upon the ground that it is a taking of property without due process of law, or that it deprives persons of the equal protection of the laws contrary to the Fourteenth Amendment of the Constitution of the United States.

[5] It is a proposition too well settled to require discussion or authority in support of it that legislation which applies generally to all persons within the territory to which the legislative power extends who come within the classification of the law is not special legislation within the meaning of section 25 of article 4, provided the classification is one which is allowable under section 21 aforesaid. The sole question, therefore, is whether or not this ordinance is discriminatory, and class legislation within the principles of constitutional law applying to the subject.

The rules upon the subject are well established by many decisions in this state.

> "From necessity it has been held that the Legislature may classify in order that it may adapt its legislation to the needs of the people. If this cannot be done, laws will not always bear equally upon the people. This classification, however, must be founded upon differences which are either defined by the Constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity in the legislation. It must not be arbitrary, for the mere purpose of classification, that legislation really local or special may seem to be general, but for the purpose of meeting different conditions naturally requiring different legislation." Darcy v. Mayor, 104 Cal. 645, 38 Pac. 501.

> "A law is general and uniform in its operation when it applies equally to all persons embraced within the class to which it is addressed, provided such class is made upon some natural, intrinsic, or constitutional distinction between the persons composing it and others not embraced in it. * * * The difference on which the classification is based must be such as, in some reasonable degree, will account for or justify the peculiar legislation." Ex parte Miller, 162 Cal. 698, 124 Pac. 430.

Other decisions supporting these propositions are cited in that case and need not be repeated here.

[6] The petitioner contends that there is no sound reason for allowing bakeries, livery stables, drug stores, confectioneries, ice cream parlors, garages, the offices of railroads, transfer, telephone, telegraph or express companies, dried or green fruit packing houses, or newspaper agencies, to be kept open, which does not apply with equal force to ordinary stores, workshops, banking houses, and the like. There appears, however, to be a well-founded distinction between the two classes of business, one of which is allowed to keep open, and the other is required to be closed upon Sundays. Stores, workshops, and banking houses, and other like places, are not usually open on Sundays, and in general there is no necessity that they should be open for business on that day. But in the case of boarding houses, lodging houses, restaurants, bakeries, livery stables, and drug stores, it is not only the custom that they should remain open for such business as they may do on Sundays, but there is to some extent a necessity that they should do so. Persons may be in need of accommodations from these places on Sundays for which they cannot conveniently wait until the following day, and their needs may come unexpectedly so that they cannot reasonably be required to prepare therefor prior to Sunday. While the necessity for the keeping open of confectioneries and ice cream parlors may not be so great in cold climates, we cannot say that in the region of Fowler the daily demand for the articles sold at such places may not be so great and general as to justify the discrimination which permits them to remain open on Sundays. Nor can we declare as matter of law that there may not be equal and like cause for the discrimination in favor of bakeries, lodging houses, garages, newspaper agencies, and the public service offices excepted from the operation of the first section. The case is almost identical with Ex parte Koser, supra. There the excepted kinds of business were hotels, boarding houses, barber shops, baths, markets, restaurants, taverns, livery stables, retail drug stores, and manufacturing establishments which are usually kept in continued operation. It was held that the classification was proper and the act constitutional. The manufacturing establishments there excepted are not substantially different from the fruit packing houses here involved. There may be a necessity for their continuous operation during the time when the packing is going on. Of this the local legislative body must be the judge. The courts cannot say that they are wrongly included, unless it appears beyond reasonable doubt that the decision was erroneous. This does not appear. Hence the legislation must be upheld. Ex parte Jentzsch, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664, is not in conflict with these views, nor with the other cases on the subject of Sunday closing laws. It merely holds that a law forbidding the keeping open of barber shops and bathhouses after noon on Sundays, leaving all other occupations free, was based on an arbitrary and unjustifiable classification not founded on any reasonable or natural distinction or difference between those occupations and others which are usually followed on Sundays.

[7] The petitioner further contends that the provision of section 3 of the ordinance, requiring persons carrying on a business which is prohibited and one which is allowed in the same room to have the permitted business inclosed by a permanent partition which shall separate it from the place where the other business is carried on, is an unreasonable regulation which makes the entire ordinance void. It appears that the petitioner is carrying on a store for the sale of general merchandise in the town of Fowler, and that in connection therewith and in the same room he maintains a soda fountain and keeps for sale soda water, candies, confections, and bakery goods, and that the part of the store in which these articles are sold is not separated from the other portions thereof.

The answer to the proposition is that, as the board of trustees has power to enact the ordinance prohibiting the operation of the general store on Sundays, it must likewise have power to adopt such regulations as may be necessary to prevent the secret or surreptitious violation of that ordinance in a manner which could not be detected without an unreasonable expense on the part of the public, and that the fact that such regulation may impose a considerable burden upon the property owner does not make the ordinance invalid. This proposition is well settled. Thus in Ex parte Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129, the court upheld section 626 of the Penal Code, which prohibited during certain seasons of the year any one from selling or offering for sale the hide or meat of any deer, holding that it was not invalid because of the fact that in the particular instance the petitioner was offering deer meat for sale from a deer carcass which he had procured from Texas where the deer had been lawfully killed, and which he had imported from Texas to California. The court said that the object of the section was to prevent the sale of game killed in the state of California, and with respect to the particular provision which made such offer of sale unlawful, regardless of the place where the game was killed, the court said:

> "It need hardly be suggested that such a provision, if enforced, will lend great aid to the attainment of the object sought. The facility and ease with which the statutes for the protection of game have been evaded in the past is a matter of common knowledge. Deer and other game have been slaughtered during the close season and foisted upon the market as game procured without the state, and, owing to the practical impossibility in the great majority of cases of proving with certainty the source from which it was procured, the attempted enforcement of the statutes for its protection has largely proven abortive."

So here it is obvious that, if the petitioner is allowed to keep his general store open on Sundays, in order that he may sell therein the soda water, confections, and bread, which under the first part of the section he would be allowed to sell on Sunday, it would be easy for him to violate the law at any time by also selling other goods to persons thus patronizing him, and it would be practically impossible for the authorities to detect or prevent such clandestine sales, except by keeping an officer in the store on Sunday. It is lawful for the legislative power to make such provisions in order to protect itself against such violations of its lawful police regulations and facilitate the enforcement thereof.

The result is that the ordinance must be declared valid, and that the petitioner is not unlawfully imprisoned.

It is ordered that the writ be discharged and that the petitioner be remanded to the custody of the officer.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; VICTOR E. SHAW, Judge pro tem.

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177 Cal. 381

HENSHAW v. HOMELAND CO. et al.
(S. F. 7769.)

(Supreme Court of California. Jan. 30, 1918. Rehearing Denied Feb. 28, 1918.)

1. MORTGAGES 🔑308 — RELEASE OF JOINT OBLIGOR—EFFECT.

Releasing one obligor of a joint and several note from personal liability would not discharge his part of the property from the lien imposed thereon by trust deed securing the note in view of Civ. Code, § 2909, providing that a lien is to be accessory to the act for the performance of which it is security, and section 1473 providing that full performance of an obligation extinguishes it.

2. SUBROGATION 🔑3(2)—PAYMENT BY JOINT OBLIGOR.

Where a mortgage was given for a joint and several note, the payment by one obligor and his release from personal liability would not subrogate him to the rights of the payee in the security.

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by William G. Henshaw against the Homeland Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Edward C. Harrison, Harding & Monroe, and Grant & Zimdars, all of San Francisco, for appellants. Pillsbury, Madison & Sutro and Alfred Sutro, all of San Francisco (A. D. Plaw, of San Francisco, of counsel), for respondent.

VICTOR E. SHAW, Judge pro tem. The mortgage for the foreclosure of which this action was brought was given to plaintiff by defendant Homeland Company to secure the payment of a note for $11,000 upon which said defendant paid the interest to February 13, 1912, together with $4,392.07 of the principal. Judgment went for plaintiff, from which, upon a bill of exceptions, the Homeland Company appeals.

In its answer defendant alleged certain facts as a defense, which facts are also contained in a cross-complaint upon which it sought to recover from plaintiff the amount of principal and interest paid by it upon the note. These facts are as follows: On July 3, 1891, James P. McCarthy and William M. Fitzhugh, as the owners in common of a tract of land, executed a mortgage thereon to plaintiff to secure their joint and several notes to him of even date in the sum of $24,000, payable on or before July 15, 1893. About February 5, 1892, McCarthy and Fitzhugh executed a deed of trust to the California Title Insurance & Trust Company, as trustee, transferring certain lands (other than those so mortgaged to secure the Henshaw notes of $24,000), together with notes and securities in trust, with power to dispose of the same, and apply the proceeds in payment of certain obligations, among which was the indebtedness evidenced by said notes of $24,000 to Henshaw, and providing that after the full execution of said trust the balance of said proceeds of sale and collections should be paid, 50 per cent. to McCarthy, 30 per cent. to Fitzhugh, and 20 per cent. to other parties named. In April, 1892, Fitzhugh paid Henshaw $8,450 on account of the $24,000 notes so given by him and McCarthy. In December, 1907, Henshaw executed an instrument whereby he transferred and assigned to the Homeland Company all the—

"right, title, interest and estate of any kind and nature, and all right or property of every kind and description belonging to or in any wise owned or claimed by the party of the first part under the aforesaid deed and assignment of trust, and of, in and to the indebtedness and obligation referred to therein, and which is designed to be, and is, in any wise secured by said deed and assignment of trust."

The document contained further provisions as follows:

> "It is also further understood that the party of the first part [Henshaw] has heretofore released William M. Fitzhugh from all personal liability upon the obligation secured by the said assignment of trust, but it is expressly understood that there has been no release, in any wise, of any property covered by said deed or assignment of trust, whether owned by said William M. Fitzhugh or any other person, excepting only that the party of the second part [Homeland Company] shall not have the right to proceed against William M. Fitzhugh, personally, and above and beyond the value of any interest which the said William M. Fitzhugh may have in the property involved in said trust." "It is further understood that there shall be no recourse against the party of the first part provided that the statements and representations herein made by said party of the first part are true. If the same are untrue, this transaction may be rescinded. The party of the first part represents to the party of the second part, and upon this representation the party of the second part purchases the obligation, that the amount of the said indebtedness due the party of the first part and hereinbefore referred to, together with accrued interest thereon, amounts to the sum of not less than $20,000."

At the time of the transaction it was supposed the notes had been destroyed in the fire of 1906. Thereafter they were found indorsed, "Without recourse on me or William Fitzhugh. Wm. G. Henshaw"—and delivered to defendant in February, 1912. This transfer and assignment constitutes the sole consideration for which the note and mortgage here involved were given.

It is conceded, as found by the court, that at the time of the making thereof the indebtedness due Henshaw under the assignment in trust was in excess of $20,000. It was further represented that there had been no release of the lien upon any of the property described in the deed of trust so conveyed as security for the payment of the indebtedness, which representation the court found to be true. Appellant insists that this finding is without support in the evidence. This contention is based, first, upon the claim that as a matter of law the payment made by Fitzhugh upon the joint and several notes made by him and McCarthy operated to discharge his part of the property from the lien impressed thereon by the deed of trust.

[1, 2] To our minds the mere statement of the proposition is sufficient answer to it. "A lien is to be deemed accessory to the act for the performance of which it is a security." Section 2909, Civ. Code. The contract of security is distinct and separate from the promise to pay, and since one may exist without the other, it follows that the release of one obligation, unless effected by a full performance thereof (section 1473, Civ. Code), does not release or affect the other. As to Henshaw each of the parties was liable for the full amount which they jointly and severally promised to pay, and all the property was pledged as security for the performance of the promise. In the absence of an agreement to release the property from the lien, full performance of the act for which it was security was necessary to extinguish it. Section 1473, Civ. Code; Cyc. vol. 37, p. 379. Nor, since the security was given for the entire debt, is there any ground for the claim that by reason of the partial payment made by Fitzhugh and his release from personal liability on the notes he was to the extent of such payment subrogated to the rights of Henshaw in the security. Finnell v. Goodman, 156 Cal. 18, 103 Pac. 483.

It is claimed, however, that Henshaw by a written instrument delivered to Fitzhugh not only released him from personal liability on the notes, but also in express language released his property from the existing lien created by the deed of trust. This contention is based on the evidence of Fitzhugh as to the contents of a lost document given him some 20 years before by Henshaw. This testimony was vague, uncertain, and conflicting. He testified:

> "The notes were supposed at that time to have been indorsed as they are indorsed at present, and that was set forth in this little agreement;" "the gist of the whole agreement was the writing on the notes;" "that William M. Fitzhugh shall be held harmless and the notes shall be indorsed without personal recourse against William M. Fitzhugh; * * * that is the gist of the whole thing."

In weighing this evidence the trial court no doubt determined that Fitzhugh's "understanding" that his property was released from the lien was based upon the fact that such was the effect of his being released from personal liability. In so doing this court cannot say the trial court erred.

The indebtedness was in excess of $20,000, and as found by the court upon sufficient evidence none of the property conveyed in trust as security for the payment thereof was released; hence defendant has no cause for complaint.

The judgment is affirmed.

We concur: MELVIN, J.; WILBUR, J.

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177 Cal. 353

In re PAVERT'S ESTATE.

LOVE v. PAVERT.

(S. F. 8469.)

(Supreme Court of California. Jan. 28, 1918.)

1. Executors and Administrators ⚷325—Sales of Realty—Discretion of Court.

Under Code Civ. Proc. § 1516, providing there shall be no priority between personal and real property as to payment of debts of a deceased, the court may in its sound discretion sell real estate to pay debts or expenses of administration, although there is personal property belonging to the estate.

2. Executors and Administrators ⚷325—Sales of Realty—Abuse of Discretion.

Where the only personal property belonging to a decedent's estate was a disputed claim of doubtful value, there was no abuse of discretion in ordering a sale of real estate to pay debts and expenses, under Code Civ. Proc. §§ 1516, 1536, relating to sale of property to pay debts and expenses of administration.

Department 1. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

In the matter of the estate of Maggie Pavert, deceased. R. J. Pavert, administrator. From an order directing a sale of real estate, F. D. Love appeals. Affirmed.

F. R. Wall, of San Francisco, and Latourette & Latourette, of Portland, Or., for appellant. Mortimer Smith, of Oakland, for respondent.

SLOSS, J. Maggie Pavert died intestate, and R. J. Pavert, her surviving husband, was appointed administrator of her estate by the superior court of Alameda county. Upon his petition, the court made an order directing a sale of the real estate of said decedent. F. D. Love, the father of the decedent, and one of her heirs, appeals from this order.

The petition asked for a sale upon the grounds: First, that a sale of the real estate was necessary to pay the outstanding debts of the decedent, and the debts, expenses, and charges of administration; and, second, that it was for the advantage, benefit, and best interests of the estate and those interested therein that said real estate be sold. The order of sale found the existence of both grounds. The appellant does not question the sufficiency of the petition. His sole contention is that the evidence did not warrant the making of the order.

The property ordered to be sold consisted of two pieces of land, both of which were subject to mortgage. The debts of the estate, consisting of the mortgage obligations, amounted to $5,700, and the expenses, accrued and estimated, of administration came to $977. The petition alleged, and the administrator testified, that he had $59 in cash on hand, and that there was no other personal property belonging to the estate. The appellant's claim is that the evidence showed that there was considerable personal property belonging to the estate and not accounted for. The administrator had, during a period of several months, collected rents of $37.50 per month on one of the pieces of land. His testimony was that all of this money had been paid out by him for expenses, and, in particular, for a payment of $300 on account of one of the mortgages. At any rate, the amount thus collected, even if it had remained on hand, was not large enough to affect the ultimate finding that a sale was necessary to pay debts and expenses of administration.

The principal controversy arises over the contention of the appellant that the administrator himself was indebted to the estate of his wife in the sum of $11,000, on account of a promissory note executed by him to her. The administrator testified that this claim had been settled. The evidence on the subject of the $11,000 indebtedness was very confused and unsatisfactory. We may concede that, if the issue were one requiring determination in this proceeding, the court below might well, and perhaps should have, concluded that the administrator, in fact, was indebted to the estate on account of the note. But the fact remains that the liability was disputed. Not only this, but there was no showing that the demand against the administrator, granting its validity, could be collected. The claim was therefore at best a doubtful one.

The mere fact that there is personal property belonging to the estate does not preclude a sale of realty. Section 1358 of the Civil Code provides that all of the property of a person dying intestate, real and personal, "without any distinction between them," is chargeable with the payment of his debts. Similarly, section 1516 of the Code of Civil Procedure declares that all of the property of a decedent shall be chargeable with the payment of his debts, of expenses of administration and family allowance, and that the property, real and personal, may be sold under the direction of the court, as prescribed by the Code. "There shall be," the section adds, "no priority as between personal and real property for the above purposes." In harmony with the rule thus enacted, section 1536 of the Code of Civil Procedure, as it now reads, does not make a deficiency of personal estate one of the prerequisites to an order for a sale of realty. Property, real or personal, may be sold "when a sale of property of the estate is necessary" to pay family allowance, debts, or expenses of administration. Under the probate act, which was followed in the original enactment of the Codes, resort for payment of debts and expenses was first had to personalty, and a sale of real estate could be ordered only when the personal estate in the hands of the executor was exhausted or insufficient. But the contrary rule, now in force, was enacted in 1874. Code Amendments 1873–4, pp. 234, 367, 369. See Richardson v. Butler, 82 Cal. 174, 176, 23 Pac. 9, 16 Am. St. Rep. 101.

[1, 2] In the present state of the law, then, the court is authorized to order a sale of real or of personal property whenever such sale is necessary for any of the purposes enumerated in section 1536 of the Code of Civil Procedure. Whether it shall order a sale of the one or the other is a question committed to its sound discretion. So long, at least, as the cash on hand or readily col-

lectible is not sufficient to pay debts or expenses, the court has authority to order a sale of real property. There may be circumstances under which it would be an abuse of discretion to direct such a sale, instead of resorting to the personal estate. But certainly this could not be said in a case where, as here, the personal property consists of a disputed claim of doubtful value. It must, therefore, be held that the court below was justified in finding that the sale was necessary to pay debts and expenses of administration. We need not inquire whether the showing was sufficient to support the sale upon the further ground that it would be for the advantage, benefit, and best interests of the estate and those interested therein.

The order is affirmed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

177 Cal. 395

SOUTHERN PAC. CO. v. LOS ANGELES MILLING CO. (L. A. 4066.)

(Supreme Court of California. Jan. 30, 1918. Rehearing Denied Feb. 28, 1918.)

1. EMINENT DOMAIN 🔑20(5) — RAILROAD SPUR TRACKS—"PUBLIC USE."

A railroad spur track had for years served as an adjunct and appendage to the railroad, many persons, firms, and corporations receiving and sending shipments of freight to and from industries located adjacent thereto, including a public warehouse which received goods on storage from any and all persons having goods to store and shipped them over such spur track and received thereover incoming cargoes generally delivered for storage and subsequent distribution. The right of way was fenced and the doors and gates opening therefrom into the premises of the various industrial concerns along such track were locked against the general public, and where the track crossed public streets gates were maintained across the openings. *Held* that, notwithstanding these facts, the purpose to which the track had been devoted was a "public use," for which the railroad might have proceeded by condemnation to acquire land under Civ. Code, § 465, subd. 7, authorizing railroad corporations to acquire land by condemnation to be used in the construction and maintenance of their roads and all necessary appendages and adjuncts, and section 1001, authorizing any person to acquire property by condemnation for the uses specified in the Code of Civil Procedure.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Use.]

2. EASEMENTS 🔑17(5) — IMPLIED RESERVATION—RAILROAD SPUR TRACK.

That a railroad company's predecessor was the grantee of one of the defendants under a warranty deed did not prevent an assertion by it of the right to use a spur track in existence across the land at the time the deed was executed, since where the owner of one tract of land sells part of it, and such part is burdened by an obvious easement in favor of other persons or other parts of the larger tract, an implied understanding arises that the burdens and correlative advantages shall continue as they existed before the separation of the title.

3. APPEAL AND ERROR 🔑994(3) — REVIEW — CREDIBILITY OF WITNESSES.

In a suit to enjoin defendants from tearing up a spur track across its land, the credibility of a witness who testified that before building a warehouse adjoining such spur track he had a conversation with the president of defendants' predecessor who told him that he would at no time in the future be molested in the use and enjoyment of the spur track was a matter peculiarly for the determination of the trial court, though the president was dead at the time of the trial.

4. CORPORATIONS 🔑432(1) — AUTHORITY OF OFFICERS—PRESUMPTIONS.

Where the unmolested use of the property was obvious to all, and such use at all was due to the permission granted by the president, the presumption arose that he acted upon authority.

5. ESTOPPEL 🔑93(2)—PERMITTING IMPROVEMENTS — INDUSTRIES ADJOINING RAILROAD SPUR TRACK.

Where, from the time defendants' predecessor acquired title to property across which was a railroad spur track in 1878 until 1911, the use of the spur track for the purpose of serving industries located along its line was uninterrupted, and warehouses and other buildings of very great value had been erected by the different industries, defendant was estopped to deny the right of the railroad to continue the use of such track.

6. LIMITATION OF ACTIONS 🔑55(6)—ACCRUAL OF CAUSE OF ACTION — CONTINUING TRESPASS.

Where a railroad company conveyed land across which it had a spur track which it continued to use thereafter, any action for damages for trespass was barred in three years under Code Civ. Proc. § 338, subd. 2, requiring actions for trespass upon real property to be brought within three years, as the action must be commenced within the statutory period after the original infliction of the injury.

7. EMINENT DOMAIN 🔑2(1) — NATURE OF PROCEEDINGS—SUIT FOR INJUNCTION.

Where a railroad company had been using a spur track across defendants' land without interruption for over 30 years, a suit to restrain defendant from tearing up the track or obstructing its use could not be regarded as an action in condemnation under the guise of a proceeding to obtain an injunction, as it was a proceeding by which plaintiff sought to maintain a status acquiesced in for many years.

Department 2. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Suit by the Southern Pacific Company against the Los Angeles Milling Company, which filed a cross-complaint against the plaintiff and another. Judgment for plaintiff, and defendant appeals. Affirmed.

W. G. Van Pelt and E. S. Williams, both of Los Angeles, for appellant. J. W. McKinley, Frank Karr, W. R. Millar, and W. I. Gilbert, all of Los Angeles, for respondent.

MELVIN, J. The defendant, Los Angeles Milling Company, having threatened to destroy that portion of a certain spur track which traversed its premises, suit for an injunction was instituted by Southern Pacific Company. Defendant answered and filed a cross-complaint by which Southern Pacific Railroad Company, the lessor of the plaintiff, was brought in, and after issues joined upon answers to that pleading the cause was heard with the result that an injunction was granted restraining Los Angeles Milling Company from tearing up the track or obstructing the use thereof.

Prior to April 24, 1878, the Southern Pacific Railroad Company owned the land now occupied by appellant which is situated in the city of Los Angeles between Market and Commercial streets and fronting on Alameda street. At that time there was a spur track which joined the main line on Alameda street at a point about halfway between Jackson and Market streets. This spur track extended in a northwesterly direction across private property on the southwest corner of Market and Alameda streets, thence, after crossing Market street diagonally over the southwest corner of the property now owned by appellant and on into that now owned and occupied by the Los Angeles Warehouse Company, to a point near Commercial street, and thence by a switchback to a point on that property at the north side of Market street. Later this branch was extended southerly across Market street to the property between Market and Jackson streets now owned and occupied by the Los Angeles Warehouse Company and occupied also by certain industrial concerns to a terminus on the property of Nelson-Morris & Co. The entire spur track is about 1,575 feet in length. In 1878, W. H. Perry owned the land now occupied by the Los Angeles Warehouse Company and that now occupied by John A. Roeblings & Sons Company at the southwest corner of Alameda and Market streets. He conducted lumber yards on these two pieces of land. Later he owned and occupied with his pine lumber yard the property on the south side of Market street now occupied by the Western Commercial Company. It was at that time that the switchback was extended southerly across Market street.

On April 24, 1878, the Southern Pacific Railroad Company deeded the property now owned by appellant to Isaac Lankershim, the deed containing a covenant of warranty particularly against a certain deed of trust promising to repay the grantee, his heirs, or assigns $17,500 in gold coin in case of eviction by any one claiming under the said deed of trust. Thereafter service on the spur track was continued without interruption. Lankershim conveyed to the Los Angeles Farming & Milling Company and by mesne conveyances appellant has succeeded in title to that property. Warehouses and other buildings of very great value have been erected by the different industries which have developed on the land served by the spur track, and the Southern Pacific Railroad Company, or its successor, the Southern Pacific Company, has operated its cars on the spur track as convenience required without interruption until in 1911 the railroad company was ordered to remove its tracks from defendant's land. All of these facts appear, without contradiction, from the testimony adduced at the trial.

Respondent also introduced testimony tending to prove, not only the hauling of materials and products to and from the manufacturing plants adjacent to the spur track, but also the transportation to and from the public warehouse of the Los Angeles Warehouse Company from points both within and without the state of California of goods and wares of many kinds; the outgoing cargoes consigned to various persons in many places; the incoming generally delivered for storage and subsequent distribution.

The complaint was founded upon the theory that the spur track had been devoted to a public use, and also that defendant was estopped to deny plaintiff's right to maintain the track by reason of said defendant's conduct in favor of plaintiff and in favor of the Los Angeles Warehouse Company.

The court found that the spur track for many years, last past, "has served as an adjunct and appendage to the railroad of plaintiff, many persons, firms, and corporations engaged in receiving and sending shipments of freight, to and from the industries owned and operated by said persons, located on and adjacent to the spur track"; that it serves and has served as an adjunct of the said railroad certain named firms; that "said Los Angeles Warehouse Company receives goods on storage from any and all persons having goods to store, and ships the same to points both inside and outside of the state of California, over said spur track and in cars placed on said spur track by plaintiff for the purpose of delivering freight to said warehouse company and its patrons, and for the purpose of receiving freight from said warehouse company and its patrons;" and that the spur track "has been and is now devoted and dedicated to public use, and plaintiff has at all times carried, and will hereafter continue to carry, all sorts of goods and freight for all purposes as a common carrier and deliver them to such persons as the consignors may designate, and carry and deliver them to the Los Angeles Warehouse Company, over and by means of said spur track, for the purpose of distribution to the general public."

It was also found that in 1906, just prior to the purchase by the corporation of the property now occupied by the Los Angeles Warehouse Company, O. B. Fuller and George Safford, two officers of said corporation, called upon I. N. Van Nuys, then president of appellant's predecessor in interest, and told him that their company was about to expend approximately $200,000 in the construction of a warehouse on the land, and that they desired to know whether or not any difficulty would arise from the use by their corporation of the said spur track as an adjunct to their business and whether or not the Los Angeles Farming & Milling Company would at any time in the future object to their use of the track or seek to curtail or prevent enjoyment thereof by the warehouse company; and that thereupon Mr. Van Nuys assured them that they would not at any time in the future be molested in such use and enjoyment of the spur track. It was found further that relying upon this assurance the Los Angeles Warehouse Company expended large sums of money in building the warehouse, and that it has continued to make substantial outlays in the conduct of its business. There were elaborate findings to the effect that, by failing for more than 20 years to object to the use of the track, defendant and its predecessors (being fully aware of all of the facts and the necessity of such spur track to the conduct of plaintiff's business as a common carrier) were estopped to deny the right of plaintiff to continue such use of the track.

[1] Appellant contends that the spur track has been devoted not to public but to private use; that the estoppel found was not justified by the evidence; and that the court's failure to take testimony regarding and to award damages for the use of its property amounted to condemnation of land without recompense. In support of the first position assumed in argument by appellant, counsel call our attention to the fact that the right of way is carefully fenced; that doors and gates opening from the right of way into the premises of the various industrial concerns along the spur track are locked against the general public; and that where the track leaves private property to cross the street gates are maintained across the openings to exclude the general public. All of these circumstances do not prevail against the finding of a public use, for it is not shown that any one of the establishments along the line of the spur track is denied the service of the plaintiff whenever it requires cars and equipment for facilitating shipment or receipt of commodities. That the track is well fenced and provided with elaborate safeguards tends merely to show that these establishments pay due regard to the very salutary slogan of modern railroading and manufacturing, "Safety First."

Respondent is of the opinion that under section 1001 and subdivision 7 of section 465, Civil Code, the purpose to which this spur track has been devoted for more than two decades is a public use for which, if there were no track in place, it might proceed by an action in condemnation to acquire land for such a branch. This position is, we think, well taken. A very illuminating authority upon this subject is Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27, a cause in which this court denied a petition for transfer. That was a condemnation suit, and defendants resisted the proposed taking of their land upon the ground that the use was in reality a private one, the road being designed only to serve plaintiff's alter ego the Madera Granite Company. Mr. Presiding Justice Chipman, in the course of the opinion of the court prepared by him, used the following language:

> "There was considerable evidence tending to the point that the main object in building the road was to enable the owners of the Madera Granite Company to market its product. Circumstances may arise where it becomes of public benefit for branch railroads to be built primarily to reach some important industry about to be inaugurated, or that is struggling along under difficulties for want of transportation facilities. The fact that the advantage of such road inures to a particular individual or a class of individuals will not render the use any the less public. And the fact that the stockholders of the Madera Granite Company were also stockholders of plaintiff company does not prove that the contemplated use is a private use. Lindsay I. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802."

Appellant calls attention to the fact that in the case just cited the railroad traversed a public highway, and that the general public would therefore have access to it virtually throughout its entire extent. But in the case at bar the track crosses public streets, and might be used if needed by the general public. It appears that the railroad possesses excellent terminal facilities, and our attention is called to no proof that any goods have been shipped from or received upon the public streets, but this is not controlling. The fact remains that none of that part of the public whose establishments are conveniently served by the spur track and no customer consigning goods to the public warehouse for storage or shipment has been denied the use of this branch of plaintiff's track. It would not illuminate but would merely lengthen this discussion to attempt analyses of the many authorities cited in the able briefs in this case. Counsel seem to be agreed that each case must be tested with reference to its peculiar facts. There is no testimony to the effect that any one who had lawful occasion to use the spur track had ever been unable to do so. The testimony tended to show that the spur track has been used in common by all of the establishments conveniently located for such use.

The following language from the opinion in Madera Ry. Co. v. Raymond Granite Co., supra, expresses the true rule:

> "The public use required need not be of the whole state or any considerable portion of it, but the use and benefit must be in common, not to particular individuals. Every public use is in more or less degree local and benefits a particular section more than others. This is true of railroads, as well as of ordinary highways. The cases are numerous sustaining this rule. See notes to Lewis on Eminent Domain, 161. See, also, Lindsay I. Co. v. Mehrtens, 97 Cal. 676, 32 Pac. 802."

[2] Respondents deny that they seek to uphold their use of the right of way by prescriptive title. There is no finding of such title. They do contend, however, that, if it be said that in violation of the warranty contained in the deed of grant they or either of them evicted appellant or its predecessor

from the strip occupied by the track, such eviction took place in 1878, or at any rate so long ago that the statute of limitations, which they pleaded, was entirely available. The deed to Lankershim is set forth in the cross-complaint of appellant as the basis of an alleged estoppel of either respondent to claim any title or interest in the right to maintain the spur track on the land of the Los Angeles Milling Company. Some of the defenses to this cross-complaint were based upon sections 318 and 343 of the Code of Civil Procedure, and the court found in favor of respondent on those statutes. This was proper. The mere fact that appellant's predecessor was the grantee of one of the respondents under a warranty deed does not prevent an assertion by plaintiff of a right to use the track. Where the owner of one tract of land sells part of it, and that part is burdened by an obvious easement in favor of other persons or other parts of the larger tract, an implied understanding arises that the burdens and correlative advantages shall continue as they existed before the separation of the title. Cheda v. Bodkin, 173 Cal. 7–14, 158 Pac. 1025; Goodman v. Heilig, 157 N. C. 6, 72 S. E. 866, 36 L. R. A. (N. S.) 1004; Geren v. Caldarera, 99 Ark. 260, 138 S. W. 335.

[3-5] The finding of estoppel arising out of promises made by the president of appellant's predecessor to representatives of the Los Angeles Warehouse Company is attacked on several grounds, one being the alleged inherent weakness and improbability of the testimony given in its support. It is true that Mr. Van Nuys, who was the person said to have made the promise, was dead before the trial of this case, but the credibility of the witness who related the conversation with him was a matter peculiarly within the determination and discretion of the trial court. There is nothing inherently improbable in the story as told by the witness. Indeed, it would be strange if the warehouse company would spend $200,000 to erect a building on the property without having some understanding with its neighbor such as that described in the testimony. But appellant denies the right of a president so to bind his corporation. In cases of this sort, where the unmolested use of the property is obvious to all, and such use was due at all to the permission granted by the president, the presumption arises that he acted upon authority. Fresno Street Railroad Co. v. Southern Pacific Railroad Co., 135 Cal. 202–208, 67 Pac. 773; Katz v. Walkinshaw, 141 Cal. 116–136, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35. There is more force in the contention that appellant was not shown to be in privity with its grantor in the matter of the consent to respondent's use of the property on behalf of the warehouse company, one of the railroad company's patrons. It would seem, however, than an intending purchaser, seeing the valuable improvements on neighboring land and observing that said property was served by a track passing through the premises offered for sale, would buy at its peril if it should fail to inquire by what authority the spur track was maintained. The matter of the estoppel against the appellant by reason of its promises to the warehouse company is comparatively unimportant, however, as there was abundant support of the finding that it was estopped to deny the right of plaintiff to continue the use of the spur track, by reason of long acquiescence of the said Los Angeles Milling Company and its predecessor in such operation. Fresno Street Railroad Co. v. Southern Pacific Company, supra; Katz v. Walkinshaw, supra; Hartley v. Vermillion, 141 Cal. 339, 74 Pac. 987; Crescent Canal Co. v. Montgomery, 143 Cal. 248, 76 Pac. 1032, 65 L. R. A. 940; Leverone v. Weakley, 155 Cal. 395–400, 101 Pac. 304; Schwerdtle v. County of Placer, 108 Cal. 589, 41 Pac. 448.

In Gurnsey v. Northern California Power Co., 160 Cal. 699, 117 Pac. 906, 36 L. R. A. (N. S.) 185, it was held that an owner who has long acquiesced in the use of his land by a public service corporation may not maintain ejectment against such corporation because the rights and interests of the public attach to the use. And in that case it is also held that while under the Constitution private property may not be taken for public use without compensation first paid, this condition is solely for the benefit of the landowner and may be either enforced or waived at his pleasure.

[6] Under the authority of the case last cited it is clear that any claim for damages which may have existed in favor of appellant has been waived. Any action for damages for trespass was barred within three years after the deed to Lankershim under subdivision 2 of section 338, Code of Civil Procedure. The action for damages must be commenced within the statutory period after the original infliction of the injury. Williams v. Southern Pacific Railroad Co., 150 Cal. 624, 89 Pac. 599.

[7] This cannot be regarded as an action in condemnation under the guise of a proceeding to obtain an injunction. It was a proceeding by which plaintiff sought to maintain a status in which appellant and its predecessors had acquiesced for many years.

The judgment is affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

177 Cal. 347

In re GLANN'S ESTATE. (Sac. 2646.)

(Supreme Court of California. Jan. 28, 1918. Rehearing Denied Feb. 25, 1918.)

1. DESCENT AND DISTRIBUTION 🔑57 — RIGHTS OF WIDOW.

Where deceased was survived by wife and one daughter, and the daughter died unmarried and without issue, the widow by right of inheritance from her husband and as heir of her daughter became entitled to all of deceased's property in absence of will, or to all property undisposed of by will, in view of Civ. Code, § 1386, subd. 1, stating the order of succession.

2. WILLS 🔑634(16) — ESTATES CREATED — CONSTRUCTION—"VEST."

Where a will gave wife homestead during life of testator's brothers, recited formation of partnership with brothers, and gave wife one-third of net proceeds of the business for the life of the brothers, and provided that when the brothers died the use of his interest in the partnership should be given to the wife until majority of the child, and thereafter gave the use of one-half of the property to the wife during her life, the other half to the child, and on the death of the wife all of the property to go to the child, provided that it should not vest in her until the death of testator's brothers, and that, if the wife and child died before the brothers, all the property should go to them for their lives, and on their death to other relatives, the provision that the property should not "vest" in the child until the death of the brothers did not prevent title vesting in the child if the brothers were alive when the wife died; the word "vest" being used in a sense equivalent to right of possession by the child of the partnership property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Vest.]

3. WILLS 🔑634(16) — ESTATES CREATED — CONSTRUCTION.

Under such will, death of wife and child being condition precedent to the disposition to the brothers, in view of Civ. Code, §§ 1346, 1347, defining and stating the effect of a condition precedent, where the child survived testator, but predeceased the mother and the brothers, the mother was entitled to the entire property.

In Bank. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceedings in the matter of the estate of Daniel Glann, deceased. From a decree determining rights of succession, Peter and Vincent Glann appeal. Affirmed.

Henry Conlin and John O. McElroy, both of San Francisco, Elliott & Atkinson and White, Miller, Needham & Haber, all of Sacramento, and Paul A. McCarthy, of San Francisco, for petitioners. George & Hinsdall, Devlin & Devlin, and Stephen F. Otis, all of Sacramento, for respondent.

WILBUR, J. [1] This is an appeal from a decree made October 3, 1916, determining the rights of all persons to the estate of the deceased in a proceeding under the provisions of section 1664 of the Code of Civil Procedure. The deceased died March 14, 1887. His will was thereupon probated, but, in accordance with a request expressed in the will, no proceedings were taken for distribution until after the death of his two brothers, Peter and Vincent. Then these proceedings were instituted. The lower court held that all the property should go to the respondent Anna Glann, the surviving wife of the decedent. There also survived the decedent a daughter, Anna, an only child, the fruit of his marriage with respondent. This daughter died May 23, 1901, when 16 years of age, unmarried and without issue. The widow, by right of inheritance from her husband and as the heir of her daughter, would be entitled to all the property of the decedent, in the absence of any will, or to the extent that the property was undisposed of thereby. Civ. Code, § 1386, subd. 1. The appellants herein do not claim by right of heirship, but under the fifth provision of the will, hereinafter set forth.

For a correct understanding of this contention it will be necessary to state some of the facts and some of the provisions of the will. The will was executed November 23, 1886, contemporaneously with an agreement of partnership between the deceased and his two brothers, Peter and Vincent, which was referred to in the will. At the time of the execution of these instruments the decedent had been married about 2½ years to Anna Glann. They had one child, the daughter above mentioned, then about 1 year and 6 months old. The testator was then about 55 and his wife about 20 years old. The partnership agreement provided:

> That the business of the firm should be the business of "farming, stock raising, and conducting a dairy on the land therein described"; that the copartnership was to commence at once, and be continued as long as two of the partners survived; that "if either of the partners shall die the business of the firm shall be carried on by the survivors"; after the death of two of such firm "the business shall be carried on by the survivor in the same name (Glann Bros.) until his death"; that in the case of the death of either of said firm, "leaving a family, the said family shall be entitled to the share of the deceased member in the profits of said business, and the survivor or survivors shall be deemed a trustee for such family, and the support of such family shall come out of the deceased member's share of the profits of said business"; "that if all the members of said firm or the survivor or survivors shall determine it to be for the benefit of said business, any part of the real estate owned by the said three members, as above stated, may be sold, and the proceeds invested for the firm or for the use or benefit of the survivor or survivors and the family of the deceased member or members"; that "at the death of the survivor all of the property of the said copartnership, as well as the real estate hereinbefore mentioned, shall be disposed of as provided in the several wills of the said copartners, or as directed by the laws of succession of said state; it being the purpose of the signers hereof to continue said business as long as either shall live, and that then said property shall go to the heirs, devisees, and legatees of each."

The first clause of the will gives the wife a homestead in certain property during the life of the two brothers of the deceased. The second clause refers to the above-mentioned partnership agreement, and recites that thereby the balance of his property had been "placed under the control of the firm formed by said contract, and the survivor or survivors of the members thereof until all of such members shall be dead." Then bequeaths his wife "my third of the net proceeds of the business of said copartnership so long as either of my said brothers shall live, for the support of herself and family," and provides for the distribution of any surplus of said income, so that the children will have a share therein. The next four clauses are as follows:

> "Third. When my said brothers Peter and Vincent shall both be dead then there shall be under the direction of the proper court a division and distribution of all my interest in the property held under said contract and of the accumulations thereof in the hands of such survivor and of said homestead property as follows: To my said wife if she be then living the use of all of said property until my said child shall attain majority and when my child or children shall become of age my wife shall have the use of one-half of all of said property real and personal, during the term of her life, the other half shall go to my children share and share alike, and in the event of the death of any of my children under age leaving issue such issue shall take the share of the parent by right of representation, upon my youngest child attaining majority.
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> "Fourth. On the death of my said wife all my said property shall go to my children then living in equal shares and to the children of such children if any by right of representation provided that such property shall not so vest in such children until the death of both my said brothers Peter and Vincent and after my wife's death, and until the death of my said two brothers my said children shall only receive my one-third of the net proceeds of said copartnership business.
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> "Fifth. If my said wife and all my children and their children shall die before the death of both of my said brothers Peter and Vincent then it is my will that all my property shall go to my said two brothers Peter and Vincent for their lives and upon their death the same shall go to and vest in my other brothers and sisters in equal shares and as to any brother or sister who is now dead or who may die before the death of the said Peter and Vincent it is my will that his or her share shall go to his or her heirs.
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> "Sixth. It is my will that during the continuance of the said copartnership agreement all my interest in the said property in said agreement mentioned and the proceeds thereof not turned over to my said wife and children as above provided, shall be held in trust by my said brothers and the survivor of them, the proceeds to be disposed of as in that agreement herein provided."

The will then provides:

> That the brothers, Peter and Vincent, should be appointed executors without bonds; that after the filing of the inventory and payment of debts, "no further proceedings be taken in my estate, but that the affairs thereof be administered under said agreement and this will without the intervention of such court until the death of my two brothers Peter and Vincent, and upon their death I request that my wife or one of my children be appointed executrix and the distribution of all my property be immediately made as hereinbefore provided."

It is apparent from the foregoing that it was the intention of the testator that his estate should be held in trust by his brothers or the survivor of them, the income thereof to be paid for the support of his family, and upon their death the property to be distributed, the management and control, however, at all times theretofore to be in the survivor or survivors of said partnership.

It will be observed that the third clause gives the fee in one-half of the property to the daughter, and a life estate in the other half to the wife, "when my brothers Peter and Vincent shall both be dead," leaving the remainder of the fee, in the half subject to the wife's life estate, undisposed of; that the fourth clause in logical sequence disposes of that remainder by providing that "on the death of my wife all my property shall go to my children then living," but the testator evidently considered that such death might precede that of either Peter or Vincent. So we have the proviso that the property shall not vest in such children "until the death of both my said brothers, Peter and Vincent," etc.

[2] Appellants treat this clause as a provision that title should not vest at all in the children if the brothers are alive when the wife dies. This does violence to the express terms of the will, which provide that upon the death of the wife the property should go to the children "then living." The proviso that the property should not "vest" in the children was evidently to prevent them from interfering with the possession and management of the property by Peter and Vincent and the performance of their duties with relation thereto, as provided by the partnership agreement and the will, and was used in the same sense as taking of possession, as is permissible. Burney v. Arnold, 134 Ga. 141, 67 S. E. 712; Jacobs v. Whitney, 205 Mass. 477, 91 N. E. 1009, 18 Ann. Cas. 576; Nolan v. Otney, 75 Kan. 311, 89 Pac. 690, 9 L. R. A. (N. S.) 317. No provision is made in the event that the wife survived all issue, but the fifth clause does provide for the other possible situation, namely, the death of the wife and children and their descendants before the death of the brothers, Peter and Vincent.

[3] That the death of the wife and issue before the death of the brothers, Peter and Vincent, was a condition precedent applying to the entire disposition in the fifth clause to such brothers, with the remainder to the other brothers and sisters and heirs, seems too plain for argument, or to require a discussion of the numerous cases cited by the appellant, each of which must of course, depend upon the peculiar circumstances of such case. Civ. Code, §§ 1346, 1347. If we hold under subdivision 4 that the title of the child to one-half the property was dependent upon its surviving its mother, then as to that contingent remainder there was no disposition by will, and the title to that extent goes by inheritance one-half to the wife and one-half

to the daughter, and by reason of the latter's death that half goes to her mother, the decedent's wife, as her heir. If we regard the fourth clause as vesting a remainder in fee in the child, the same result follows by a little different process, namely, all goes to the mother, as her sole heir. It is true that wills are to be construed so as to prevent partial intestacy, but here we have a complete scheme for distributing all of the property of the estate in all events except to those very unlikely to occur. The claims of the appellant are based on a clause of the will which deals with the remote contingency that the wife, child, and descendants of children shall be dead before the two brothers of the deceased died, and, aside from their life estate, make substantially the same disposition as by the law of succession. A strained construction of this clause should not be indulged in at the expense of the widow of the deceased.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; VICTOR E. SHAW, Judge pro tem; MELVIN, J.; SLOSS, J.; RICHARDS, Judge pro tem.

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177 Cal. 363

In re RANDALL'S ESTATE.

RANDALL v. PHILBROOK.

(S. F. No. 8521.)

(Supreme Court of California. Jan. 29, 1918. Rehearing Denied Feb. 28, 1918.)

1. Executors and Administrators 🔑32(1) — Issuance of Letters Testamentary — Right of Executor.

Code Civ. Proc. § 1354, provides that when a person absent from the state is named as executor, letters of administration with the will annexed must be granted, but that the court may in its discretion revoke them on the return of the absent executor. Sections 1383–1386 provide that when letters of administration are granted to any other person than the surviving husband or wife or certain other relatives, any one of them who is competent may obtain the revocation of the letters, and be entitled to administration, and that the surviving husband or wife when letters of administration have been granted to other relatives may assert a prior right and obtain letters of administration and have the letters before granted revoked. *Held* that, where the widow, the named executrix, was residing in Maine, and letters of administration with the will annexed were granted to a sister of the decedent, and the widow subsequently came to California, whereupon the court revoked the letters of administration granted to the sister, it was not an abuse of discretion to grant letters testamentary to the widow, and it would have been an abuse of discretion to refuse such letters, as she had an absolute right to the revocation of the letters granted to the sister and to the issuance to her of letters of administration, and the only substantial difference between letters testamentary and of administration with the will annexed is the matter of giving of bonds.

2. Executors and Administrators 🔑32(1) —Issuance of Letters Testamentary—Right of Executor.

Code Civ. Proc. § 1301, providing that an executor failing for 30 days to petition the proper court for the probate of the will and for the issuance of letters testamentary may be held to have renounced his right to letters, and that the court may appoint any other competent person as administrator, must be construed in connection with section 1354, relative to the revocation of letters of administration with the will annexed on the return to the state of the person named as executor, and the court, in its discretion, may appoint a returning executrix on revoking letters previously issued, though she failed to file such petition within 30 days, as the renunciation referred to in section 1301 is in no sense the equivalent of a voluntary renunciation.

3. Executors and Administrators 🔑15—Competency of Person Named as Executor.

The testator's widow named as executrix was not disqualified because she was defending a suit brought by one to whom letters of administration with the will annexed had been granted.

4. Executors and Administrators 🔑32(2) —Issuance of Letters Testamentary—Findings.

In a proceeding by the testator's widow to revoke letters of administration with the will annexed, and for her own appointment as executrix, all the essential facts were found by an order containing findings that the petitioner was the surviving wife of the decedent, that she was the person named in his last will as executrix, and was competent to be appointed and to act, and that she had not renounced or forfeited her right to letters testamentary.

5. Executors and Administrators 🔑32(2) —Issuance of Letters Testamentary—Reservation of Grounds of Review.

In such proceeding, where no complaint was raised in the court below because the clerk did not set the matter for hearing, nor give sufficient notice thereof, and defendant appeared and submitted to a trial on the merits, such questions could not be raised on appeal.

Department 2. Appeal from Superior Court, Alameda County; William S. Wells, Judge.

Proceeding by Anne Bates Randall for the revocation of letters of administration with the will annexed on the estate of Humphrey A. Randall granted to Florence E. Philbrook, and for the issuance of letters testamentary to the petitioner. From an order revoking the letters of administration, and appointing the petitioner as executrix, the administratrix appeals. Affirmed.

Horace Philbrook, of San Francisco, for appellant. Ftizgerald, Abbott & Beardsley, of Oakland, for respondent.

WILBUR, J. This is an appeal from an order of the superior court revoking letters of administration with the will annexed issued to the appellant, Florence E. Philbrook, a sister of the decedent, and appointing as executrix Anne Bates Randall, widow of said decedent, named in the will as executrix thereof. Decedent at the time of his death, November 18, 1914, was a resident of the state of Maine, residing there with his wife, the respondent herein. Upon his death his will was there offered by his widow for probate, and was on January 22, 1915, admitted to probate in Cumberland county, Me. On February 3, 1915, the appellant, Florence E. Philbrook, filed a petition for the probate of said will as a foreign will and for her appointment as administratrix with the will annexed. This order was made on the 15th day of February, 1915, and is the appointment revoked by the order appealed from. Subsequently the widow came to California, and on March 15, 1917, applied for the revocation of said letters to appellant and for her own appointment as executrix. Notice of the hearing of said application was given by personal service of citation upon the appellant, and by posting and publication of such notice. Appellant appeared and answered said petition, and after trial thereon the order appealed from was made.

[1, 2] The Code provides:

> "Where a person absent from the state * * * is named executor. * * * If there is no other executor, letters of administration, with the will annexed, must be granted; but the court may, in its discretion, revoke them on the return of the absent executor. * * *" Section 1354, Code Civ. Proc.

The respondent had an absolute right to the revocation of appellant's letters and to the issuance to her of letters of administration, with the will annexed, without regard to the question of whether or not she was named as executrix in the will as against the appellant. Code Civ. Proc. §§ 1383 to 1386; In re Li Po Tai, 108 Cal. 484, 41 Pac. 486. In such a case where the substantive right to administer the estate is absolute, and the only substantial difference between letters testamentary and of administration with the will annexed is the matter of the giving of bonds (the will waiving bonds), and where a bond may be required by the court in its discretion in that case, it would be an abuse of discretion to refuse, rather than an abuse of discretion to grant, such letters testamentary. Appellant, however, claims that the respondent widow had renounced her right to letters testamentary by a failure for 30 days "to petition the proper court for the probate of the will, and that letters testamentary be issued to" her, under section 1301, Code of Civil Procedure, which provides that an executor who has knowledge of a will, and that he is named therein as executor, who fails for 30 days thereafter to petition the proper court for the probate of the will, and that letters testamentary be issued to him, "he may be held to have renounced his right to letters, and the court may appoint any other competent person administrator, unless good cause for the delay is shown." It is contended that "may" as used in this section, should be construed as "must." But it is evident that this section must be construed in connection with section 1354, Code of Civil Procedure, above quoted. Where the executor is "absent from the state" and returns, the court "may revoke" letters previously issued, and so construed the question of the appointment of the returning executor is discretionary with the trial court. It is also apparent that the "renunciation" referred to in section 1301, supra, is not in any sense the equivalent of a voluntary renunciation, and cases with relation thereto do not apply. The case of Rice v. Tilton, 13 Wyo. 420, 80 Pac. 828, relied on by appellant, decides that a statute of that state (section 4574, Rev. Stat.), corresponding to our section 1301, Code of Civil Procedure, applies to foreign as well as domestic wills, and that the delay of 30 days without application for probate of the will "unless good cause for delay is shown," operates as a renunciation of the right of appointment, and justifies a court, in the exercise of a sound discretion, in refusing to revoke letters of administration, with the will annexed, issued before such application. The effect of section 5499, Revised Statutes of Wyoming 1910 (similar to our section 1354, Code of Civil Procedure), is not discussed in that opinion; nor was the case one in which a widow entitled to preference in the granting of letters of administration applied therefor; nor does that case help the appellant here, for it decides that the probate court's action was discretionary, as is provided by our section 1354, Code of Civil Procedure. A similar conclusion here would result in an affirmance of the judgment, for there was no abuse of discretion in appointing the respondent executrix without bonds, as provided in the will.

[3, 4] Appellant complains of a failure of the trial court to find on certain issues. To this there are two answers: First, that the essential facts that petitioner was the widow of said decedent, and the appellant the sister, are admitted by the pleadings, as were the will and terms thereof. The allegations of the answer that the petitioner (respondent) was defending a suit brought by the administratrix, and for that reason was disqualified, was not material, for that fact did not disqualify her. Estate of Brundage, 141 Cal. 538, 540, 75 Pac. 175. Second, that all essential facts are found by the court. The order states:

> "The court finds that the said petitioner Anne Bates Randall is the surviving wife of said decedent; that said Anne Bates Randall is the person named in the last will and testament of said decedent as the executrix thereof, and is competent to be appointed as and to act as the executrix; * * * that said Anne Bates Randall has not renounced or forfeited her right to letters testamentary. * * *"

[5] Appellant complains that the clerk did not set said matter for hearing, nor give sufficient notice thereof. These questions were not raised in the court below, and for that reason cannot be raised here by the appellant, who appeared and submitted to a trial on the merits. Estate of Dombrowski, 163 Cal. 290, 125 Pac. 233; Estate of Latour, 140 Cal. 414,

425, 73 Pac. 1070, 74 Pac. 441; Estate of Kasson, 119 Cal. 489, 51 Pac. 706. Cases cited by appellant concerning defects in notice of probate of will (Estate of Cobb, 49 Cal. 599; Estate of Carpenter, 127 Cal. 582, 60 Pac. 162) have no application.

We have considered the various matters complained of by appellant, notwithstanding that it is clearly apparent that there was no "miscarriage of justice in the lower court," and that appellant relies on alleged errors in "matters of procedure" (article 6, § 4½ of the Constitution); and notwithstanding the fact that the opening brief of appellant is filed with language so improper and abusive of the trial court as to require that it be stricken from the files (Gage v. Gunther, 136 Cal. 338, 350, 68 Pac. 710, 89 Am. St. Rep. 141).

The order appealed from is affirmed, and the opening brief of appellant is ordered stricken from the files of this court.

We concur: VICTOR E. SHAW, Judge pro tem.; MELVIN, J.

(177 Cal. 325)

KELLY, County Treasurer, v. WOOLSEY et al. (S. F. 6667.)

(Supreme Court of California. Jan. 26, 1918.)

1. TAXATION 🔑879(1)—INHERITANCE TAXES —TRANSFER IN CONTEMPLATION OF TO TAKE EFFECT AFTER DEATH.

St. 1905, p. 341, § 1, imposing an inheritance tax on all property transferred "in contemplation of the death of the grantor, vendor, or bargainor, or intended to take effect in possession or enjoyment after such death," looks to the substance rather than to the form, and can be avoided only by bona fide conveyances, parting absolutely with possession, title, and enjoyment in grantor's lifetime.

2. TAXATION 🔑880—INHERITANCE TAXES—TRANSFERS IN CONSIDERATION OF SUPPORT NOT TAXABLE.

Property conveyed in consideration of support of grantor by grantee, if title, possession, and enjoyment pass at date of conveyance, and no intention to evade the tax appears, is not taxable as made in contemplation of death or to take effect at or after death, even though the deed is withheld from record until grantor's death.

3. TAXATION 🔑893—INHERITANCE TAXES—TRANSFER SUBJECT TO TAX—INTENT—PAROL EVIDENCE.

In determining whether property transferred is subject to inheritance tax, the inquiry is not confined to the terms of the written instrument, but parol evidence of the real agreement may be shown, as in cases of resulting trust or to declare a deed a mortgage.

4. TAXATION 🔑893—INHERITANCE TAXES—TRANSFERS TO DEFEAT TAX—EVIDENCE.

Facts examined, and findings of court that, in the transfer of property, there was no intent to evade the inheritance tax law or to defraud the state, upheld.

5. TAXATION 🔑893—INHERITANCE TAXES—TRANSFER IN CONTEMPLATION OF OR INTENDED TO TAKE EFFECT AFTER DEATH—EVIDENCE.

Facts examined, and findings of trial court that there was no intent to postpone passing of title, control, or use and enjoyment of property, and that it was not made in contemplation of death, upheld.

6. TAXATION 🔑879(1)—INHERITANCE TAXES —LIFE ESTATE.

The mere fact that the transferor remains in possession and enjoyment of the property, by sufferance, or permission, or at the request of the transferee, does not establish intent or agreement to retain a life estate, where the circumstances justify a reasonable inference otherwise.

7. DEEDS 🔑58(1)—SUFFICIENCY OF DELIVERY TO THIRD PERSON—"CONSTRUCTIVE DELIVERY."

A grant without actual delivery to grantee is constructively delivered, where deed is delivered to a stranger for benefit of grantee, whose assent is shown or may be presumed. Civ. Code, § 1059.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Constructive Delivery.]

8. DEEDS 🔑208(5)—DELIVERY—INTENT OF PARTIES—EFFECT—PROOF.

That grantor executed and delivered deed to a stranger without conditions or reservation of control or other directions as to time than to deliver to grantee at his discretion, and immediately informed grantee of transaction asking grantee to reside on property, is sufficient proof of delivery of deed on its day and date.

9. GIFTS 🔑30(4)—INTER VIVOS—BY DEPOSIT IN BANK OF MONEY OF DONOR AND DONEE.

An aunt creating with her own money a joint bank account with her niece *held* to have made a gift of the money then on deposit.

10. GIFTS 🔑52—DEPOSITS—JOINT ACCOUNT —CHECKS.

Where an aunt established a joint bank account with her niece in which were deposited rentals from her property, and thereafter checked on the account, the inference that the rentals were used by the aunt for her own support being as reasonable as the opposite inference, the finding to that effect will be upheld.

11. DEEDS 🔑192—DELIVERY AND EFFECT—PRESUMPTIONS.

Where grantor made a deed to one to take effect after her death, it does not follow that in the deed of other property to another person made at the same time and delivered with the first deed to a third person does not pass immediate title; the circumstances being materially different.

12. TRUSTS 🔑63¾—RESULTING TRUST—DEPOSIT IN BANK.

Where two persons have a joint bank account and one deposits rents from her property therein, a resulting trust may arise in her favor unless she shall have withdrawn such deposits.

13. APPEAL AND ERROR 🔑1071(6)—HARMLESS ERROR—FINDING WITHOUT EVIDENCE.

The failure to make findings on an issue is not prejudicial error unless there is evidence on the subject.

In Bank. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Action by M. J. Kelly, County Treasurer of Alameda County, against Rosa M. Woolsey and others to recover inheritance tax. From a judgment denying part of plaintiff's claim and denying a new trial, plaintiff appeals. Affirmed.

W. H. L. Hynes, of Oakland, U. S. Webb, of San Francisco, Crosby & Richardson, of Oakland, Robert A. Waring, of Sacramento, and J. C. Altman, of San Francisco, for appellant. J. A. Elston, of Berkeley, and Fitzgerald, Abbott & Beardsley, of Oakland, for respondents.

SHAW, J. The plaintiff appeals from certain parts of the judgment, and from an order denying his motion for a new trial.

The action was begun in September, 1909, to recover inheritance tax alleged to be due upon certain properties, transferred by Rosa M. Shattuck in her lifetime to the defendants. It is alleged that the transfers were made by said Rosa M. Shattuck, without valuable consideration, in contemplation of her death, and that they were intended to take effect in possession and enjoyment after her death. The transfers in question are the following: (1) A deed to Rosa M. Woolsey, dated August 16, 1906, conveying certain parcels of real estate in the town of Berkeley; (2) a deed to the defendants Clinton R. Morse, Blanche Morse, Ruby R. Morse, and Nellie M. Winter, dated August 15, 1906, conveying a lot in the town of Berkeley; (3) a deed dated August 15, 1906, conveying to Mary C. Morse and Minnie Morse two lots in the town of Berkeley; (4) balances upon two joint accounts standing in the names of Rosa M. Shattuck and Rosa M. Woolsey at the time of the death of Rosa M. Shattuck, one in the First National Bank of Berkeley, the other in the Berkeley Bank of Savings.

[1] Rosa M. Shattuck died on September 13, 1908. The law in force on the subject at the time of these transfers provided for the imposition of inheritance tax upon all property transferred by the owner thereof, if "made in contemplation of the death of the grantor, vendor, or bargainor, or intended to take effect in possession or enjoyment after such death." Stats. 1905, p. 341.

The court below found that none of the transfers was made in contemplation of death; that the transfers to Rosa M. Woolsey were not intended to take effect in possession or enjoyment after the death of the grantor, but were intended to have full effect at once, except a certain part of the real property conveyed, consisting of the dwelling house occupied at the time by said Rosa M. Shattuck, as to which part the intention was that the possession and enjoyment of the grantees should be postponed till after the death of the grantor; that the transfers made by the two conveyances to the Morses were intended by the grantor to take effect in possession and enjoyment after her death and not before; and that the transfers of the said bank accounts to Rosa M. Woolsey were not made either in contemplation of death, or with the intention that they should take effect in possession and enjoyment upon, or after, her death. Judgment was accordingly given that inheritance tax be paid upon the value of properties so conveyed to the Morses, and upon that part of the property conveyed to Rosa M. Woolsey on August 16, 1906, embraced in the dwelling house and appurtenances occupied at the time by Rosa M. Shattuck; and refusing to order the payment of taxes on the remainder of said lands, or upon the said bank accounts. The appeal is taken from portions of the judgment refusing to allow the claim of inheritance tax on said parts of the property.

The inheritance tax law looks to the substance rather than to the form of the transaction.

> The "payment of the tax can only be defeated or avoided by such a bona fide conveyance as parts absolutely with the possession, title, and enjoyment in the grantor's lifetime." Dos Passos on Inheritance Taxation, 329.
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> "It is not an entirely unnatural desire, and certainly not one infrequently indulged, for property owners to attempt to evade the inheritance tax and transmit estates to the objects of their bounty unimpaired; and even though the transfer is not actuated by any such motive, its practical effect, so far as the public revenue is concerned, is the same. It is the purpose of such statutes to preclude, so far as possible, this evasion of taxation, whether with fraudulent intent or not, and to secure to the state its revenue on all transfers which have their occasion in the death of the transferor; but it is not the purpose of the statute to inhibit ordinary transfers, by gift or otherwise, if not made in contemplation of death, or not postponed in enjoyment or possession until after the death of the donor or grantor." Ross on Inheritance Taxation, § 111.

[2] In cases where property is conveyed in consideration of the support of the grantor by the grantee during the former's life, "if a present title is conveyed, if the property passes in possession and enjoyment as of the date of the conveyance, no intention to evade the tax appearing, the transfer is not taxable as having been made in contemplation of death or to take effect at or after death; and this although the deed is withheld from record until the grantor's death." Ross on Inheritance Taxation, § 114; Lamb v. Morrow, 140 Iowa, 89, 117 N. W. 1118, 18 L. R. A. (N. S.) 226; Estate of Hess, 110 App. Div. 476, 96 N. Y. Supp. 990.

[3] The character of the transaction is not wholly determined by the terms of the written instrument employed to accomplish it. Parol evidence of the real agreement is permitted with a latitude similar to that indulged to show a resulting trust or to transform a deed absolute on its face into a mortgage. People v. Moir, 207 Ill. 190, 69 N. E. 905, 99 Am. St. Rep. 205; Ross on Inheritance Taxation, § 112. These are the leading principles of law upon which the provisions of the statute are to be applied to the present case.

[4, 5] The finding of the court that the property here in controversy was not transferred to Rosa M. Woolsey in contemplation of death, or with the intention that the transfer should take effect in possession or enjoyment after the death of Rosa M. Shattuck is general in terms and follows the language of the statute. It amounts to a finding against the appellant upon every element of the case mentioned in the above statements of the law. The transfers in the present case were made by instruments in

writing. The finding is, in effect, a finding with respect to the property exempted, that there was no intent to evade the inheritance tax law, or to defraud the state thereof, and no intent to postpone the passing of title and absolute control of the property to the grantee, or to restrict the grantee's use and enjoyment thereof in any manner not compatible with the legal effect of the instruments by which the transfers were made, and that there was no agreement except those expressed by said instruments.

It is the contention of the appellant that the finding above mentioned is contrary to the law and the evidence. It is not contended that the finding that the transfers were not made by Rosa M. Shattuck in contemplation of death is contrary to the evidence. The controversy arises upon the question whether the transfers were intended to take effect in possession and enjoyment only upon or after the death of Rosa M. Shattuck. The finding of the court being to the contrary, the evidence must be considered on the theory that every reasonable inference deducible therefrom favorable to the respondent must be deemed to be an established fact. There is no substantial conflict in the testimony. The inquiry is confined to a consideration of the different inferences that may be reasonably deduced from the evidence.

Rosa M. Shattuck was possessed of an estate for her life in the real property formerly belonging to her deceased husband, worth from $400,000 to $500,000. She also possessed other real property, which, in 1906, was estimated to be worth in excess of $500,000. She had no children or lineal descendants. John W. Havens was a nephew of her deceased husband. Rosa M. Woolsey was her niece. The Morses mentioned above were also of kin, but the degree of relationship does not appear. She was of a gentle, affectionate, generous, benevolent, and trustful disposition, and much attached both to Havens and to her niece Mrs. Woolsey and her husband. On November 27, 1905, she conveyed to Havens, as a gift, her said life estate in the property of her deceased husband. He immediately took possession thereof, and that transfer is not in controversy. The transfers to Mrs. Woolsey and to the Morses covered all of the property that she owned, except her household goods. She was then 77 years of age and was in her usual health. Mrs. Woolsey, with her husband and family, had been residing on a farm in Sonoma county for about 25 years. A large lot or block of the land included in the deed to Mrs. Woolsey was the homestead of Mrs. Shattuck. It consisted of two dwelling houses, one of which she occupied, a barn, a chicken yard, a garden and a pasture. For some 10 years prior to that time Mrs. Shattuck had desired to arrange her affairs so that Mrs. Woolsey could live with her, or near her, on said premises. Shortly before the making of these transfers, while on a visit to Mrs. Woolsey in Sonoma county, Mrs. Shattuck obtained Mrs. Woolsey's consent to go to live on the Berkeley homestead. She then returned to Berkeley, executed the deed to Mrs. Woolsey, informed Mrs. Woolsey that she had done so, and asked her to come to Berkeley. The Woolseys thereupon removed to Berkeley, arriving there in October, 1906, and thereafter they resided in the old Shattuck residence on the Shattuck homestead, adjoining the new dwelling house thereon occupied by Mrs. Shattuck. No rent therefor was ever paid, nor was it ever mentioned.

John W. Havens had been for many years the confidential agent and adviser of Mrs. Shattuck, and the manager of her affairs. The deeds to Mrs. Woolsey and to the Morses were all prepared, signed, and acknowledged, at the same time, under the direction of Havens, and were thereupon delivered to him without any instructions as to further delivery, but with the understanding that he "should keep them and record them some time" and should give the possession of them to the grantees at "the proper time"; that being left to his judgment. Nothing was said or understood to the effect that he should keep the Woolsey deed until after Mrs. Shattuck's death, nor was there any instruction that he should hold it as an escrow, or for the benefit of Mrs. Shattuck, or subject to her order or control. To Mrs. Woolsey Mrs. Shattuck said:

> "I have made a deed. I have given the deeds to John (meaning Havens) for you. It is all yours. Everything is yours. All I have got here is yours. You might as well learn how to manage it."

She also frequently said to Mrs. Woolsey that the property was all hers to do with as she pleased. In September, 1907, a parcel of the land deeded to Mrs. Woolsey was conveyed to the Shattuck Hotel Association as a hotel site, in exchange for 6,800 shares of its stock. In negotiating for the sale the attorney for the association had an interview with Mrs. Shattuck in the presence of Mr. Woolsey and Havens, in which Mrs. Shattuck said:

> "I have very little interest in the matter. I have turned everything over to Rosa"—meaning Mrs. Woolsey.

The attorney was then ignorant of the deed to Mrs. Woolsey. After learning of Mrs. Woolsey's deed, the attorney prepared a deed to be executed by Mrs. Shattuck and Mrs. Woolsey to the hotel association. In company with Mr. Havens, he went to Mrs. Shattuck's house and there read said deed to her, saying:

> "I understand that this property has been deeded away, and it will be necessary for Mr. Woolsey to join in the deed."

To which she said:

> "Yes, that has all been arranged; the property belongs to Rosa. John has the deed."

Referring to the stock to be taken in exchange, she said that it made no difference to her whether it was issued in her name and indorsed by her to Mrs. Woolsey, or whether it was issued immediately to some one else. The deed was executed by both of them, and the stock was issued in the name of Mrs. Shattuck, and by her indorsed to Mrs. Woolsey, and delivered over to Havens for delivery to Mrs. Woolsey; but it was not actually delivered by him until after Mrs. Shattuck's death. All the parties knew that Havens had the Woolsey deed and the stock, and no demand for either was made on him by them. Some time during the two years of Mrs. Shattuck's life, after the making of the Woolsey deed, another parcel of land was conveyed to the First National Bank of Berkeley for $3,000 in cash and $10,000 in stock of said bank. The cash was deposited to the aforesaid joint account, and the stock was issued to Mrs. Woolsey.

The deeds were not recorded until after Mrs. Shattuck's death, and were not actually delivered by Havens into the possession of the grantees until after that event. Neither Mr. Woolsey nor Mrs. Woolsey were informed of the making of the deeds to the Morses. They remained ignorant thereof and supposed that the deed to Mrs. Woolsey included it all, until after the death of Mrs. Shattuck. On October 3, 1906, Mrs. Shattuck had some money on deposit with the First National Bank of Berkeley, and on that day she, by a writing signed by her, opened a joint account of herself and Rosa M. Woolsey, payable to either of them, with said bank and transferred said deposit to said joint account. From that time forward Mr. Woolsey had the active management of the property formerly belonging to Mrs. Shattuck, including that embraced in the deeds to the Morses, as well as that transferred to Mrs. Woolsey. A large part of it was leased to tenants. These leases were renewed from time to time under Mr. Woolsey's management; the new leases being usually signed by him, alone, or by Mrs. Shattuck, as lessor. The money received as rent was deposited to the joint account. There was no request by Mrs. Shattuck that this should be done, nor any agreement to that effect. So far as the evidence shows, the matter was never mentioned by her, although, of course she must have been aware of the fact. Mrs. Woolsey and Mrs. Shattuck each checked upon this account for their respective individual uses. Each would sign checks thereon for management expense, but usually these checks would be signed by Mrs. Shattuck. The property was assessed in the name of Mrs. Shattuck and the taxes were paid by checks on the joint account which, generally, were signed by her.

In explanation of the fact that he consulted Mrs. Shattuck about the property, and had her sign leases and checks for taxes and expenses, Mr. Woolsey testified: That he attended to the business entirely as representing his wife, and had no agreement with Mrs. Shattuck to act as her agent. That he would talk with his wife and Mrs. Shattuck, and the latter would advise and make suggestions. That he more frequently had Mrs. Shattuck sign the expense checks because the business was done in the office in the house in which Mrs. Shattuck lived, and, as she was generally around, it was more convenient to go to her than to Mrs. Woolsey. That, in regard to the leases, Mrs. Shattuck was generally known as the owner, while the Woolsey deed was not public, and he thought it was more satisfactory to Mrs. Shattuck to have it kept quiet. That, while it was not necessary to take matters of concern to the estate to Mrs. Shattuck, he would "defer to her, naturally, of course, as a man would under the circumstances, as far as I ever could. We naturally felt under great obligations to Mrs. Shattuck. She had been my wife's benefactress, had practically turned over everything she had to my wife, and I couldn't do less than consider her, and consult with her, on every occasion." That when he first came to the property it was practically new to him, and she would talk with him and advise him as to the better policy, and that he always felt that he would never give Mrs. Shattuck occasion to think that he would ignore her, and always took her into consultation whenever he could, although the business was entirely in his hands and he managed it and looked after it just as if it was his own, and for his wife.

Upon moving into the house, Mrs. Woolsey immediately took the active management of all of the property, and always thereafter, through her husband as her agent, continued to manage the same, excepting, however, the house in which Mrs. Shattuck lived. During the following two years of Mrs. Shattuck's life the Woolseys used the horses and carriage, the barn, chicken yard, garden, and pasture, and all of the homestead, excepting only the Shattuck dwelling and the grounds immediately around it. Mrs. Shattuck also made such use as she desired although it was but little, of the horses, carriage, barn, chicken yard, garden, and pasture. Nothing was ever said between them on the subject of this mutual use, and there is no evidence that it was in pursuance of any arrangement between them whereby Mrs. Shattuck reserved, or was granted, the right to such use.

[6] There was no evidence of an express agreement that the possession or enjoyment of the property was to be given to Mrs. Shattuck during her life, or for any period, or that the possession or enjoyment thereof by Mrs. Woolsey was to be postponed until the death of Mrs. Shattuck. The contention of the appellant is that the circumstances conclusively establish the intent of the parties, as to all of the property, that Mrs. Shattuck

should have the possession and enjoyment thereof during her life. By the terms of the act, it is only where such intent exists that property transferred is subject to such taxation at the death of the transferor. This intent is essential and must be proven, either by the instrument of transfer, or by some other agreement, oral or written, express or implied. Such agreement or intent may be shown by circumstances from which it may be reasonably inferred, as well as by express declarations. For the purposes of the case, it may be conceded that such intent may be shown by proof, direct or circumstantial, of a parol agreement contradicting the terms of the instrument of transfer. But the mere fact that the transferor remains in possession and enjoyment, by sufferance, or permission, or at the request of the transferee, does not of necessity establish such intent or agreement, where there are circumstances justifying a reasonable inference that there was no such intent.

[7, 8] The evidence supports the conclusion that the Woolsey deed was delivered to Havens with intent to pass to the grantee the present title to the property in question, and that the title thereupon vested absolutely in Mrs. Woolsey. A grant without any actual delivery into the possession of the grantee is constructively delivered "where it is delivered to a stranger for the benefit of the grantee, and his assent is shown, or may be presumed." Civ. Code, § 1059. Mrs. Shattuck signed and acknowledged the deed to Mrs. Woolsey and handed it to Havens, without conditions or reservation of control thereof, and with directions to deliver it to the grantee at his discretion, and without other direction as to time of delivery, and she immediately informed Mrs. Woolsey that she had made the deed, saying, "I have given the deeds to John for you," and that the property was hers, and asked her to take up her residence upon it; and she afterwards frequently repeated the statement that the property belonged to Mrs. Woolsey. Mrs. Woolsey took possession of the property, but left the deed in the custody of Havens. This sufficiently establishes the fact that Mrs. Shattuck intended that Havens should hold the deed for the benefit of and as agent for Mrs. Woolsey, and supports the finding that the deed was delivered on the day of its date. Carr v. Howell, 154 Cal. 381, 97 Pac. 885. Where a grantor intends that the deed executed by him shall operate as a present transfer of title, and delivers it to a third person without condition, the title passes as of the date of the delivery to such third person, although the deed is not actually delivered to the grantee until after the grantor's death. Sneathen v. Sneathen, 104 Mo. 210, 16 S. W. 497, 24 Am. St. Rep. 326; 1 Devlin on Deeds (3d Ed.) § 275a, p. 433. There can be no doubt that Mrs. Woolsey assented to the transfer. This brings the case within the rule stated in section 1059. The finding of the court that there was a transfer of the property and a passing of the title thereto at the date of the execution of the deed is therefore sustained by the evidence.

The evidence is also sufficient to uphold the finding that there was no secret intent or understanding that Mrs. Shattuck should have, during her life, the use and enjoyment of the property. The court below, from the evidence, may have inferred that she was entirely willing to trust her own support, unasked, to the generosity and kindly affection of her niece and nephew, believing that it would be freely provided, with the tact and grace which the mutual love and affection between them would inspire. Such unconditional dispositions of property by aged persons to members of the immediate family are not unusual or infrequent. This is shown by the many cases in the reports which have arisen because such confidence has been betrayed, and in which unavailing attempts are made to have a constructive trust declared against the beneficiary. The cases where there is no betrayal do not come before the courts for relief, and it may well be supposed that they are the rule and that the betrayals are the exception. Therefore it cannot be said to have been unreasonable for the court below to infer that the disposition in the present case was made without any secret intent or any arrangement or understanding whatever for the benefit of Mrs. Shattuck.

[9, 10] In the creation of the joint account in October, 1906, she was dealing with the money she already had on hand, and was making a gift thereof to Mrs. Woolsey. The subsequent deposits to that account were made by Mrs. Woolsey out of the rents accruing from the property, including that accruing from the property deeded to the Morses. She was put in possession of all of this property by Mrs. Shattuck, and was not placed by her under any obligation to account for the rentals accruing during her lifetime. The evidence shows that these deposits were made without consultation or arrangement with Mrs. Shattuck, and without any obligation on the part of Mrs. Woolsey to do so. The inference therefore is that these subsequent deposits, so far as they consisted of rentals from the Woolsey property and were used by Mrs. Shattuck for her own support, were not in discharge of any implied obligation or any promise, but were made by Mrs. Woolsey as a voluntary provision for that support, and as a gift to her aunt, and that she took this method of providing for her support in order to enable her aunt to avail herself thereof freely without the annoyance or embarrassment of asking therefor, and to feel herself independent. All these inferences are as reasonable, from the evidence, as the supposition that there was an obligation or promise by Mrs. Woolsey to do so. It is enough to support the findings if we can

say that the conclusion was not unreasonable, although the opposite inference might be equally reasonable.

[11] The argument is made that, since it was found by the court below that the deeds to the Morses were made with the intent that they should not take effect in possession and enjoyment by the Morses until the death of Mrs. Shattuck, it must follow that the deed to Mrs. Woolsey, being made at the same time, was made with the same intent. The circumstances, however, were materially different, and such conclusion does not necessarily follow. Mrs. Woolsey was immediately informed of the deed to her, and was invited to take possession at once, which she did with the entire consent and approval of Mrs. Shattuck. The Morses were not informed of the deeds made to them, nor asked to take possession, and they received none of the rents. These differences justify the different inferences made by the court with respect to the several transactions. So, also, with regard to the dwelling in which Mrs. Shattuck continued to reside after the making of the Woolsey deed. While it was included in that deed, the conduct of the parties with reference thereto was wholly different from that respecting the other portions of the land conveyed. Mrs. Shattuck remained in possession. While there is no evidence of any express arrangement by which she was to have the right to such possession, the court may justly have inferred from the conduct of the parties that such arrangement was in fact made, as to that part. The opposite conduct respecting the other parts of the property authorized it to infer the contrary with respect to those portions. Our conclusion therefore is that the finding of the court that the transfers to Mrs. Woolsey, except of the Shattuck dwelling and grounds, were not made with intent that the enjoyment and possession thereof should remain in Mrs. Shattuck until her death, or with the intent that the enjoyment and possession of Mrs. Woolsey should be postponed until the death of Mrs. Shattuck, is fully sustained by the evidence.

The appellant cites a number of cases holding that the inheritance tax cannot be escaped or evaded by a resort to any device or plan, the effect whereof is that the income, profit, or enjoyment of the property, is secured to the grantor or transferor during his life. These cases are distinguishable from the case at bar by the fact that in each of them the arrangement was such that the enjoyment or possession was secured to the grantor, and in none of them did the grantor rely wholly on the kindness, affection, or gratitude of the beneficiary, as was the case here. Thus, in Reish v. Commonwealth, 106 Pa. 526, where the court said that the grantor could not defeat the statute "by any device which secures to him, for life," the enjoyment of the property, the grantee gave a bond to pay the income to the grantor and to allow him the free use and control of the residence and appurtenances during his life. This was the device referred to in the above quotation. In Du Bois Appeal, 121 Pa. 368, 15 Atl. 641, the deed of transfer created a charge on the land in favor of the grantor for the payment of his debts, contracts, and obligations, made or incurred during his life, and was conditioned that if he survived the grantee the deed should be void. In People v. Moir, 207 Ill. 180, 69 N. E. 905, 99 Am. St. Rep. 205, the transfer was made, and simultaneously therewith the grantor made a partnership agreement with the grantees, whereby one-half of the net income from the property was to be paid to the grantor. In Lacy v. State Treasurer (Iowa) 121 N. W. 179, the instrument of transfer reserved to the grantor the use and possession of the property during his life. In State Street Trust Co. v. Treasurer, 209 Mass. 373, 95 N. E. 851, the donees were not to receive any part of the property during their lives, but were to receive one half of the income thereof, the donor retaining the other half. The property itself did not pass until his death. In Estate of Jones, 65 Misc. Rep. 121, 120 N. Y. Supp. 862, the deeds in question were held by the grantor, unrecorded, and without delivery until his death. In Todd's Estate, 237 Pa. 466, 85 Atl. 845, 43 L. R. A. (N. S.) 869, the grantor reserved to himself during his life a right to the income of the property. In Matter of Cornell, 170 N. Y. 423, 63 N. E. 445, the instrument of transfer reserved to the donor during his life all, or such part, of the net income, of the property, as he might wish. It is obvious that none of these cases is authority for the proposition that where no reservation is made, and the grantor relies on the voluntary acts of the grantee without receiving any promise, secret or otherwise, to allow him the enjoyment of the property or any part thereof, and the grantee thereafter voluntarily allows the grantor to receive a part of the income from the property, such transfer can be deemed to have been made with the intent that it shall take effect in possession and enjoyment after death.

It follows from what has been said that the transfer of the real property by Mrs. Shattuck to Mrs. Woolsey does not come within the terms of the inheritance tax law, and that said property is not only not taxable thereunder, but also that since August 16, 1906, it has been the absolute property of Mrs. Woolsey. The effect is that the deposits made to the joint account thereafter from the rents of said property were not transfers made by Mrs. Shattuck to Mrs. Woolsey, but were transfers made by Mrs. Woolsey out of her own property to the joint account, and, so far as Mrs. Shattuck availed herself thereof by checking out that money for her personal use, the amount so used was a gift by

Mrs. Woolsey to Mrs. Shattuck. Necessarily the amount thereof remaining at the death of Mrs. Shattuck was not taxable as property disposed of by her in her lifetime.

The amount of money in the account of Mrs. Shattuck on October 3, 1906, when she changed it to the joint account, is not shown by the evidence or pleadings. It does appear that Mrs. Shattuck drew on said account for her personal expenses from that time until her death. In the absence of anything to the contrary, and if it were necessary to support the judgment, it would be presumed that she consumed it all for her personal support during her lifetime.

[12] The moneys received from August 16, 1906, until the death of Mrs. Shattuck, from the rents of the three lots deeded to the Morses, were also deposited in the joint account. As this property, according to the findings, still belonged to Mrs. Shattuck, and as there is no evidence of any understanding between Mrs. Shattuck and Mrs. Woolsey respecting its disposition, except such inferences as may arise from the fact that Mr. Woolsey received and deposited it, the result would be that in equity a resulting trust might arise with respect thereto, in favor of Mrs. Shattuck, so that to that extent the joint account may be deemed to have been held in trust for her use. The amount of rents accruing from this source was not shown. Only one of said lots was improved. A large part of the property embraced in the Woolsey deed had valuable improvements thereon. On January 30, 1908, so much had accumulated in that joint account, which was drawing no interest, that $10,000 was drawn therefrom and deposited to the joint account in the savings bank. At the death of Mrs. Shattuck in the following September, the balance in the commercial account was nearly $7,000. It is to be inferred that the amount received from the Morse property was relatively very small, as compared with that from the Woolsey properties. The checks drawn by Mrs. Shattuck for her personal use on the joint account would be equitably chargeable to the rents accruing from the Morse lots, and would be applied to that part of the fund, rather than to the contributions thereto made by Mrs. Woolsey from her rents. There being evidence that she drew checks as desired for her personal use, and no evidence as to the amount of this part of the fund, it may be that it was all drawn out by her for her own use. Nothing to the contrary appearing, that fact is to be inferred in support of the judgment. It follows therefore that the plaintiff has failed to establish the fact that any of the funds contributed by Mrs. Shattuck to the joint account remained undisposed of by her in her lifetime for her own use. It may be added that the complaint does not assert any claim to a tax on the money deposited to this account after August 16, 1906. From these facts it appears that the question of the effect of a deposit to joint account, as a disposition of property with the intent that it shall take effect in enjoyment and possession at the death of the donor, does not arise in the case. This renders it unnecessary to consider the argument of appellant on that subject.

[13] Appellant further claims that the findings do not cover all the matters in issue. This refers to the allegation of the complaint that, in addition to the personal property hereinbefore described, Mrs. Shattuck, after August 15, 1906, and in her lifetime, transferred to Mrs. Woolsey "other personal property, the character of which was unknown to" plaintiff, owned by Mrs. Shattuck on August 16, 1906, of the value of $2,000. Appellants say the evidence shows a transfer of some household goods, a horse and carriage, and 6,800 shares of stock in Shattuck Hotel Association, none of which is mentioned in the findings.

The failure to make findings on an issue is not prejudicial error unless there is evidence on the subject. There was no evidence that Mrs. Shattuck in her lifetime transferred any household goods, or horse and carriage, to Mrs. Woolsey. Apparently she continued to be the owner of this property until her death. The facts already stated show that the transaction by which Mrs. Woolsey acquired the hotel stock was, in substance and effect, not a transfer to her by Mrs. Shattuck as a gift, but an exchange by Mrs. Woolsey of a parcel of the land which she had already acquired by the deed from her aunt as aforesaid, for the stock in question. The evidence of that transaction does not tend to sustain the allegation. Moreover, it is plain that the aforesaid allegation of the complaint referred to property owned by Mrs. Shattuck on August 16, 1906, and consequently it did not include the hotel stock. In these circumstances the failure to make findings concerning these articles of property is not assignable as prejudicial error.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; MELVIN, J.

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177 Cal. 356

ASH v. SOO SING LUNG. (S. F. 7922.)

(Supreme Court of California. Jan. 29, 1918.)

1. WITNESSES ⚷374(2) — EXAMINATION OF IMPEACHING WITNESS.

After the purpose of showing the interest of defendant's witness has been completely subserved by answer of plaintiff's witness that defendant's witness did ask him to become a witness in the case, the sustaining of objection to the further question, "What did he say to you?" was not error.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

2. WITNESSES 🔑373—LAYING FOUNDATION FOR IMPEACHMENT.

To impeach a witness by evidence of his declarations showing his interest in the case which he has denied, the foundation must first be laid by calling his attention to the particular statements with such circumstances of time, place, and persons present as to give full opportunity for explanation.

3. APPEAL AND ERROR 🔑1056(1)—HARMLESS ERROR—EXCLUSION OF EVIDENCE—FACTS OTHERWISE ESTABLISHED.

An alleged error in sustaining objections to a question asked plaintiff's witness as to whether defendant's witness had talked to him about testifying in the case *held* not sufficiently harmful to justify reversal where the evidence was cumulative and was purely preliminary to one calling for declarations that were inadmissible.

4. DAMAGES 🔑62(3) — DUTY OF OWNER TO PREVENT OR MINIMIZE.

One recovering for injury to property through breach of an obligation respecting it by another cannot recover for losses directly resulting from his own failure of duty to prevent or minimize the loss, but an instruction that plaintiff could not recover if he could have done himself what defendant failed to do goes beyond the rule.

5. TRIAL 🔑296(1)—INSTRUCTIONS—CORRECTION.

An instruction examined, and *held* in direct contradiction to, but not correcting, an erroneous instruction, since it entirely omits all reference to plaintiff's duty to avoid injury to his property through the breach of contract by another which had been erroneously stated.

Department 1. Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by David Ash against Soo Sing Lung. From a judgment for defendant and denial of a motion for new trial, plaintiff appeals. Judgment and order reversed.

Everts & Ewing and Carl E. Lindsay, both of Fresno (M. G. Gallaher, of Fresno, of counsel), for appellant. M. B. Harris, E. M. Harris, and T. R. Thomson, all of Fresno, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment in favor of the defendant in an action to recover damages for the breach of a contract. The plaintiff was the owner of a peach orchard in the county of Fresno upon which there was growing a crop of peaches during the year 1914. In the month of July of that year the plaintiff and the defendant entered into a contract in writing by the terms of which the defendant agreed to purchase the said growing crop of peaches and to harvest and market the same upon the terms and conditions set forth in said contract. Among these were the following stipulations:

> "Said second party shall at his own cost and expense tie up the trees, the twine to be furnished by said second party therefor. * * * It is expressly understood and agreed that all of the work herein designated shall be done at the time and in the manner herein set forth, under the direction of the said party of the first part and at such times as he shall designate and to his satisfaction."

The defendant, upon the execution of this contract, entered into possession of the premises and proceeded with the performance of his part of the agreement, except that he did not tie up a considerable number of the trees so as to prevent the breaking of the limbs from the increasing weight of their fruitage, as a result of which the limbs of such trees were overweighted and broken down, and the orchard thereby materially injured. The plaintiff sued to recover damages for this alleged breach of the defendant's contract and consequent injury to his orchard. The defendant in his answer denied the existence of any agreement on his part to tie up the trees, and denied that he had failed or refused to do so, and denied that any of their limbs were broken and destroyed, and affirmatively alleged that any injury and damage which had been occasioned to the trees was caused by the fault and negligence of the plaintiff himself, and in the course of this averment stated that:

> "From and after the time the said agreement was entered into by said plaintiff and said defendant, and during all of the time the said injury and damage were being done, the said plaintiff knew that said trees were becoming broken and damaged."

The cause was tried before a jury, which returned a verdict in the defendant's favor, and from the judgment entered thereon and after denial of the plaintiff's motion for a new trial the latter prosecutes this appeal.

[1, 2] The appellant presents two points for our consideration upon this appeal. The first relates to an alleged error of the court in the exclusion of certain evidence offered on plaintiff's behalf. During the trial a witness named E. H. Morgan was called and examined on behalf of the defendant. Upon cross-examination he was asked, the following questions, and gave the following answers:

> "Q. Haven't you interviewed witnesses for the defendant? A. No, sir. Q. Haven't you talked to any of his witnesses? A. No, sir; I haven't. Q. Haven't you gone around trying to get witnesses for him? A. No, sir; I haven't."

The evident purpose of these inquiries was to show interest on the part of the witness in the success of the defendant's case. Thereafter in rebuttal the plaintiff produced a witness named Saffell, who was asked by plaintiff's counsel if he knew E. H. Morgan, and answered that he did. He was then asked if since the damage done to plaintiff's orchard Mr. Morgan had any conversation with him with reference to his becoming a witness in the case. He answered in the affirmative. He was then asked if Mr. Morgan requested him to become a witness, and he answered that he did. Thus far no objection had been made to the foregoing questions or answers. He was then asked the question, "What did he say to you?" to which the defendant objected upon the ground that it was irrelevant, incompetent, and immaterial. The court sustained this objection. It is not contended by the appellant that the objection made was not broad enough in terms to cover the specific objection that the proper foundation for the question had not been laid; but, even if that criticism had been urged, it would not in our opinion be tenable, particularly since the record discloses that the court was fully advised by the discussion attending the objection as to its scope. The court did not err in sustaining the objection. The purpose of the inquiries put to this witness being that of showing the interest of the witness Morgan in defendant's case, that purpose was completely subserved by the testimony of the witness Saffell, given without objection, to the effect that he had been interviewed by Morgan and requested to become a witness in the case. The particular question objected to called for declarations of the witness Morgan, and it is a well-settled rule that, when a witness is sought to be impeached by evidence of his declarations showing his interest in the case, the foundation for such an inquiry must first be laid by directing the attention of the former witness to the particular statements sought to be proven, with such circumstances of time, place, and persons present as will give the witness intended to be impeached a full opportunity for explanation. Code Civ. Proc. § 2052; 2 Wigmore on Evidence, § 953; Silvey v. Hodgdon, 48 Cal. 185; Fagan v. Lentz, 156 Cal. 681, 105 Pac. 951, 20 Ann. Cas. 221; Est. of Bedford, 158 Cal. 145, 110 Pac. 302. The case of Lewis v. Steiger, 68 Cal. 200, 8 Pac. 884, chiefly relied upon by appellant as laying down a different rule does not in fact do so, since in that case the decision states that the record discloses that the proper foundation for the impeaching testimony was in fact laid.

[3] Following the witness Saffell the plaintiff produced two other witnesses named Vickery and Eudaly, of the first of whom the question was asked as to whether the witness Morgan "had talked" to him about testifying in the case. To this question the defendant urged the same objection as before, which the court sustained. Of the witness Eudaly the same question was asked, and this witness was permitted to answer it affirmatively, without objection; but when asked for the conversation, the former objection was urged and sustained. The trial court might well have permitted the preliminary question asked of the witness Vickery to have been answered, but its error, if any, in refusing to do so was harmless for several reasons. In the first place the interest of the witness Morgan in the defendant's case had already been shown by the preceding testimony given by the witness Saffell without objection, and it was further shown by the answer of the witness Eudaly, given without objection, that he had been "talked to" by Morgan. The addition of like evidence on the part of the witness Vickery would only have been cumulative, and for that reason the exclusion of it would not be sufficiently harmful to justify a reversal of the case. People v. Emmons, 7 Cal. App. 685–694, 95 Pac. 1032. Besides, it is evident from the record that the question was purely preliminary to one calling for declarations on the part of the witness Morgan, and which, as we have seen, would have been inadmissible for the reasons already given. For the same reasons the final question asked of the witness Eudaly was, upon objection, properly excluded.

[4] A much more serious contention on the part of the appellant arises over the alleged error of the trial court in the giving of a certain instruction to the jury. There was evidence in the case sufficiently tending to show that the defendant did not tie up a considerable number of the larger of the fruitladen trees, as a result of which their branches became badly broken. There was also evidence tending to show that shortly after the contract with the defendant was entered into, and after the latter had gone into possession of the premises, the plaintiff visited the orchard, and then observed that numbers of the trees were becoming overweighted with their burden of fruit, and were in danger of being broken, and that he directed the attention of the defendant's employés to the matter, and insisted upon the tying being done, and even went to the extent of showing how the same should be done, and was then assured that it would be attended to. The evidence further tends to show that upon a later visit not long thereafter the plaintiff saw that the defendant's agreement in that regard was not being kept, and that numbers of the trees were already broken, and that others were in imminent danger of breaking. The plaintiff did not himself act upon the discovery of these facts in the way of taking any steps to avert further injuries to his trees by tying them up himself. The defendant in his pleading, proof, and argument sought to invoke the rule of law which renders it the duty of one who is threatened with an injury of his property through the breach of an obligation by another to do everything in his power to prevent or minimize the loss consequent upon such breach, and if he suffers injury by failing to take these precautions he cannot recover for such damages as are the direct result of such failure on his part. In support of this contention before the trial court the defendant requested and the court gave the following instruction:

> "You are instructed that the law requires that the party claiming to be injured shall do whatever he reasonably can, and improve all reasonable opportunities to lessen the alleged injury. * * *
>
> "If you find from the evidence that the defendant failed to tie the trees according to the directions of plaintiff, or at the times designated by him, and if you also find from the evidence

> that plaintiff knew of such failure on the part of defendant at the time of such failure, and if you also find from the evidence that plaintiff could himself have tied or caused said trees to be tied, and if you further find that he failed to do so, then in such event your verdict must be for the defendant."

Conceding that the rule contended for by the defendant requiring one threatened with injury to his property through the breach of an obligation respecting the same undertaken by another to do all in his power to prevent or minimize the loss to himself impending upon such breach to be a correct statement of the law, it must be apparent that the foregoing instruction went far beyond the boundaries of this rule; for in effect it charged the jury that the plaintiff could recover no damages from the defendant for injuries arising from the latter's breach of his obligation if the plaintiff could have done himself what the defendant ought to have done, but failed to do under the terms of his contract. A rule of law thus broadly stated would place a premium upon the defendant's breach of his agreement, and result in entirely transferring to the plaintiff's shoulders the burden of the defendant's violated obligation. The utmost extent to which the rule invoked by the defendant in this case should have been applied would have been in the form of an instruction that the defendant was bound to respond in damages to the full extent of whatever injuries the plaintiff had sustained through the breach of the obligation, less such an amount of such damages as the jury might find could have been prevented or minimized by the plaintiff's own action in the use of ordinary care and prudence to avoid the effects and consequences of the defendant's breach of his obligation, after discovering the impending danger of injury to his property resultant upon such breach.

[5] The respondent, however, contends, that the vice of the foregoing instruction, conceding it to be faulty, was offset or removed by the following instruction, given at plaintiff's request:

> "Gentlemen of the jury, if you find from the evidence that the defendant in this action agreed with the plaintiff in this action to tie up the trees on said premises, under the direction of plaintiff, and at such times as plaintiff should designate, and if you further find that the plaintiff gave such instructions, and if you further find that the defendant neglected so to do, you are instructed that your verdict should be for the plaintiff for such damage, if any, as was proximately caused thereby, not exceeding, however, the amount prayed for, namely $4,628.00."

The utmost that may be said of this instruction is that it is in direct contradiction of the former one, and that it cannot be held to have cured the error therein, since it entirely omits all reference to the very matter of the plaintiff's duty to avoid injury, which constitutes the vice of that instruction. The jury could hardly have failed to be led into confusion by these conflicting instructions and hence the error in giving the former instruction must be held to have been prejudicial. The respondent's contention that such error would be cured by the general verdict of the jury in defendant's favor upon all of the issues in the case has no merit in view of the fact that the uncontradicted evidence in the case shows that some at least of the damages complained of arose after the date of the contract between the parties had been entered into and was due to the defendant's breach of his obligation to properly tie up the branches of the plaintiff's trees. This being so, the court's erroneous instruction went to the very meat of the case, and obviously conduced to the verdict in the defendant's favor.

Judgment and order reversed.

We concur: SLOSS, J.; SHAW, J.

(177 Cal. 367)

In re PUSEY'S ESTATE. (L. A. 5283.)

(Supreme Court of California. Jan. 29, 1918.)

1. APPEAL AND ERROR 🔑1180(1), 1202—REVERSAL WITHOUT DIRECTION—NEW TRIAL.

Where the Supreme Court reverses a judgment or order without special direction to the court below to proceed further, the case is not concluded, and the court below can act further and direct new trial of the matter.

2. JUDGMENT 🔑822(1)—INVALIDITY OF FOREIGN JUDGMENT OR JUDGMENT OF OTHER STATE—EVIDENCE.

The invalidity of a foreign judgment, or of a judgment of a sister state, may be shown collaterally by evidence not incorporated into the part of the record constituting the technical judgment roll.

3. DIVORCE 🔑79 — AFFIDAVIT SUPPORTING SERVICE BY PUBLICATION.

In proceedings for probate of a deceased wife's will, the question in issue being whether such will had been revoked by her marriage, and it being claimed that her marriage was void because her husband had a first wife living and undivorced at the time of the purported marriage, affidavit of the husband, in his divorce suit against his first wife in another state, supporting service of summons by publication, and stating that personal service within the state could not be made, etc., was competent evidence tending to prove that defendant wife could not be found within the state.

4. EVIDENCE 🔑80(1)—PRESUMPTION—IDENTITY OF LAW OF TWO STATES.

Where it is not shown that the law of Oregon on a particular point differs from the law of California, the California court, where the matter is material, will presume it to have been the same.

5. DIVORCE 🔑326 — RECITALS OF DIVORCE DECREE—CONCLUSIVENESS AS TO DUE SERVICE OF PROCESS.

Where an Oregon divorce decree contained recitals as to service of summons having been made by publication, the same having been ordered on due and proper "affidavits" filed and approved by the judge, the publication of summons having been duly approved according to law, etc., such recitals were conclusive of the fact that due service of process on proper affidavits had been made, unless contradicted by other parts of the record, or by proof made independently of the record, where admissible, and the recital imported that at least two affidavits were filed to obtain the order of publication, and the California court, upon collateral attack on the Oregon decree, must presume that there was another affidavit, not incorporated by the Oregon clerk in the transcript of record introduced in evidence, sufficient to support the order in such particular, this though the order for publication of summons referred to but one affidavit.

6. DIVORCE 🔑326 — FOREIGN JUDGMENT — PRESUMPTIONS FAVORING.

In proceedings to probate a woman's will, wherein the validity of divorce secured by her husband in Oregon from his first wife was material on the question of revocation of the will by marriage, the Supreme Court of California was bound to presume that the date in the summons by publication in the Oregon suit was the date of the order for publication as required by the Oregon statute.

In Bank. Appeal from Superior Court, Orange County; Z. B. West, Judge.

In the matter of the estate of Gertrude C. Pusey, deceased. From an order admitting decedent's alleged will to probate on petition of S. H. Finley, H. F. Pusey appeals, and, from an order denying his petition for administration, C. S. Crookshank appeals. Orders reversed.

C. D. Latourette, of Oregon City, Or., and Williams & Rutan, of Santa Ana, for appellants. Steele Finley, of Santa Ana, and E. J. Fleming and B. F. Woodward, both of Los Angeles, for respondent.

SHAW, J. Gertrude C. Pusey died on October 1, 1914, leaving property subject to administration in Orange county, Cal. S. H. Finley filed a petition in the superior court of Orange county for the probate of a document dated September 20, 1913, alleged to be the last will of said decedent. Henry F. Pusey, claiming to be the surviving husband of said decedent, filed a contest of said will on the ground that he was lawfully married to said decedent on June 15, 1914, and that by reason of said marriage said will was by law revoked. Civ. Code, § 1300. M. M. Crookshank, as nominee of H. F. Pusey, the alleged husband of said decedent, filed in said court a petition for letters of administration upon the estate of said decedent. The two petitions came on for trial, whereupon the court made its orders admitting the alleged will to probate, and denying the petition of Crookshank for letters of administration. Appeals were duly taken from these orders and in July, 1916, this court reversed both of them. 159 Pac. 433. It was the contention of Finley that the claim that Pusey was the surviving husband of the decedent was not sustained, because in the year 1891 he was lawfully married to one Julia Jarvis, who was still living, and that said marriage still existed, and that his subsequent attempted marriage to the decedent was for that reason void. In proof of this contention Finley introduced in evidence the record of a judgment of the circuit court of the county of Clackamas, state of Oregon, rendered on November 13, 1893, purporting to be a judgment divorcing said Pusey and his said former wife Julia, which judgment he claimed was void because of the failure to obtain jurisdiction of the defendant therein. The orders admitting the will to probate and denying administration were reversed on the ground that no evidence had been given to show whether or not the former wife, Julia, was alive at the date of the marriage of Pusey to said decedent, and that in view of the presumption that persons were innocent of crime, it would be presumed that the former wife was dead at the time of the subsequent marriage, and that said Pusey was therefore free to enter into said subsequent contract of marriage. The judgment of the court was simply that the two orders appealed from be reversed. There was no direction for further proceedings in the court below.

Thereafter, on motion of the proponent of the will, the court, over the objection of contestant, proceeded to try the causes again, and again made orders therein admitting the will to probate and denying the petition for administration. It appeared that during the pendency of the appeal M. M. Crookshank, the petitioner for administration, had died, and that a new petition was then filed by C. S. Crookshank, who had been subsequently nominated as administrator by Pusey. Thereupon Pusey appealed from the order admitting the will to probate and Crookshank appealed from the order denying his petition for administration. These are the appeals now presented for our consideration.

[1] The appellants first contend that the entire matter was concluded by the judgment of this court upon the former appeals, and that the court had no power to try the causes again, and could do nothing more than deny probate of the will and make an order appointing Crookshank as administrator of the estate. His theory upon this point is that where this court reverses a judgment or order without special direction to the court below to proceed further, the case is concluded and the court below is without power to act further, except to carry out the judgment of the Supreme Court by giving the relief demanded by the party who is successful in the appeal. There is no merit whatever in this contention. The contrary is thoroughly settled by numerous decisions of the court. In Sharp v. Miller, 66 Cal. 98, 4 Pac. 1065, upon a similar question, the court said:

> "The reversal of the judgment and order denying the motion for a new trial when the cause was here before, * * * placed the parties in the lower court in the same position as if the case had never been tried, with the exception that the opinion of this court must be followed so far as applicable in the new trial."

When an order has been reversed the effect is that:

"It no longer had any vitality or force, and the result was to leave the proceeding where it had stood before that order was made." Estate of Mitchell, 126 Cal. 250, 58 Pac. 549.

In Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624, speaking of a decree which had been reversed, the court said:

> "But that decree having been reversed—vacated—on appeal, the matter stood as though no decree had ever been made."

Many cases decide the same proposition. Stearns v. Aguirre, 7 Cal. 443; Phelan v. Board, 9 Cal. 16; Davidson v. Dallas, 15 Cal. 84; Ryan v. Tomlinson, 39 Cal. 639; Myers v. McDonald, 68 Cal. 162, 8 Pac. 809; Falkner v. Hendy, 107 Cal. 49, 40 Pac. 21, 386. The court, therefore, was acting within its powers in directing that a new trial of the two petitions should be had.

Upon the second trial it was shown that Julia, the former wife of Pusey, was still living; that she was informed of the decree of divorce in favor of Pusey against her shortly after it was rendered, and took no steps to vacate or defeat it; that on July 18, 1902, a marriage ceremony was regularly performed between her and one J. H. Proctor; that they have ever since lived together as husband and wife; that on November 6, 1906, Henry F. Pusey was again married to one Kittie E. Paine, who thereafter, on May 7, 1907, duly obtained a judgment of divorce from him. It inferentially appears, and it is not disputed, that Henry F. Pusey never instituted any other action for divorce from his first wife Julia, or obtained any decree of divorce from her, other than the decree of 1893 aforesaid. It would follow, therefore, that if that decree is void he still remains her lawful husband; that his subsequent marriages were void; that he is not the surviving husband of the decedent nor entitled to succeed to any part of her estate or to nominate a person to apply for letters of administration thereon, or to contest her will, and that a will made by her prior to said attempted marriage to him would not be revoked by that marriage. The decision of the case, therefore, depends upon the question whether or not the decree of the Oregon court in 1893, purporting to divorce Henry F. Pusey from his wife Julia, is valid. Upon the former appeal the court held that the presumption of innocence and death above mentioned rendered it unnecessary to determine this question.

A document was introduced in evidence, duly authenticated by the certificate of the clerk of Clackamas county, Or. The certificate stated that:

> "The annexed transcript of record, including decree, has been compared by me with the original files on record in this office, and that it is a correct transcript therefrom, and of the whole of said original files as the same appear of record in my office and in my custody."

The transcript on its face appears to be a copy of the record and papers in the proceedings in the case of Henry F. Pusey v. Julia Pusey, for a divorce, culminating in the decree of divorce rendered on November 13, 1893. It is claimed by the respondent that the decree is void for the reason that the summons was not served on the defendant, except by publication, and that the affidavit for publication, the order for such publication, and the summons as published were not in conformity with the laws of Oregon then in force upon the subject, and consequently that they were ineffectual to confer upon the court jurisdiction to render the decree against the defendant.

[2] The appellants claim that under the law of Oregon the affidavit and order for publication of summons form no part of the judgment roll and cannot be considered, upon collateral attack, as evidence to impeach the validity of the decree. This was the rule in force in this state with regard to collateral attacks upon domestic judgments during the time when our Code was the same as the law in force in Oregon in 1893. Hahn v. Kelly, 34 Cal. 404, 94 Am. Dec. 742; Estate of McNeil, 155 Cal. 342, 100 Pac. 1086. But in this case the question is unimportant. The decree was rendered in Oregon. So far as this point is concerned it stands upon the same footing as a foreign judgment. The invalidity of a foreign judgment, or of a judgment of a sister state, may be shown collaterally by evidence which is not incorporated into the part of the record constituting the technical judgment roll. Estate of Hancock, 156 Cal. 812, 106 Pac. 58, 134 Am. St. Rep. 177. The copies of the affidavit and order for publication, aforesaid, were introduced as evidence to impeach the judgment, and they must be considered.

[3, 4] The laws of Oregon on the subject were introduced in evidence, and it was stipulated at the trial that any decision of the Supreme Court of Oregon pertinent to the case should be deemed to be in evidence, and could be used either on the trial or on appeal to prove the law of that state. The statute provided that when "the defendant cannot after diligence be found within the state, and when that appears by affidavit to the satisfaction of the court or the judge thereof," the court shall order that the service be made "by publication of a summons." On the subject of diligence the affidavit states:

> "That personal service of summons herein within this state cannot be made on the defendant, and that the sheriff [of the county] having made due return thereof on the back of said original summons to that effect after due diligence and the plaintiff has made diligent search and inquiry and knows that said defendant is not within the state of Oregon."

This is a positive statement by the plaintiff that he knows that the defendant was not at that time within the state. If that were true, then, of necessity, she could not have been found within the state, even with the utmost diligence, or, in the words of the statute aforesaid, it would be true that "the defendant cannot after diligence be found within the state." It was possible that the plaintiff may have had positive knowledge that she was not then within the state. The affidavit was therefore competent evidence tending to prove the fact that the defendant could not be found within the state, and it was sufficient, so far as that point was concerned. As was said in Rue v. Quinn, 137 Cal. 656, 66 Pac. 217:

> "There is not an entire absence of evidence in the affidavit on behalf of the plaintiff to sustain the order, and it cannot be regarded as void." Anderson v. Goff, 72 Cal. 69, 13 Pac. 73, 1 Am. St. Rep. 34; Hoffman v. Superior Court, 151 Cal. 390, 90 Pac. 939; People v. Wrin, 143 Cal. 13, 76 Pac. 646.

It is not shown that the law of Oregon on this point differs from that of California, and it is therefore presumed to have been the same.

[5] The Oregon law further provided that:

> "In case of publication, the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the defendant at his place of residence, unless it shall appear that such residence is neither known to the party making the application nor can with reasonable diligence be ascertained by him."

On this subject the affidavit states only this:

> "That defendant's present address and whereabouts are to the plaintiff unknown, excepting that the last he heard of her she was somewhere in the state of California."

This does not even purport to aver that the residence of the defendant could not by reasonable diligence have been found by him, nor that he used reasonable, or any diligence, to ascertain it. The facts necessary to sustain an order for publication of summons which did not direct mailing of a copy of the summons and complaint to the residence of the defendant did not appear from this affidavit. The order for publication contained no directions for mailing such copy. If no other foundation were laid for the order, it would be invalid under the statute quoted. The decree itself, however, contained the following recital:

> "Service of summons having been made by publication, the same having been ordered herein upon due and proper affidavits having been filed and approved by the Honorable Loyal B. Stearns, judge of the Fourth judicial district of the state of Oregon, during the absence from Clackamas county, Or., of the Honorable T. A. McBride, judge of this court. The publication of summons having been duly approved according to law," etc.

The rule on this subject is that such recitals in a decree are conclusive of the fact that due service of process had been made, unless the recital is contradicted by other parts of the record, or by the proof made independently of the record, where such proof is admissible. If the recital is sufficient and the other parts of the record are equivocal, or if the independent proof is not of necessity inconsistent with the recital, such recital will prevail, and the judgment will be held valid by virtue thereof. In the present case the recital states, that the publication was ordered "upon due and proper affidavits," filed and approved by the judge making the order. The transcript certified by the clerk contains but one affidavit, and that does not support the order of publication as made. If the recital mentioned one only, it would be presumed that it referred to the affidavit in the record, and the decree would be held void. But the recital imports that at least two affidavits were filed to obtain the order, and we must therefore, upon this collateral attack, presume that there was another affidavit which was sufficient to support the order in this particular, and that for some reason the clerk failed to incorporate it in the transcript introduced in evidence. The certificate of the clerk does not, of necessity, show the contrary. It states that the document is a correct transcript "of the whole of said original files as the same appear of record in my office and in my custody." The certificate was made in the year 1914. It may be that another affidavit was filed in 1893 and that by some means it had been lost or removed from the files and was not in the custody of the clerk or in his office in 1914. The law does not require that such affidavits be recorded, and it is to be presumed that it was merely filed. This rule is well supported by authority. Thus in Hahn v. Kelly, 34 Cal. 407, 94 Am. Dec. 742, where the record contained a recital of service, the court said:

> "To illustrate: Suppose that portion of the judgment roll denominated the 'affidavit or proof of service' shows that personal service was made upon the son of defendant, and the remainder of the roll says nothing about service. We then have a want of jurisdiction appearing upon the face of the record. But suppose the judgment states that the defendant appeared, or that personal service was made upon him, or something else * * * equivalent, as it frequently does, the opposite result follows, for the record cannot lie, and it appears that the father as well as the son had been served, which may well have been the case. The record in such a case does not blow hot and cold, as might be supposed; on the contrary, both acts may have been done. On presentation of the return of service upon the son, the court may have declared it no service, and service upon the father may have been subsequently made, and the wrong return may have found its way into the judgment roll. To hold thus would be consistent with the record, while to hold otherwise would be to contradict the judgment. So in the case of a service by publication—if the affidavit of the printer states that the summons was published one month, and yet the court in its judgment states that it was published three, or that service has been had upon the defendant, it will be presumed that other proof than that contained in the judgment roll was made, for not to so presume would be to deny to the record that absolute verity which must be accorded to it."

Quivey v. Porter, 37 Cal. 463, is to the same effect. So far as we are advised the same doctrine prevails in Oregon. So in this case the judge who made the order may have declared the affidavit presented in the transcript introduced in evidence insufficient, and may have required another affidavit to be filed, upon which the order was made, which other affidavit was afterwards lost from the files. In support of the recitals in the judgment it must be presumed that this was done, otherwise the recitals would not be true. Upon these principles the judgment must be sustained so far as this objection is concerned.

The proposition that there was another affidavit as above stated is not disproved by the fact that the order for publication of summons refers to but one affidavit. Assuming the verity of the recital in the decree, as we must, the fact would be that the order would have been made upon the affidavit that was sufficient to support it, and which was subsequently lost, and not upon the affidavit contained in the record, and which was defective. This being so, the order would be accurate in referring to but one affidavit.

[6] With respect to the sufficiency of the summons as published, the requirement of the statute is that:

> "The summons published shall contain the name of the court and the title of the cause, a succinct statement of the relief demanded, the date of the order for service by publication, and the time within which the defendant is required to answer the complaint."

The summons as published, according to the record, closes as follows:

> "This summons is published by order of Hon. Loyal B. Stearns, judge of the Fourth judicial district of the state of Oregon.
>
> "Brownell & Dresser,
> "Attorneys for Plaintiff.
>
> "Dated September 19, 1893. 9–22:10–27."

According to the law of Oregon, it is imperative that the published summons shall comply with the above-quoted statute, in order to make a lawful service upon the defendant by publication. Odell v. Campbell, 9 Or. 304. The date of the order of service by publication does not appear in the summons, except as it appears by the words above quoted. It is claimed that the date therein given is not the date of the order for publication, but is the date of the summons itself, and hence that the publication is void. The law of Oregon does not require that the summons should be dated. The original summons appears in another place in the record, and it contains no date. It seems also that the law of Oregon does not require the summons to be issued by the clerk, and that the practice is for it to be signed by the attorneys for the plaintiff. The original summons was so signed, precisely as the summons published as aforesaid was so signed. It is obvious, therefore, that the date given in the publication as above shown was not intended as the date of the summons, but must have been intended for some other purpose. If it had been placed two lines higher in the paper there would have been no doubt that it was intended as the date of the publication order. Inasmuch as the law requires the summons to contain the date of that order, and as the date given was the correct date thereof, and serves no other purpose, and as the summons was not required to be dated, and was not dated, and in view of the presumptions in favor of lawful service arising from the effect of the recital in the decree aforesaid, we are of the opinion that we are bound to presume that this date was the date of the order for publication.

The respondent does not claim that any other defects exist in the record of the divorce case in 1893 which would defeat the jurisdiction of the court, or render the decree invalid. It must therefore be treated as a valid judgment of divorce. The result of this conclusion is that the marriage of Henry F. Pusey to the decedent was valid; that the will previously made by her was revoked by such marriage; and that upon the proofs offered the court below should have denied probate of the will and should have granted the petition for letters of administration.

The orders appealed from are reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

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177 Cal. 385

WEBSTER v. LOWE et al. (S. F. 7897.)

(Supreme Court of California. Jan. 30, 1918.)

1. Appeal and Error ⟹1010(1)—Review—Findings Supported by Evidence.

If there is any evidence to support findings of trial court, they are binding on appeal.

2. Partnership ⟹24—Estoppel—Accepting Obligation of One Partner.

That plaintiff took the note of the father alone as payment for property purchased by a firm in ignorance of the partnership would not estop him from claiming that the son was a silent partner.

Department 2. Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by George A. Webster against Annie S. Lowe and husband and others. Judgment for plaintiff, and defendants named appeal. Affirmed.

C. A. S. Frost, of San Francisco (Calder Innes, of San Francisco, of counsel), for appellants. Marcel Cerf and J. J. Lermen, both of San Francisco, for respondent.

WILBUR, J. This is an appeal from a judgment in favor of the plaintiff, to subject certain real property conveyed by defendant Lou Choy to his daughter-in-law, Annie S. Lowe, to the lien of a judgment theretofore obtained by plaintiff against defendant Lou Choy, execution thereon having been returned nulla bona. Plaintiff alleges that the property in question was transferred by defendant Lou Choy to said daughter-in-law for the purpose of hindering, delaying, and defrauding creditors. The court found in favor of the plaintiff upon all the allegations of the complaint, finding, among other things, that defendant Lou Choy was insolvent at the time of said transfer; that there was no consideration for the transfer, and that it was made for the purpose of hindering, delaying, and defrauding creditors. These findings are attacked on the ground that they are unsupported by the evidence. Appellant claims that the evidence shows that the consideration for said transfer was: First, an indebtedness due to his son Toy Kay Lowe for salary at $75 a month as an employé in the farming business for four years, together with money deposited by said son with said father, aggregating $5,000.10; second, the sum of $700 belonging to said daughter-in-law and loaned Lou Choy; and, third, the assumption of an indebtedness secured by deed of trust upon said property to the defendants Garthwaite and Eccleston as trustees for the Oakland Bank of Savings.

[1] It is unnecessary to discuss in detail the evidence in the case, for if there is any evidence to support the findings of the trial court those findings are binding on this court. With reference to the indebtedness alleged to be due from the father, Lou Choy, to the son, Toy Kay Lowe, respondent took the position that that indebtedness did not exist; that the relation between father and son was that of partners in the farming business, the son being a silent partner. There was evidence to support this view. Mr. Metson testified that defendant Toy Kay Lowe told him that he was interested with his father in farming, and that he was a silent partner with his father in the farming business. There was evidence with reference to the alleged indebtedness to the daughter-in-law of $700 which would have justified the court in a finding on that issue in favor of the appellants, but the court was not bound to believe that testimony, and this finding against the appellants on that issue must stand. The same is true with relation to the contention that the assumption of the indebtedness above mentioned constituted a consideration for the transfer.

[2] Appellant claims that the plaintiff is estopped from claiming that Toy Kay Lowe was a partner of his father. In order to understand this contention it will be necessary to state some of the evidence upon which it is based. The respondent furnished seed potatoes to defendant Lou Choy. The arrangement for the purchase of said potatoes was made with Toy Kay Lowe, but before he would sell the potatoes respondent demanded that the father, Lou Choy, execute notes in payment therefor. It is claimed that, having declined at that time to recognize Toy Kay Lowe as a partner, he is now estopped from claiming that he was then a partner. It was not claimed that respondent knew at that time that Toy Kay Lowe was a silent partner in the business. The result of appellants' contention, if sustained, would be this: Father and son were partners. They purchased potatoes from respondent, who took the promissory note of the father as payment for said potatoes, in ignorance of the partnership. Thus the son as silent partner secured the advantages of the transaction without assuming its burdens, so far as respondent knew. The son's wife now claims that, because the obligation of the father alone was taken as payment for property purchased by the partnership, respondent is thereby estopped from pursuing the father's property, upon which credit was intended, into her hands, on the theory that, not having recognized the existence of a partnership before he knew of it, he cannot assert its existence after discovering it. The mere statement of this proposition is its own sufficient refutation. No principle of estoppel applies.

Judgment affirmed.

We concur: VICTOR E. SHAW, Judge, pro tem.; MELVIN, J.

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35 Cal. App. 663

LOGAN v. LEWIS. (Civ. 2255.)

(District Court of Appeal, First District, California. Dec. 20, 1917. Rehearing Denied by Supreme Court Feb. 18, 1918.)

1. APPEAL AND ERROR 🔑1002 — FINDING BASED ON CONFLICTING EVIDENCE—REVIEW.

A jury finding based on sharply conflicting testimony will not be disturbed on appeal.

2. APPEAL AND ERROR 🔑1040(10)—OVERRULING DEMURRER—HARMLESS ERROR.

In suit for personal injuries, where no evidence was introduced in support of the cause of action for damages to the motorcycle, and the same was dismissed before the case was submitted, defendant could not be prejudiced by the overruling of his demurrer, although causes of action were improperly joined under Code Civ. Proc. § 427.

3. TRIAL 🔑339(2)—VERDICT—CORRECTION.

The jury returned a verdict for plaintiff assessing general damages at $3,240 and compensatory damages at $400. Counsel for plaintiff, being of the opinion that that latter item was not warranted by the evidence, suggested that the court advise the jury to reconsider the verdict. This, with proper instruction, was done, and after further deliberation the jury returned a second verdict reducing the special damages, but adding the difference to the general damages, thus leaving the gross amount of the verdict the same as before. *Held* that, as the verdict had not been recorded, nor the jury discharged, the court was warranted in permitting the jury to amend their verdict in view of Code Civ. Proc. § 619, providing that where the verdict is informal or insufficient, it may be corrected by the jury under advice of court.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by William A. Logan against H. F. Lewis. Judgment for plaintiff, and defendant appeals. Affirmed.

Milton L. Schmitt, of San Francisco, for appellant. Dunn, White & Aiken, of Oakland, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of the plaintiff in an action for personal injuries caused by a collision between a motorcycle and an automobile.

Appellant's first point is that the evidence is insufficient to sustain the verdict and judgment. According to the evidence introduced by the plaintiff the accident occurred about as follows:

Piedmont avenue in Oakland is one of the thoroughfares of that city running nearly north and south. At nearly right angles thereto it is intersected but not crossed by Monte Vista avenue, which comes into it from the east or right as one looks north. The neighborhood at this intersection is a business district of the city. On the day of the accident the plaintiff was riding on a motorcycle traveling north on Piedmont avenue toward the intersection of Monte Vista avenue, and the defendant's automobile, driven by his chauffeur, Kurihari, and containing his son and a young lady, was at the same time being driven from the east or right on Monte Vista avenue toward Piedmont avenue. At the corner of the intersection nearest plaintiff as he approached, a row of business houses entirely obstructed the view of defendant's chauffeur to his left, so that he was entirely unable to see the approach of plaintiff on his motorcycle until he passed this corner. The plaintiff was traveling north on the right-hand side of Piedmont avenue toward Monte Vista avenue at a speed of about 10 miles per hour, and the automobile of the defendant, a large Pierce-Arrow car, swung south around this obstructed corner at a speed of about 25 miles per hour, and in doing so came suddenly into the direct path on which plaintiff was traveling, by reason whereof there was a collision between the motorcycle and the automobile. The automobile did not cross the street to the right of the intersection before turning to the left, but took a short, sharp turn to the left, cutting this corner at a place and a rate of speed prohibited by law.

[1] It is defendant's contention that his car had come to a stop and was at rest when the accident occurred, and that the plaintiff in fact ran into the automobile. Two of his witnesses so testified; and he argues that the physical facts of the collision demonstrate this to be true. As to this controversy between the parties it is sufficient to say that the record presents a sharp conflict in the testimony, in the presence of which under a familiar rule appellate courts cannot disturb the finding of the jury or the trial court. Carter v. Grosshans, 17 Cal. App. 703, 121 Pac. 700.

[2] The appellant next contends that the court erred in overruling his demurrer to the complaint upon the ground of misjoinder of several causes of action. Assuming for the sake of argument that at the time this case was tried a cause of action for damages for personal injuries could not, under section 427 of the Code of Civil Procedure, be joined with one for injuries to personal property, and that the demurrer to the complaint ought for that reason to have been sustained, still as no evidence was introduced in support of the cause of action relating to damages to the motorcycle, and the same was dismissed before the case was submitted to the jury, we are at a loss to understand how it can be seriously asserted that the defendant was prejudiced by the overruling of the demurrer.

Exception is also taken to certain remarks made by the court in the presence of the jury concerning the manner in which the jury should bring in its verdict; the general tenor of those remarks being that the jury should separate the special from the general damages. Reading this instruction alone it perhaps would appear that the court assumed that the jury would find for the plaintiff, but the instruction immediately thereafter given to the jury directed them what to do in case they should find for the defendant; and moreover, all the instructions read together we think fairly covered the law applicable to the facts of the case.

The jury returned a verdict for the plaintiff, assessing the general damages at $3,240, and the compensatory damages—damages for nursing and medical attendance, etc.—at the sum of $400. As to this last item counsel for the plaintiff, fearing that perhaps this sum was larger than was warranted by the evidence, suggested to the court that it advise the jury to reconsider the verdict. This, with proper instructions, was done, and after further deliberation the jury returned a second verdict reducing the special damages to the sum of $285, and adding the difference to the general damages, thus leaving the gross amount of the verdict the same as before.

[3] Inasmuch as the verdict of the jury had not been recorded nor the jury discharged, we think the court was warranted in permitting the jury to make this amendment. Code Civ. Proc. § 619; 38 Cyc. 1893, 1894; 22 Ency. Plead. & Prac. 967, 968; McNutt v. Pabst, 25 Cal. App. 177, 143 Pac. 77; Conlin v. Lewis Inv. Co., 26 Cal. App. 388, 147 Pac. 472.

Judgment affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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35 Cal. App. 666

BANK OF FRUITVALE v. FIDELITY & CASUALTY CO. OF NEW YORK.

(Civ. 2228.)

(District Court of Appeal, First District, California. Dec. 21, 1917. Rehearing Denied by Supreme Court Feb. 18, 1918.)

1. INSURANCE ⚷177—INSURANCE AGAINST ROBBERY — CONSTRUCTION OF POLICY — STANDARD TIME.

In view of Code Civ. Proc. § 1875, enumerating the measure of time as one of the facts of which courts take judicial notice, and the fact that since 1883 standard or railroad time has been uniformly recognized and adopted as the measure of time in the state, where a bank's policy of insurance against inside or outside robbery in that part fixing the attaching and termination of the insurance specified that standard time should control, the parties contracted with reference to standard time in a stipulation as to the hours between which the custodian of property must be accompanied by a guard.

2. INSURANCE 🔑143(6)—REVISION OF POLICY —STATUTE.

Under Civ. Code, § 3399, providing that when, through fraud or mutual mistake, etc., a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved to express that intention, where a bank applied for a policy of insurance against inside or outside robbery, and the insurer wrote its agent October 10th stating that it was covering the bank as of October 15th, and the bank had applied for insurance against loss of the character indicated up to 9 p. m. Saturdays, but the policy issued and handed to the bank covered only up to 8:30 p. m. Saturdays, the bank not examining the policy, and so not discovering the fact, such bank was not entitled to have the policy revised or reformed to extend insurance up to 9 p. m. Saturdays; the application for insurance and the insurer's letter to its agent not constituting a preliminary contract of insurance.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by the Bank of Fruitvale, a corporation, against the Fidelity & Casualty Company of New York, a corporation. From a judgment for defendant, plaintiff appeals. Judgment affirmed.

Chas. C. Boynton, of Oakland, for appellant. Chickering & Gregory and Winfield Dorn, both of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of the defendant after an order sustaining its demurrer to the plaintiff's fifth amended complaint.

The action was brought upon a policy of insurance against inside or outside robbery for a loss alleged to be covered by the policy. The complaint is in two counts, and the facts therein stated show that plaintiff is a banking corporation doing business in the city of Oakland, where it maintains a main office and a branch office in different parts of the city, keeping its money and valuables at the main office and conveying some portion thereof by a custodian to and from its branch office every day before and after business hours, which were from 8 a. m. to 5 p. m. daily except on Saturday, when its two places of business were kept open until 9 p. m.

On October 8, 1913, having received a request from plaintiff for a policy of insurance protecting it against loss from robbery and burglary, defendant sent one of its agents to plaintiff to obtain its application therefor. At this visit the agent of the defendant was told by one of the officials of plaintiff that the bank desired a policy of insurance to protect it against loss by robbery, such loss to be covered on Saturday evenings up to 9 o'clock. No assurance was given to the plaintiff that such a policy would be issued, but the application was reduced to writing by the agent and sent to the defendant, which in acknowledging its receipt on October 10, 1913, in a letter to its agent, stated that the company was covering the plaintiff as of the date of October 15, 1913, on which date the defendant issued and delivered a policy of insurance, which by its terms covered plaintiff against loss of the character indicated but only up to 8:30 p. m. on Saturdays. Upon receipt of this policy the plaintiff placed it in its vaults without reading it, and had no further communication with the defendant with reference thereto until after the occurrence of the loss. On Saturday evening, February 21, 1914, and for a long time prior thereto, plaintiff had in its employ an armed guard, a trustworthy person, who was specially directed and instructed by plaintiff to accompany its custodian while conveying plaintiff's money and valuables between its places of business, such attendance on Saturday evenings being required of him between the hours of 5 and 9 o'clock. On said evening the guard remained constantly with plaintiff's custodian until about the hour of 8:15, when, without the knowledge or consent of plaintiff, he left his place of duty, and the custodian remained unattended. A few minutes thereafter, about the hour of 8:34 p. m. standard time at Oakland, Cal., and 8:25 p. m. mean time for the meridian of that city, while plaintiff's custodian was conveying money and valuables from its branch office to its main office, he was held up and robbed of $2,300, the property of plaintiff. Other allegations of the complaint will appear in the course of this opinion.

The respondent, in upholding the action of the trial court in sustaining defendant's demurrer to the fifth amended complaint, contends that said complaint states no cause of action for the reason that it appears therefrom: First, that the custodian when robbed of the bank's funds was not accompanied by an armed guard; second, that the loss occurred at a time not covered by the insurance; and, third, that the facts pleaded do not entitle the plaintiff to a reformation of the policy as prayed.

As to the first of these points, one of the provisions of the policy reads:

> "The insurance provided by this policy attaches specially and as stated below in section (a) to (f) respectively. * * *"

And section (c) of that part of the policy, which was made the subject of special indorsement, attached as a rider to the policy, reads:

> "* * * In an amount of $2,000 to the loss of property * * * in the care and custody of the custodian unaccompanied by a guard except between the hours of 5 p. m. and 8:30 p.

m., when the custodian will be accompanied by one guard."

The respondent argues that these provisions of the policy constitute a condition upon which the insurance attaches; that between 5 p. m. and 8:30 p. m. money of the bank in possession of the custodian was not insured, unless the custodian was accompanied by the armed guard. On the other hand, plaintiff contends that the insurance company was not exonerated by the negligent disregard of his duty by the armed guard employed by plaintiff; its theory being that the requirement as to this guard was a warranty on the part of the plaintiff which was complied with by the employment of the guard, and that the latter's dereliction of duty in no way affects plaintiff's right to recover.

The conclusion we have reached as to the other points in the case will make it unnecessary to pass upon this contention.

[1] Referring to the second point made by plaintiff for a reversal of the judgment, we think that it must be held that the parties contracted with reference to standard time. In that part of the policy which fixes the attaching and termination of the insurance the parties specified that standard time should control. Having so contracted in one part of the policy a reasonable and logical construction requires that other points of time in the policy, in the absence of a specific provision to the contrary, should be determined to be the same standard. Section 1875 of the Code of Civil Procedure enumerates "the measure of time" as one of the facts of which courts take judicial notice; and since the year 1883 standard or railroad time has been uniformly recognized and adopted as the measure of time in this state. Here and elsewhere throughout the country the time of the arrival and departure of trains is governed by standard time; street cars are also operated with reference thereto; banks, stock exchanges, and public and private offices are opened and closed according to standard time. Mortgage foreclosure sales and sales under deeds of trust in this state are governed by standard time, as also legal notices by lawyers and business men. Some of the authorities supporting this view are: Rochester German Ins. Co. v. Peaslee, 120 Ky. 752, 87 S. W. 1115, 89 S. W. 3, 1 L. R. A. (N. S.) 364, 9 Ann. Cas. 324; State v. Johnson, 74 Minn. 381, 77 N. W. 293; Salt Lake v. Robinson, 39 Utah, 260, 116 Pac. 442, 35 L. R. A. (N. S.) 610, Ann. Cas. 1913E, 61; Globe, etc., Ins. Co. v. David Moffat Co., 154 Fed. 13, 83 C. C. A. 91.

[2] It is the final contention of the appellant that if it is not entitled to recover under the terms of the policy as written by reason of the precise moment when the loss occurred, the policy should be reformed so as to cover the risk up to 9 o'clock p. m. instead of 8:30 as written in the policy. In this regard appellant contends that its application for insurance together with defendant's letter of October 10, 1913, to the latter's agent, constituted a preliminary contract of insurance under which the plaintiff was insured against robbery of the character indicated up to the hour of 9 o'clock on Saturday evenings; and that when the defendant delivered its policy to plaintiff covering only up to 8:30 p. m. without calling attention to the change plaintiff was led to believe, and was warranted in believing, that the policy had been issued in exact accordance with the application and with this preliminary insurance, and was justified in accepting the same without examination.

The letter, however, was not addressed to the plaintiff, but to the defendant's agent; and while it used the word "covering," it did not purport to create a temporary arrangement for insurance pending the formal execution of a policy. In fact the letter states that the plaintiff will be covered as of the date October 15th, which is the precise day upon which the policy itself was issued. It is therefore apparent that the language of the letter now sought to be availed of by the plaintiff referred only to the issuance of the policy itself.

Section 3399 of the Civil Code, upon which the present contention of the appellant is based, reads as follows:

> "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

The only fact alleged in the complaint which it is claimed entitles plaintiff to the benefit of the application of this section of the Code is that the defendant did not issue a policy covering the particular risk applied for. This circumstance would have justified plaintiff in refusing to accept the policy; but it is far from constituting fraud, or a mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected—the conditions enumerated in the section necessary to entitle a party to a revision of a contract. Certainly no facts are pleaded showing that the defendant knew or could have known that the plaintiff would not examine the policy when issued to it; nor that the defendant or its agent took any affirmative action to prevent such examination. The plaintiff is therefore not entitled to a revision of the policy.

For the foregoing reasons, we conclude that the court committed no error in sustaining the demurrer to the fifth amended complaint, and in entering judgment for the defendant.

Judgment affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

35 Cal. App. 654

In re PAULSEN'S ESTATE.

UNITED STATES FIDELITY & GUARANTY CO. v. SUPERIOR COURT OF SAN DIEGO COUNTY et al.

(Civ. 2504.)

(District Court of Appeal, Second District, California. Dec. 19, 1917. Rehearing Denied Jan. 18, 1918.)

1. Certiorari 🔑28(1)—Invalid Judgment—Review.

When a tribunal is clothed with authority and jurisdiction to act only upon the existence of certain facts, and it receives no evidence tending to show that such facts exist, its action is void for want of jurisdiction, and it will be annulled on writ of review, provided no right of appeal exists.

2. Certiorari 🔑5(1) — Executors and Administrators 🔑20(7) — Appointment of Administrator—Review.

Where a special administrator is appointed without evidence of the death of the alleged decedent, the order is void for want of jurisdiction; and, as under Code Civ. Proc. § 1413, no appeal lies from such an order, the appointment may be reviewed by writ of review.

3. Affidavits 🔑18—Evidence of Death.

As affidavits may be used as evidence only in the cases expressly permitted by Code Civ. Proc. § 2009, and that use is not sanctioned in the case of an application for the appointment of an administrator, an order appointing a special administrator is void for want of jurisdiction where the only evidence of death was contained in an affidavit.

4. Executors and Administrators 🔑29(2) —Appointment—Collateral Attack.

An order granting special letters of administration without proof of the death of the alleged decedent is not subject to collateral attack by objection to the admission of the letters in evidence, where that fact did not appear on the face of the letters.

5. Executors and Administrators 🔑32(2) —Issuance of Letters—Cancellation.

Where special letters of administration were granted without proof of the death of the alleged decedent, the alleged decedent if alive, or any heir at law if such decedent be dead, may, within a reasonable time, procure a vacation of the order on that ground, and the time is not restricted to the six months period prescribed by Code Civ. Proc. § 473, for relief from judgments, the ground for vacation of the order not being mistake, inadvertence or excusable neglect.

6. Certiorari 🔑33(2)—Writ—Persons Entitled to Sue Out.

Letters of administration issued to petitioner's principal were revoked and a new administrator appointed. Such administrator commenced a suit against petitioner, the surety, and its principal for fraud in the prior administration. All the parties having an interest in the estate were ordered joined as parties plaintiff. Without proof of her death a special administrator was appointed for one of the heirs at law, and such special administrator joined as a plaintiff. Code Civ. Proc. § 1069, authorizes the issuance of a writ of review on the petition of a party beneficially interested. *Held*, that petitioner was entitled to a writ of review to set aside the special letters of administration, for, as the want of jurisdiction did not appear on their face, they could not be excluded from evidence, on objection; and, as they could be set aside by the heir at law if living or her heirs within a reasonable time, the judgment in the action against petitioner would not be binding on the heir at law represented by such special administrator.

In the matter of the estate of Bjelka Paulsen, deceased. Original application by the United States Fidelity & Guaranty Company for a writ of review to the Superior Court of San Diego County, and S. M. Marsh, Judge thereof, to review an order appointing a special administratrix. Order annulled.

Patterson Sprigg, of San Diego, and Thomas, Beedy & Lanagan, of San Francisco, for petitioner. Bischoff & Thompson, of Escondido, for respondent.

WORKS, Judge pro tem. [1, 2] On September 14, 1917, upon petition regularly filed, the respondent made an order appointing Ingina Ostergard special administratrix of the estate of Bjelka Paulsen, deceased; but at the hearing on the petition no evidence was received of the death of Bjelka Paulsen. This proceeding is instituted for an annulment of the order because of the lack of the evidence mentioned. An administrator of the estate of a person manifestly cannot be appointed until such person is deceased, and the only manner in which death can be shown to the court which is asked to appoint is by the production of evidence of death. When a tribunal is clothed with authority or jurisdiction to act only upon the existence of certain facts, and it receives no evidence tending to show that such facts exist, its action is void for want of jurisdiction, and will be annulled upon proceedings under the writ of review (Great Western Power Co. v. Pillsbury, 170 Cal. 180, 184, 185, 149 Pac. 35), provided, of course, no right of appeal exists in the premises; and no appeal lies from an order appointing a special administrator (Code Civ. Proc. § 1413).

[3] The respondent apparently concedes the invalidity of the order appointing the administratrix, for counsel makes no reply, in his argument, to the contention of petitioner that the order is void. At any rate, it is void. To clarify the situation, it may be stated that the order of appointment was made upon a recital of the fact of death in an affidavit, which, of course, was not evidence, as affidavits may be used as evidence only in cases expressly permitted by the Code (Code Civ. Proc. § 2009), and that permission is not given in the case of an application for the appointment of an administrator, either general or special.

[4-6] There is but one real controversy presented for our consideration, and what we have said above is only introductory to it. Section 1069 of the Code of Civil Procedure provides that the writ of review will issue on the petition of the party beneficially interested in a given controversy, and the respondent contends that the petitioner has

not such an interest in the outcome of the present proceeding. A more complete statement of the facts is necessary to a discussion of this question. The petitioner is surety upon the bond of E. M. Barber as administrator of the estate of James Ostergard, deceased. The letters of Barber were revoked, and a new administrator was appointed in his stead. The new administrator commenced suit for fraud in the administration of the estate against Barber and petitioner, upon Barber's bond. The superior court then ordered that all parties having an interest in the estate of James Ostergard, deceased, be joined as parties plaintiff to that action. Bjelka Paulsen was an heir at law of the decedent, and therefore came within the order. Thereupon, and for the purpose of complying with the order as to parties, Ingina Ostergard filed her petition for appointment as special administratrix of the estate of Bjelka Paulsen, deceased, alleging the death of the latter. The petition came on for hearing, with the result above stated. The petitioner in this proceeding presented to respondent, before the filing of its petition here, a motion to set aside the appointment of the special administratrix on the ground that the court heard no evidence of Bjelka Paulsen's death, and the application was denied. By this step petitioner put itself in proper train for the maintenance of this proceeding (Elliott v. Superior Court, 144 Cal. 501, 77 Pac. 1109, 103 Am. St. Rep. 102), provided it has an actual beneficial interest in the controversy, for the filing with respondent of the motion to set aside could not give petitioner an interest which it did not as of right already possess.

Ingina Ostergard, as special administratrix of the estate of Bjelka Paulsen, deceased, has already been made a party plaintiff in the action on Barber's bond, although legally, as we have shown, she is not the representative of her alleged intestate. The amended complaint making her a party, although it is not before us, necessarily alleges her appointment and qualification as administratrix. If her appointment is to withstand the assault made upon it in this proceeding, and if petitioner, as a defendant in the action on the bond, shall object to the offer in evidence in that action of the special letters of administration, the objection will be overruled, because the lack of jurisdiction will not appear upon the face of the offer, and because the objection will be but a collateral attack upon the order of appointment. Emery v. Kipp, 154 Cal. 83, 97 Pac. 17, 19 L. R. A. (N. S.) 983, 129 Am. St. Rep. 141, 16 Ann. Cas. 792. But Bjelka Paulsen, if she be in fact alive, or any heir at law of hers, if she be deceased, may within a reasonable time, upon proper procedure—whether by motion or by independent action—procure a setting aside of the void order appointing the special administratrix; for a proceeding to set aside that order on the ground now presented to us does not come within the terms of section 473 of the Code of Civil Procedure, limiting the time for relief thereunder to six months, there being no mistake, inadvertence, surprise, or excusable neglect as an element of the ground urged. Norton v. Atchison, T. & S. F. R. Co., 97 Cal. 388, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198; De la Montanya v. De la Montanya, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165; Grannis v. Superior Court, 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23; Smith v. Jones (Sup.) 163 Pac. 890, decided March 7, 1917. If such steps are taken by any of the interested parties mentioned, it may be that the void order of appointment will not thus be vacated until after final judgment shall have been rendered in the action on Barber's bond. If the order is then vacated, the judgment in that action will not bind Bjelka Paulsen, if she be yet alive, nor her heirs, if she be deceased. Under the order requiring that all persons interested in the estate of James Ostergard, deceased, be brought into the action on Barber's bond, we must assume that Bjelka Paulsen is a necessary party to that litigation. Therefore, if the appointment of Ingina Ostergard shall be set aside by any person other than petitioner, in the manner above mentioned, particularly after judgment shall have been rendered in the action on the bond, with Ingina Ostergard as a party, as administratrix, the petitioner may be subjected to further litigation of the matters involved in the action, either at the hands of Bjelka Paulsen in person, or at the hands of her duly lettered personal representative. Under these circumstances it is manifest to us that petitioner is beneficially interested in the outcome of this proceeding. It is the right of petitioner to have either Bjelka Paulsen, or her properly designated representative, made a party to the action on the bond.

The order of respondent appointing the special administratrix is annulled.

We concur: CONREY, P. J.; JAMES, J.

35 Cal. App. 650

RICHARDSON & FISHER CO. v. CHICAGO BONDING & SURETY CO.

(Civ. 1959.)

(District Court of Appeal, Second District, California. Dec. 19, 1917.)

MECHANICS' LIENS 🔑128—ACTION ON BOND OF CONTRACTOR—CONDITIONS PRECEDENT.

Plaintiff materialman's complaint in an action on a bond given pursuant to Code Civ. Proc. § 1183, as amended by St. 1911, p. 1313, and providing that suit should be instituted within the time required by law for enforcement of liens, was insufficient where it omitted to state that plaintiff had filed his claim in the county recorder's office in view of section 1187, providing that every person save the original contractor must file for record with the county recorder of the county a claim of lien, section 1190, providing that no lien provided for in this chapter binds any property for a longer period than 90 days after the same has been filed, unless proceedings be commenced in a proper court within that time, and Civ. Code, §§ 2848, 2849, giving surety right of subrogation where he is required to pay under compulsion.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the Richardson & Fisher Company against the Chicago Bonding & Surety Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Hoff & Chatterson, of San Diego, for appellant. Waldo, Root & Dysert, of Los Angeles, for respondent.

CONREY, P. J. The plaintiff appeals from a judgment entered after an order had been made sustaining a general demurrer to the complaint as amended. Plaintiff is a materialman who furnished to the contractor materials which were used in the construction of a building for one Wm. J. Thayer. The action is brought to recover upon a bond which was given in conformity with the provisions of section 1183 of the Code of Civil Procedure as amended in 1911. As required by that section, the bond provides:

> That it "shall inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in the work described in said contract, so as to give such persons a right of action upon this bond in any suit brought to foreclose the liens provided for by the laws of the state of California, or in a separate suit brought on this bond."

The bond further provided:

> "That any suit brought on this bond to recover any claims hereunder must be instituted within the time allowed by law for instituting a suit to enforce a lien claim."

The following provisions from the chapter concerning the enforcement of liens of mechanics and others upon real property, have a bearing upon this case: Section 1187 contains the proviso:

> "That all claims of lien must be filed within ninety days after the completion of any building. * * *"

Section 1190 declares that:

> "No lien provided for in this chapter binds any property for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same."

Section 1187 provides that:

> "Every person save the original contractor claiming the benefit of this chapter * * * must file for record with the county recorder of the county or city and county in which such property or some part thereof is situated, a claim of lien containing a statement of his demand after deducting all just credits and offsets," etc.

The building was completed by the contractor on the 1st day of September, 1914. The owner accepted the same, but did not at any time file notice of completion in the recorder's office. The complaint does not allege that he ever filed for record in the county recorder's office his claim of lien, and therefore it must be assumed that such claim was not filed. This action was not commenced until the 16th day of February, 1915.

It is our opinion that the plaintiff has no right to maintain this action without having first filed his claim of lien, as required by the above-quoted provisions of section 1187, Code of Civil Procedure. The plaintiff is a person "claiming the benefit" of the chapter in which section 1187 is contained. The bond was made in the form and was given for the purposes prescribed by section 1183, which also is a part of that chapter. It seems clearly to follow that an action upon the bond constitutes a claim of benefit under that chapter. The bond provided that:

> "The said owner shall retain the last payment and reserve, due said principal * * * until the expiration of the time within which liens or notices of liens may be filed, by reason of anything done in the performance of said contract, and until the payment of all claims of which he shall have knowledge or notice."

The requirement that the claimant must have filed for record his claim of lien is a requirement made for the benefit of the surety on the bond, as well as for the benefit of the owner of the building. If a claim of lien had been filed and if the surety had been required to pay, and under such compulsion had paid, the plaintiff's demand, the surety thereby would have been subrogated to the rights of the lienor. Civ. Code, §§ 2848, 2849. Of this right of subrogation defendant was deprived by the plaintiff's failure to file a claim of lien. For this reason we are satisfied that the complaint in this action, by omitting to state that a claim of lien had been filed, failed to state a cause of action against the defendant.

The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

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35 Cal. App. 658

NOEL v. LEWIS, County Auditor.
(Civ. 2488.)

(District Court of Appeal, Second District, California. Dec. 19, 1917.)

1. STATUTES 🔑93(9)—SPECIAL LEGISLATION—STATUTE PROVIDING FOR SECRETARY OF SUPERIOR COURT.

St. 1909, p. 940, providing for a secretary of the superior court in counties, and cities and counties, having a population of 300,000 inhabitants and over, is not unconstitutional on the ground that its application is special and limited.

2. STATUTES 🔑93(9)—SPECIAL LEGISLATION—CREATION OF "OFFICE."

St. 1909, p. 940, does not create an "office" within the meaning of Const. art. 4, § 25, subd. 28, providing that the Legislature shall not pass local or special laws creating offices, or prescribing the powers and duties of officers in counties, cities and counties, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Office.]

3. COURTS ⚿55—COUNTY "OFFICER"—SECRETARY OF SUPERIOR COURT — "EMPLOYÉ" — "ATTACHÉ."

The secretary of the superior court of a county, appointed by the judges under St. 1909, p. 940, is not an "employé" or "attaché" of a county office, within the constitutional provisions authorizing the framing of county charters, nor within the provisions of the county charter itself.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Attaché; First and Second Series, Employé.]

Petition for writ of mandate by James A. Noel against Walter A. Lewis, as County Auditor of the County of Los Angeles. Peremptory writ ordered to be issued.

Allen W. Ashburn, of Los Angeles, for petitioner. A. J. Hill, Co. Counsel, and Edward T. Bishop, Deputy Co. Counsel, both of Los Angeles, for respondent.

JAMES, J. Petitioner in this proceeding seeks a writ of mandate to compel the issuance to him of warrants in payment of compensation which he alleges is due him for services while acting as secretary for the judges of the superior court of Los Angeles county and for performing the duty of jury commissioner. Petitioner was appointed secretary of the superior court under an act which, in its amended form, is found in the statutes of 1909, page 940. This act, in the portions material for consideration here, provides as follows:

> "In all counties, and cities and counties, having a population of three hundred thousand inhabitants and over, the judges of the superior court in such counties, and cities and counties, may appoint a secretary, who shall receive a salary of two hundred and fifty ($250) dollars per month, and hold office at their pleasure, and shall perform such duties as may be required of him by the court or the judges thereof. Said salary shall be audited, allowed, and paid out of the general fund of such counties, and cities and counties."

The Legislature in the year 1917 added certain new subdivisions to section 204 of the Code of Civil Procedure. St. 1917, p. 1169. Section 204 of that Code contains provisions relating to the making up of lists of grand and petit jurors. It provides generally that the selection of the persons to serve as such jurors shall be made by boards of supervisors, except that in counties, and cities and counties, having more than 100,000 population the selection shall be made by a majority of the judges of the superior court. In the new subdivisions added by the act of 1917, it is provided that in counties, and cities and counties, where the judges of the superior court are required to make the selection of persons to serve as jurors, a jury commissioner may be appointed, who shall receive a salary of $350 per month, and hold office at the pleasure of a majority of the judges, and that his salary shall be audited, allowed and paid out of the general fund of the county. Subdivision 204e provides that in such counties, or cities and counties, where there is a secretary of the superior judges, the majority of such judges in their discretion may require such secretary to perform the duties of jury commissioner, in addition to his regular duties as secretary, and the act provides:

> "In such case the salary of the secretary of the superior judges shall be three hundred and fifty dollars a month."

Before the end of July, 1917, the superior court judges of Los Angeles county made an order, requiring the secretary, petitioner here, to perform the duties of jury commissioner. The secretary had been regularly paid theretofore the salary of $250 per month, as fixed by the act first hereinbefore referred to. His contention is that, after the additional duties were imposed upon him, he was entitled to collect the additional $100 per month as is provided to be paid by the act of 1917. He has continued to draw regularly down to the time of the filing of his petition his salary as secretary in the amount of $250, without waiving his right to enforce collection of the additional amount.

The question presented is, particularly, as to whether, as the county of Los Angeles is operating under a freeholders' charter, the matter of fixing the compensation of the secretary of the superior court is one which rests with the board of supervisors of the county, and as to whether that board has not the power to determine what the compensation shall be, regardless of the provisions of the statute on the subject. Preliminarily it should be stated that the board of supervisors, by ordinance adopted in November, 1915, did provide that the secretary of the superior court should receive a salary of $250 per month, the exact amount fixed by the statute. In September, 1917, by an amendatory ordinance, it was provided, among other things, that the secretary of the superior court should receive a salary of $350 per month. This ordinance did not take effect until about the 6th of October, 1917. Were it not for the fact that two months and a fraction of a month elapsed between the date of the order of the superior court imposing the duties of jury commissioner upon the secretary and the date of the taking effect of the last ordinance of the board of supervisors, this proceeding would probably not have been instituted. However that may be, the controversy is now here, and the contention of petitioner is that he is entitled to look wholly to the two statutes of the Legislature in ascertaining the amount of his compensation and the manner of the payment thereof. Respondent's position is that the board of supervisors, acting with authority under the county charter, have both established the office of secretary of the superior court and provided for the compensation to be paid to such secretary. It is suggested further by respondent that the act of the Legislature, attempting to create the office of secretary of the superior court, when considered without reference to the question of the right of the supervisors to create such a position, is unconstitutional as being special legislation. Respondent's counsel argues that by that act an attempt is made to create an office in violation of section 25, art. 4, subd. 28 of the Constitution of the state. Qualified by the objections noted, respondent makes the following express admission:

> "That it is competent for the Legislature to provide for a jury commissioner who is an adjunct of the court; that it is competent for the Legislature to provide that the judges or majority of the judges of the superior court may appoint a jury commissioner or secretary of the court, and that in the present case the power of appointment is lodged in the judges of the superior court, and not in the board of supervisors, nor in the civil service commission; that section 204 of the Code of Civil Procedure is valid."

[1, 2] We do not think that the act providing for secretary of the superior court in counties, and cities and counties, having a population as fixed by the law, is unconstitutional on the ground that its application is special and limited. We do not think that the act creates an office within the meaning of the provision of the Constitution cited by respondent. Pratt v. Browne, 135 Cal. 649, 67 Pac. 1082; Stevens v. Truman, 127 Cal. 155, 59 Pac. 397. And we do not understand that respondent contends for any stronger cause or reason against the validity of the provisions of section 204 of Code of Civil Procedure, or the amendments made in 1917 thereto, which provide for the work to be done by a jury commissioner. The most important question presented in the argument is as to the effect of the power derived from the freeholders' charter adopted by the county of Los Angeles. Under the constitutional provisions authorizing the framing of such charters, very complete authority is vested in the electors of the county to adopt charters which shall be comprehensive in controlling and regulating the matter of the appointment and compensation to be paid to the officers and attachés of counties. See section 7½, art. 11, Const. Cal. If the secretary of the superior court may be considered as an officer of the county or an attaché connected with a county office, then respondent's position is unassailable.

[3] We are of the opinion, however, first, as we have already stated, that the act of the Legislature has not the effect of creating an office, and we are of the further opinion that the secretary of the superior court is not to be considered as an employé or attaché of a county office. Superior courts are a part of the judicial system of the state. Their process operates beyond the confines of the particular county in which the judges may have been elected, and the judges are authorized in particular contingencies to sit in any county of the state interchangeably. The secretary, like the official reporter, becomes an adjunct of that system, and one which the Legislature, we do not doubt, has the right to provide for when it deems necessary. Nicholl v. Koster, 157 Cal. 416, 108 Pac. 302. Our attention is called to certain decisions rendered by this court referring to the application of the county charter in its control of officers acting within the county. Gibson v. Civil Service Commission, 27 Cal. App. 396, 150 Pac. 78, is a fair type of these cases. It was therein held that a probation officer was an officer whose appointment and compensation were regulated by the county charter provisions. That decision is not of particular application here, because the constitutional provision authorizing the framing of freeholders' charters in counties expressly named probation officers as among those which county charters should affect. So that the question as to whether a probation officer provided for by general statute should be considered as falling within the classification of "county officers" was not necessary to be considered in the case above cited. The Constitution in its provisions relating to the framing of county charters does not in any manner refer to the state judicial department. The Los Angeles county charter nowhere makes provision for a secretary of the superior court, although it does contain the general provision authorizing the board of supervisors to provide for attachés, clerks, assistants, deputies, etc., "to be employed from time to time in the several offices and institutions of the county, and for their compensation and the times at which they shall be appointed." We have already sufficiently indicated our view that the secretary of the superior court is not an officer or attaché of the county within the meaning of the constitutional provision authorizing the framing of county charters, and we may add, not within the meaning either of the provisions of the county charter itself. If these conclusions are correct, it follows that the petitioner here is entitled to the relief asked for.

Peremptory writ is ordered to be issued; petitioner to have his costs.

We concur: CONREY, P. J.; SHAW, J.

35 Cal. App. 676

SANTA BARBARA COUNTY v. RUCKER et al. (Civ. 1915, 1916, 1951, 1952.)

(District Court of Appeal, Second District, California. Dec. 22, 1917. Rehearing Denied by Supreme Court Feb. 18, 1918.)

1. OFFICERS 🔑100(1)—INCREASING "COMPENSATION" DURING TERM—ROAD COMMISSIONER—STATUTES AND CONSTITUTION.

Compensation of the road commissioner in a county supervisor district, as provided for in Pol. Code, § 4246, before and after its amendment by St. 1911, p. 1148, is "compensation" within the meaning of the word as used in Const. art. 11, § 9, providing that the compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term, so that the operation of such amendment of section 4246 in a supervisor district of the county was suspended until the incumbents' term expired.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Compensation.]

2. OFFICERS 🔑100(1)—INCREASING COMPENSATION DURING TERM—REIMBURSEMENT OF TRAVELING EXPENSES—CONSTITUTION— "INCREASE OF COMPENSATION."

Statute newly providing for reimbursement of expenses to the road commissioner in a county supervisor district, in addition to compensation previously allowed for his services, was an increase of the road commissioner's compensation during his term, prohibited by Const. art. 11, § 9.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Increase.]

3. HIGHWAYS 🔑97 — COUNTY SUPERVISOR AND ROAD COMMISSIONER—OFFICIAL BOND—INCLUSION OF COLLECTION OF INCREASED COMPENSATION CONTRARY TO CONSTITUTION.

The official bond of a county supervisor, ex officio road commissioner in his supervisor district, given for the faithful performance by him of all the official duties required of him by law, was broad enough to include his liability to the county for collecting increased compensation, under Pol. Code, § 4246, as amended by St. 1911, p. 1148, during his term of office, contrary to Const. art. 11, § 9, so that his sureties were subject to be sued with him.

Appeals from Superior Court, Santa Barbara County; Samuel E. Crow, Judge.

Actions by the County of Santa Barbara against George F. Rucker and others, Howe S. Deaderick and others, Albert W. Conover and another, and Harold J. Doulton and another. From judgments for plaintiff, all defendants appeal. Judgment in each case affirmed.

H. P. Starbuck and Canfield & Starbuck, all of Santa Barbara, for appellants. U. S. Webb, Atty. Gen., and E. W. Squier, Dist. Atty., Fred H. Schauer, Deputy Dist. Atty. and G. H. Gould, all of Santa Barbara, for respondent.

CONREY, P. J. The appeals in these cases are from the several judgments entered therein. The parties have stipulated that all of them may be heard together upon the same briefs and argument; the questions presented for consideration here being identical in all of the cases. In accordance with the suggestion of counsel our references to matters of record will be confined to No. 1916, County of Santa Barbara v. Rucker et al.

Appellant Rucker was elected to the office of supervisor of Santa Barbara county, for the fourth district thereof, at the general election of November, 1908, for the term of four years beginning with the first Monday of January, 1909. At that time section 4246 of the Political Code provided as follows:

> "In counties of the seventeenth class the county officers shall receive as compensation for the services required of them by law or by virtue of their offices, the following salaries, to wit: * * * 15. Each supervisor, six hundred dollars per annum, and twenty cents per mile for traveling from his residence to the county seat; and a road commissioner, four dollars per day, not to exceed two hundred dollars per annum in the aggregate." Stats. 1907, p. 473.

By an amendment approved April 27, 1911, said section 4246 was amended so that subdivision 15 read as follows:

> "Each supervisor, six hundred dollars per annum and twenty cents per mile for traveling from his residence to the county seat; and as road commissioner, four dollars per day for not to exceed eighteen days in any one month: Provided, that said supervisors shall receive no mileage when acting as road commissioner, but shall receive his actual traveling expenses while acting as such road commissioner, not to exceed the sum of two hundred dollars in any one year." Stats. 1911, p. 1148.

The Constitution of California, at article 11, § 9 thereof, as adopted in 1879 and still in force, provides that:

> "The compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office. * * *"

After April 27, 1911, appellant Rucker, assuming that he was entitled to collect for his services as road commissioner in accordance with the terms of the act of 1911, made demands upon the county, which were approved and paid to him, for sums in excess of the amount which he could have collected under the statute as it was at the beginning of his term of office. This action was prosecuted to recover the amount of such excess payments together with 20 per cent. damages, as provided by section 4005b of the Political Code, a part of which reads as follows:

> "Whenever any board of supervisors shall, without authority of law, order any money paid as a salary, fees, or for any other purposes, and such money shall have been actually paid; or whenever any county officer has drawn any warrant or warrants in his own favor, or in favor of any other person, without being authorized by the board of supervisors, or by the law, and the same shall have been paid, the district attorney of such county is hereby empowered, and it is hereby made his imperative duty, to institute suit, in the name of the county, against such person or persons, to recover the money so paid, and twenty per cent. damages for the use thereof. * * *"

Appellants contend that the word "compensation" in section 9 of article 11 of the

Constitution, refers only to the principal sum allowed to the officer as his salary, and does not include such compensation as that described in said section 4246, whereby the supervisor is allowed a limited per diem as road commissioner, or such as that other provisions of the same section as last amended whereby the supervisor is allowed also to receive, within a stated limit, the amount of his actual traveling expenses while acting as such road commissioner.

[1] The duties performed by a county supervisor as road commissioner are duties imposed upon him by virtue of his status as supervisor, but his official position and functions as road commissioner are separately classified and described by the statute. "Each supervisor shall be ex officio road commissioner in his supervisor district." Pol. Code, § 2641. The law awarded to defendant Rucker, at the commencement of his term, a limited compensation "as road commissioner" at the specified rate per day, not exceeding $200 in any one year and not including any reimbursement for traveling expenses. By the amendment enacted in 1911 the possible compensation of a road commissioner in that county was raised from the sum of $200 to the sum of $864, plus traveling expenses. The salary allowance to the supervisor for his general services as a supervisor is completely separate and distinct from the prescribed compensation allowed to him as road commissioner. It seems very clear, therefore, that the "compensation" of the road commissioner as provided for in section 4246, both before and after the amendment, is compensation within the meaning of that word as used in section 9 of article 11 of the Constitution, under any possible construction of that section; for as road commissioner he receives no fixed salary. It follows that the operation of the said amendment increasing the compensation of road commissioner, for the fourth district in Santa Barbara county, was suspended until Rucker's term expired.

[2] The defendant Rucker was not entitled to reimbursement of traveling expenses, any more than to increase of his aggregate per diem allowance. It has been decided that a supervisor of a county may not as road commissioner have reimbursement for traveling expenses, when at the time there was no statutory provision for such reimbursement. The reason given was that under section 215 of the County Government Act—corresponding to section 4290, Political Code, as enacted later—the salaries and fees provided for should be in full compensation for all services rendered the county as such officer or ex officio officer. The court declared that:

> "This language is in absolute repugnancy and hostility to the idea that where the compensation for all services is fixed by statute, personal and traveling expenses may still be allowed." County of Placer v. Freeman, 149 Cal. 738, 87 Pac. 628.

It would be inconsistent with that decision to say that a statute newly providing for reimbursement of expenses, in addition to compensation previously allowed for his services, is not an increase of the officer's compensation.

[3] We think that the terms of the official bond of defendant Rucker are broad enough to include the facts constituting the basis of Rucker's liability in this action, and that the sureties on the bond are subject to be sued with him in order to obtain recovery of the moneys illegally collected by him under his wrongful demands for compensation in excess of that to which he was legally entitled. It is true that Rucker did not as supervisor vote on the allowance of those demands, and that the acts of other officers in auditing and paying his claims were official acts which as to those particulars were not performed by him. But the bond was given for the faithful performance by Rucker of all of the official duties required of him by law. When Rucker presented those demands, obtained his warrant, and collected the money, he connived at and participated in a proceeding which as an entirety constituted the illegal withdrawal by him of money from the county treasury; all of which was done by reason of his office and contrary to his official obligation.

It being conceded that the questions presented in the Rucker Case are in legal effect identical with those pertaining to the other above-entitled cases, it is hereby ordered that in each of said four cases the judgment be and is hereby affirmed.

We concur: WORKS, Judge pro tem.; JAMES, J.

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35 Cal. App. 738

FERGER v. ALLEN et ux. (Civ. 2235.)

(District Court of Appeal, First District, California. Dec. 31, 1917.)

1. Vendor and Purchaser 🔑255—Vendor's Lien—Creation.

Under Civ. Code, § 3046, giving a lien to one who sells real property for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer, as well as under the principles of equity giving such a lien, it is not essential to the right to claim a vendor's lien that an intention to retain the right to such a lien should be expressly declared, as the right is given in equity and in law by the nature of the transaction, and exists without regard to the express agreement of the parties.

2. Trial 🔑404(1) — Findings — Construction and Operation.

Where the court found that defendants sold property to H. with knowledge that it was to be hypothecated for the purpose of procuring a loan with which to build upon the property, and also found as a separate and distinct finding that defendants intended to and did waive any lien which they might have had or claimed as vendors, this finding was not limited for its support to the fact found in the preceding finding.

3. VENDOR AND PURCHASER 🔑266(1)—WAIVER OR LOSS OF LIEN.

Under Civ. Code, § 3048, providing that a vendor's lien is valid against every one claiming under the debtor, except a purchaser or incumbrancer in good faith, a vendor's right to claim a lien was defeated by his knowledge of and acquiescence in the purchaser's hypothecation of the property, as against the claim of the mortgagee.

4. ASSIGNMENTS FOR BENEFIT OF CREDITORS 🔑185 — TITLE ACQUIRED — EQUITIES OF THIRD PERSONS.

Generally a trustee claiming under a conveyance for the benefit of creditors takes the property at the time of the execution of the conveyance subject to every equity which might then have been enforced against it in the hands of the debtor.

5. ASSIGNMENTS FOR BENEFIT OF CREDITORS 🔑334(3) — PRIORITY OF LIENS — VENDOR'S LIEN.

An assignment for the benefit of creditors and a conveyance made thereunder, executed prior to an endeavor on the part of a vendor to declare and establish his lien, will prevail over his right to claim a lien, where the creditors become subscribing parties to the assignment and thereby accept it, by assenting to and claiming the benefits of its provisions, as they thereby assume the character of lien claimants; and hence where defendant, knowing that his vendee was in failing financial circumstances and informed that he was about to make an assignment of the property for the benefit of creditors, failed to assert and prove his lien until the vendee's creditors had joined in and agreed to accept the provision of the assignment, his right to a lien was extinguished in so far as such creditors were concerned.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by J. C. Ferger against Harry W. Allen and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

N. Lindsay South, of Fresno, for appellants. U. G. Hayden, of Fresno, for respondent.

LENNON, P. J. This is an appeal from a judgment in favor of plaintiff quieting title as against the defendants to certain described real property situate in the county of Fresno. The facts of the case as revealed by the pleadings and proof are substantially these:

The defendants sold the real property in question to one Heimbach for the agreed price of $900, and upon a conveyance of the property by deed dated November 25, 1912, Heimbach paid to the defendants $300 in cash on account of the purchase price, and for the balance due thereon gave his unsecured note, dated November 27, 1912, to the defendants in the sum of $600. This sum by the terms of the note was to be paid in installments "at the rate of $18 a month." It was Heimbach's desire to build a home upon the property. This desire was made known to the defendant Harry W. Allen, and the conveyance was accordingly made to Heimbach absolute in form to enable him to obtain a loan upon the property of a sum sufficient to defray the cost of the desired building. Thereafter Heimbach, with the tacit consent of said defendant, executed a deed of trust, dated December 11, 1912, conveying the property in question to the Pacific States Savings & Loan Company as security for a loan of $2,500, which sum, it seems to be conceded, was expended in the erection of a building upon the property. Thereafter Heimbach became financially involved as a result of the business transactions of the Heimbach Company, of which he was a copartner, and to such an extent that the plaintiff Ferger and other creditors of the copartnership attached certain property of Heimbach. The attachment, however, was subsequently released upon Heimbach executing an assignment, dated July 17, 1913, of his property, real and personal, including the real property in question, to the plaintiff Ferger, as trustee for the benefit of Heimbach's general unsecured creditors.

This assignment was made pursuant to and as a part of a contemporaneous trust agreement executed and signed by Heimbach and some 13 of his general unsecured creditors, wherein it was agreed that each of the creditors named thereby assigned the accounts due and owing them from Heimbach of the date of the agreement to the plaintiff Ferger for collection, and further agreed that the proceeds thereof were to be distributed pro rata among the creditors after paying preferred claims. Simultaneously with the execution of the assignment, and accompanying the trust agreement as a part thereof, and pursuant to its terms, Heimbach and his wife executed to plaintiff, Ferger, a mortgage of even date on the property in question, which was duly recorded July 22, 1913. On the 19th day of February, 1914, Heimbach and his wife, for the stated consideration of $10, but in fact for the purpose of enabling the plaintiff, Ferger, to consummate negotiations for the sale of the property pursuant to the terms of the assignment and trust agreement, executed to the plaintiff, Ferger, a quitclaim deed to the property in question, and on January 13, 1915, the plaintiff, Ferger, instituted this action to quiet his title as against the defendants to the same property. On the 23d of June, 1914, the plaintiff, Ferger, pursuant to the terms of an executory contract of purchase and sale, sold the property in question to one J. F. Cullen for the agreed price of $4,200, of which $800 was paid in cash, and the balance agreed to be paid in specified installments. This contract of purchase and sale was placed on record on June 27, 1914. On June 26, 1914, the defendant Harry W. Allen, upon behalf of himself and his wife, the defendant Claribel Allen, filed for record with the recorder of Fresno county their notice and claim of a vendor's lien upon the property in question.

The record contains some evidence which tends to show that the defendant Harry W. Allen, at all times prior to the formal declaration and recordation of the vendor's lien, and particularly at and before the execution of the assignment and trust agreement, had knowledge of the fact that Heimbach "was about to fail," that Heimbach's creditors were about "to close him out," and that he had been told by Heimbach that "he was going to turn the property over to Ferger as trustee for the benefit of his creditors." The action was defended upon the theory that the defendants had an interest in the property superior to that of the plaintiffs by virtue of a vendor's lien, the creation and existence of which were in effect pleaded in the answer of the defendants by averments of the sale and the terms thereof to Heimbach of the property in suit. The subsequent formal declaration and recordation of the defendants' notice and claim of a vendor's lien were also pleaded in said answer, and a copy of the claim of lien as declared and recorded was attached to and specifically made a part of the answer.

The evidence does not support and is contrary to the finding that the defendants did not retain and never intended to retain a vendor's lien upon the property. Evidently this finding was founded solely upon the theory that neither the negotiations and circumstances preceding and attending the transfer of the property from the defendant Harry W. Allen to Heimbach, nor the terms of the sale subsequently consummated, disclosed an express intention on the part of Allen to reserve and retain unto himself a vendor's lien for the unpaid portion of the purchase price.

[1] The right to a vendor's lien upon land sold for the unpaid and unsecured portion of the purchase price as originally conceived in equity is now embodied in our statutory law, which gives the right to "one who sells real property * * * independent of possession for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." Civ. Code, § 3046. It never was and is not now essential to the right to claim a vendor's lien that an intention on the part of the vendor to create and retain unto himself the right to such lien should be expressly declared. The right is given in equity and in law by the very nature of the transaction, and consequently exists without regard to the express agreement of the parties. Claiborne v. Castle, 98 Cal. 30, 32 Pac. 807; Avery v. Clark, 87 Cal. 619, 25 Pac. 919, 22 Am. St. Rep. 272; Moshier, Adm'r, v. Meek, 80 Ill. 79.

[2] The further finding of the trial court that it was the intention of the defendants to waive, and that they did waive, any lien as vendors which they might have had or claimed against the property in question, is assailed upon the ground that it is contrary to the evidence; and in this behalf it is asserted that this particular finding receives support in the evidence only in the fact that the defendant sold the property in question to Heimbach with knowledge that it was to be hypothecated for the purpose of procuring a loan with which to build upon the property.

The particular finding under consideration does not rest solely upon the fact stated. While it is true that such fact is specifically found, still the finding of waiver is a separate and distinct finding, which, while perhaps resting in part upon the preceding finding of the fact stated, is nevertheless neither expressly nor impliedly limited for support to that fact, but may be fairly said to be based upon all of the evidence in the case, which, in addition to the fact stated, shows, as we have previously pointed out, a conveyance of the property to the plaintiff pursuant to the terms of a trust agreement to which Heimbach's general unsecured creditors were made parties by subscribing to the same and thereby claiming the benefits of the provisions which were incorporated therein for the adjustment and satisfaction of their several claims against Heimbach.

In addition to this fact the finding in question was doubtless rested in part upon proof of the fact that the property in question was in keeping with the terms of the trust agreement and as a part thereof further incumbered by the contemporaneous mortgage and the subsequent deed of the property to the plaintiff.

[3, 4] It is conceded, as indeed it must be, as against the Pacific States Loan & Trust Company, that the right to claim a vendor's lien was defeated by the defendant's (Harry W. Allen's) knowledge of and acquiescence in the hypothecation of the property to that corporation. This concession doubtless was made in deference to the provisions of section 3048 of the Civil Code which declare that a vendor's lien is "valid against every one claiming under the debtor except a purchaser or incumbrancer in good faith." But, while making this concession, it is insisted, as we understand the contention for defendant, that the plaintiff, Ferger, in the capacity of trustee for the benefit of the creditors, did not in law or in fact take the property under the trust conveyance either as a purchaser or incumbrancer in good faith and for value. Ordinarily and under a state of facts differing from those presented in the instant case this contention would prevail, for it seems to be the general and accepted rule that:

> "The assignee of a voluntary assignment for the benefit of creditors stands in no better situation than the assignor. Neither he nor the creditors whom he represents are purchasers for a valuable consideration without notice as against prior equitable liens." 2 Kent's Comm. 542, note; Haggerty v. Palmer, 6 Johns. Ch. (N. Y.) 437; Knowles v. Lord, 4 Whart. (Pa.) 500, 34 Am. Dec. 525.

This being so, it follows, generally speaking, that a trustee claiming under a conveyance made to him for the benefit of creditors takes the property at the time of the execution of the conveyance, subject to every equity which might then have been enforced against it in the hands of the debtor.

[5] But this general rule is subject to the exception that an assignment for the benefit of creditors and a conveyance made thereunder executed prior to any endeavor on the part of the vendor to declare and establish his lien will prevail over and operate to defeat the right to claim the lien, where the creditors, as did the creditors in the instant case, become subscribing parties to the assignment, and thereby accept the same by assenting to and claiming the benefits of its provisions. The reason for this exception to the rule is rested upon the theory that general creditors are not transformed into incumbrancers in good faith and for value by the debtor's mere voluntary assignment of his property for their benefit, because it still remains for the creditors to exercise the option which they have either of accepting or rejecting the assignment, and until "they have elected to take under the deed the assignee is rather the trustee for the debtor than for them; when they have accepted the assignment, by claiming or taking a benefit under it the assignee becomes their trustee, and they assume by virtue of the assignment the character of lien creditors." Green v. Demoss, 10 Humph. (29 Tenn.) 372.

This being so, the present action, although instituted in the name of the plaintiff, was to all intents and purposes an action upon behalf of lien creditors represented by the plaintiff to quiet the title to the property in question as against the defendants' alleged vendor's lien, and "where subsequent lien creditors intervene the contest is no longer between the vendor and vendee; it is between third persons contending for his estate. It depends no longer on the equity of the one party as against the vendee and those in privity with him; it depends upon the relative equities and rights of the disputants in a comparison with one another. * * * Lien creditors will supplant one who, though he had a right in equity to charge the land through his own laches and default, failed to secure a lien. Lien creditors are entitled to the whole estate of their debtor, subject only to prior specific liens, legal or equitable. If the vendor's equity be" not "a specific lien, * * * the right of lien creditors is paramount to it." Poe v. Paxton, 26 W. Va. 607.

The record shows that the defendant Harry W. Allen, notwithstanding he had knowledge of the fact that the vendee was in failing financial circumstances, and was informed that he was about to make an assignment of the property in question to the plaintiff for the benefit of creditors, failed to assert and prove his lien until the vendee's creditors had joined in and agreed to accept the provisions of the assignment; consequently it must be held that the defendant's right to the lien was, in so far as the lien creditors of the vendee were concerned, extinguished, and we take it that this is what the trial court meant by its finding that such lien had been "waived." This finding alone is sufficient to support the judgment.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

35 Cal. App. 671

WHEELER et al. v. CITY OF OAKLAND et al. (Civ. 2268.)

(District Court of Appeal, First District, California. Dec. 21, 1917.)

1. DEDICATION 🔑18(2) — STREETS — WHAT CONSTITUTES.
Deed to individual referring to map showing street conveying 10-foot strip to be used for street purposes when accepted is a dedication, though the public is not a party thereto, since there is a dedication whenever the intent unequivocally appears, so far as the owner is concerned.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dedication.]

2. DEDICATION 🔑43—STREETS—WHAT CONSTITUTES.
In determining fact of acceptance of dedication by public user, sparsity of population and infrequency of travel may be considered.

3. DEDICATION 🔑18(2) — STREETS — WHAT CONSTITUTES.
Insufficient description of land offered in dedication was cured by reference to map accurately fixing location.

4. DEDICATION 🔑43 — EVIDENCE — ADMISSIBILITY.
Where deed offering to dedicate land for street gave indeterminate beginning point in description by metes and bounds, and referred to map showing location, the map was admissible to amplify the description, though not recorded until after the deed was made.

5. DEDICATION 🔑63(2)—NONUSER—EFFECT.
The rights of the public in a dedicated street cannot be lost by nonuser or delay in the use or by a mere temporary abandonment of such use.

6. ADVERSE POSSESSION 🔑8(2) — PUBLIC STREETS.
Title cannot be acquired to a public street by adverse possession.

7. DEDICATION 🔑29 — REVOCATION — STRANGERS TO TITLE.
A stranger to the title cannot revoke an offered dedication.

8. DEDICATION 🔑39 — NONACCEPTANCE — ESTOPPEL.
That one claiming title to land dedicated for a street paid taxes and erected improvements, or that the county purchased from another adjacent owner a part of the same strip, did not estop the city to assert dedication.

9. DEDICATION 🔑51—WIDTH OF STREET—EFFECT.
The mere fact that strip dedicated for street was but 10 feet wide did not invalidate the dedication, the only restriction at the time under St. 1862, p. 78, § 2, as amended by St. 1867–68, p. 374, limiting maximum width to 4 rods.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Roscoe Wheeler and another against the City of Oakland and another. From judgment for defendants, and order denying new trial, plaintiffs appeal. Affirmed.

H. W. Brunk and William O. Minor, both of Berkeley, for appellants. Paul C. Morf, City Atty., and John J. Earle, Deputy City Atty., both of Oakland, for respondents.

KERRIGAN, J. By this action plaintiffs claim ownership to a strip of land 10 feet in width by 400 feet in depth, and complain of an alleged trespass upon said property by defendants, and they seek damages for injuries committed and an injunction to restrain a recurrence thereof.

Defendants, a municipal corporation and its superintendent of streets, justify the acts complained of on the ground that the land in question is a portion of a public street, which it is the purpose and intention of defendants to improve and maintain as such. Defendants claim in that behalf that the 10-foot strip constitutes the westerly portion of Thirty-Sixth avenue, one of the public highways and thoroughfares of the city of Oakland, and base such contention upon the following facts:

On July 19, 1876, one James Lane, being then the owner of the land in dispute and of contiguous territory, granted to Joseph B. Hogarty a lot 50 feet wide by 400 odd feet in depth, and in this same instrument also conveyed the 10-foot strip adjacent to said lot on its easterly side, with the express limitation that it was to be used for street purposes, this strip being the land now in controversy. The description in said deed also referred to certain lot and block numbers as well as to certain streets, all as contained on a certain map, describing it. On September 24, 1878, Hogarty, the grantee in said deed, not having theretofore conveyed any of the property thereby acquired, caused to be filed in the office of the county recorder of Alameda county the map referred to in his deed, on which map were delineated lot and block numbers corresponding to those mentioned in the conveyance to him, and also certain streets called Lane and Washington streets, together with a delineation of the county road of San Leandro. Thereafter, on the 27th day of September, 1878, Hogarty granted to Henry C. Edgerly the lot of land 50 feet in width. The land so conveyed was described as bounded on the east by Lane street with appropriate reference to the map filed by Hogarty. Subsequently and on the 10th day of August, 1883, H. Edgerly conveyed to one Sandford Bennett the same 50 feet of land which he had acquired from Hogarty. Thereafter, on April 21, 1884, said Bennett made a conveyance to Roscoe Wheeler, plaintiff herein, purporting to grant a lot 60 feet in extent, which included not only the land acquired by him from Edgerly and to which he had record title, but also the 10-foot strip here in dispute, to which he had no title whatever. Roscoe Wheeler and his various successors in interest have claimed title to the entire 60 feet at all times since April, 1884, have maintained a fence inclosing the whole thereof until the commission of the acts here complained of, and have paid taxes thereon.

Defendants claim that the strip in question became a part of the city of Oakland by annexation in the fall of 1909 and when the council of that municipality subsequently adopted an ordinance accepting all dedications and offers thereof theretofore made of land for public street purposes then within the city. In March, 1915, defendants removed a fence and other obstructions maintained by plaintiff upon the 10-foot strip in dispute, and opened the same as a portion of the roadway of Thirty-Sixth avenue. Plaintiffs admittedly have no record title to this strip of land. Bennett had none when he conveyed to Wheeler; Edgerly had none when he conveyed to Bennett, nor did he purport to grant any. Plaintiffs' title, if any they have, rests, therefore, upon adverse possession together with payment of taxes. Defendants, on the other hand, rely upon the offers of dedication contained in the deed from Lane to Hogarty followed by his conveyance to Edgerly by reference to said map, such offers, it is claimed, having been accepted and converted into established and irrevocable dedications by user.

Judgment went for defendants in the court below, from which judgment and from the order denying a new trial, plaintiff appeals.

[1] As grounds for reversal it is first insisted that the deed of Lane simply purports to be a conveyance to an individual, and does not constitute an offer to dedicate, the public not being a party to it. But the authorities establish the principle that an offer of the owner of land to dedicate it for public use may be established in every conceivable way in which such intention can be manifested. City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90; People v. Laugenour, 25 Cal. App. 44, 142 Pac. 888; Sussman v. San Louis Obispo Co., 126 Cal. 536, 59 Pac. 24. The vital principle of dedication is the intention to dedicate; and whenever this is unequivocally manifested the dedication so far as the owner is concerned has been made. Smith v. San Luis Obispo, 95 Cal. 463, 30 Pac. 591.

While it is true that a provision in a grant, bargain, and sale deed, whereby the parties agree that the land conveyed shall be used as a public street, may be a mere covenant between them, still an intention to dedicate may arise therefrom, and upon acceptance by the public a complete and perfect dedication is created. Here Lane expressly declared in his deed to Hogarty that the strip in controversy was to be used for street purposes. The sale was made with reference to a map subsequently filed and recorded by Hogarty showing this and other streets contiguous thereto, and the description in the deed referred to this map. We think these acts indicated a clear offer to dedicate the roadway to the public, requiring only an acceptance to render it a binding and irrevocable dedication. City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. 928, 23 Pac. 1085.

[2] The trial court found upon sufficient evidence that there was an acceptance by public user, and that such user was sufficient in extent to constitute a valid acceptance of the offer of dedication. The suggestion by appellants that this evidence at most showed but a casual use which might be referable to a license is without merit. In considering the extent of the use made by the public of the strip in dispute, the fact that at the time of the dedication the land was situated in a sparsely settled suburban community, and where travel over it was not very great, is to be considered. Concluding, as we do, that there was a valid acceptance by public use, it becomes unnecessary to discuss the question as to whether or not the acceptance by ordinance was impaired by lapse of time.

[3, 4] Again, it is urged as grounds requiring a reversal that the deed relied upon as constituting an offer to dedicate conveyed nothing, for the reason that the description was defective. In this behalf it is claimed that in the description by metes and bounds the initial point given is indeterminate. Conceding this to be true, the property was further described by reference to lot and block numbers appearing on the map to which reference was made in the deed, and which reference makes definite and certain the land conveyed. This map was offered in evidence, and was admissible in explanation and amplification of the description in the deed, though not recorded until after the deed was made. Redd v. Murry, 95 Cal. 48, 24 Pac. 841, 30 Pac. 132.

[5, 6] Appellants urge the further point that even assuming that the strip had been once accepted and used by the public, the plaintiffs have subsequent to such use obtained title thereto by adverse possession. It is well settled that the rights of the public in a dedicated street cannot be lost by nonuser or delay in the use or by a mere temporary abandonment of such use. Pol. Code, § 2621; People v. Myring, 144 Cal. 351, 77 Pac. 975. It is also an elementary proposition in this state that title cannot be acquired to a public street by adverse possession. Hoadley v. San Francisco, 50 Cal. 265; People v. Pope, 53 Cal. 437; San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405; Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145.

[7] With reference to the claim that, conceding a dedication to have been properly made, the same was subsequently revoked, it is sufficient to say that no revocation of the offer of dedication was ever attempted by any one having any connection with the record title to the strip of land, and a stranger to the title had no power to revoke.

[8] Nor do we think there is any force in the claimed estoppel. The circumstances made a basis of this claim consist of the payment of taxes and the erection of certain improvements, stipulated as being of the value of $100, and the further fact that the county of Alameda purchased a portion of the land claimed to have been dedicated but not included in the strip here in controversy. The payment of taxes did not raise an estoppel. San Leandro v. Le Breton, supra. Neither did the expenditure for the improvements (Sacramento v. Clunie, 120 Cal. 29, 52 Pac. 44) nor the recognition of private ownership in an adjacent owner (Mills v. Los Angeles, 90 Cal. 522, 27 Pac. 354).

[9] And finally, the claim of the insufficiency of the width to constitute a public highway is without merit. At the time of the dedication there were in force local road laws applicable to the county of Alameda with reference to the width of public highways in that county. St. 1862, p. 78, as amended by St. 1867-68, p. 374. Section 2 of that act provided that a public road should not exceed 4 rods in width. This was the only requirement provided for. There was, therefore, no limitation on the width of a public road other than specified.

For the reasons given, the judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

35 Cal. App. 692

POTTER v. SPAULDING et al. (Civ. 1739.)

(District Court of Appeal, Third District, California. Dec. 28, 1917. Rehearing Denied by Supreme Court Feb. 26, 1918.)

VENDOR AND PURCHASER ⚷285(3)—REMEDY OF VENDOR—STRICT FORECLOSURE OF CONTRACTS—RELIEF.

In an action by the vendor of land against a vendee and his assignee for money damages and strict foreclosure, with the right to retain the moneys paid on account of the price, the vendor's wife not being a party to the action, and being under no obligation to convey her one-fourth interest in the land, such part of the judgment as directed the assignee to pay three-fourths of the contract price, and take in return a three-fourths interest in the property, should the wife refuse to sign deed with her husband, was improper, the husband having contracted to convey title to all the property, not a three-fourths interest therein.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by T. W. Potter against Henry C. Spaulding and the United States Land Company. From the judgment, the Company appeals. Reversed in part, with directions.

Lamberson, Burke & Lamberson, of Visalia (Snook & Church, of Oakland, of counsel), for appellant. T. E. Clark and Alfred Daggett, both of Visalia, for respondent.

CHIPMAN, P. J. This action grows out of two separate contracts entered into by plaintiff and by Henry C. Spaulding, defendant, and W. R. Pigg. The action was essentially on the equity side of the court and was tried by the court without a jury. Defendant United States Land Company appeals from the judgment herein on bill of exceptions. In the same action, the transcript of which is entitled Sacramento No. 2423, Civil 1728, the plaintiff Potter appeals from the judgment and from certain orders made after final judgment. This latter appeal will be treated in a separate opinion. 170 Pac. 1066.

The first of the contracts above referred to was entered into on December 8, 1911, by which plaintiff, the party of the first part, agreed to sell to said Pigg and Spaulding, the parties of the second part, certain land in said agreement described in consideration of certain payments to be made to plaintiff and certain covenants therein set forth to be performed by said Pigg and Spaulding, the money payments to be as follows: "$1,000 which has been deposited by the parties of the second part in the Citizens' Bank at Visalia, Cal., to the credit of the party of the first part and which is to be paid over to the party of the first part as hereinabove provided;" $26,125 to be paid on delivery of the deed mentioned in the agreement, and balance, $20,000, on or before one year from the date of the agreement, to be secured by mortgage on the said land. It was provided by the agreement that first party should furnish to second parties by delivering the same to the Citizens' Bank of Visalia, a complete abstract of title to said land as soon as practicable, second parties to have 30 days from the receipt of the abstract within which to examine the same and point out any defects therein, which latter, when pointed out, first party agreed to cure "as soon as practicable thereafter"; second parties agreed to accept the property within 30 days from delivery of abstract if title was clear and merchantable, "but if not so free, as soon thereafter as said clouds are removed and said defects cured by said first party," unless the second parties should specify defects in the title within 30 days after receipt of the abstract by said bank, "title to said property should be deemed to have been accepted by them"; on the receipt of $1,000 deposited with said Citizens' Bank of Visalia, and the further sum of $26,125, and the execution of the mortgage referred to securing the payment of $20,000, first party was concurrently therewith to execute and deliver to second parties a good and sufficient deed to all the said land "free and clear of liens and incumbrances of every kind and character"; all acts and things to be performed by the parties to the agreement "shall be done with the utmost practicable expedition"; in case of default on the part of second parties in any of the terms of the agreement, it was provided that the bank should forthwith pay to first party the said sum of $1,000 "the same being the consideration moving to him for entering into this agreement." It was further provided that certain personal property described in the agreement, now on the land, "shall pass and be conveyed by the party of the first part to the parties of the second part by separate bill of sale and without any additional consideration at the time he grants and conveys said land to said parties of the second part."

On January 15, 1912, the parties to the original contract entered into a supplemental agreement in which it was recited that the first party had furnished second parties abstracts of title showing certain defects therein as pointed out by second parties and in consideration thereof and the covenants in said supplemental contract contained, it was further agreed that Power & McFadzean, attorneys at law, should proceed at once to cure any defects in the title to said property and put the same in merchantable condition at the expense of first party; that second parties shall advance to first party $11,000 to be used by him to procure from one

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Ed. Mort a release of all his claims upon said land and the personal property thereon referred to in the contract of December 8, 1911, "which said sum of $11,000 shall be credited to said parties of the second part as a payment on the purchase price of said land"; first party was to give second parties immediate possession of the land and personal property; should first party be unable to cure the title to said property within a reasonable time, "he shall repay said parties of the second part said sum of $11,000, by causing to be conveyed to them 220 acres of land to be selected by them from any portion of the land hereinbefore mentioned and specifically described in said agreement of December 8, 1911, together with said personal property." Neither the deed nor the mortgage mentioned in the original contract to be delivered until title to the land was put in good and merchantable condition, and interest on the balance over and above said $11,000 was not to commence until said title is in a merchantable condition and said deed and mortgage delivered as aforesaid. Said $11,000 was to be applied upon the purchase price of said land, and it was provided that this supplemental agreement of January 15th was to be a supplement to the agreement of December 8, 1911, which latter "shall remain in full force and effect as modified by this supplemental agreement."

On February 7, 1912, as found by the court, Pigg and Spaulding assigned and transferred all their right to and interest in the aforesaid contracts and to all said personal property to defendant United States Land Company, of which defendant Spaulding was president and general manager. By the terms of the assignment, the assignee expressly assumed the burdens and obligations of said contracts and thereafter Pigg and Spaulding ceased to have any interest therein. The action was dismissed as to Pigg, and Spaulding in his answer disclaimed any interest in said contracts. The plaintiff alleged full performance of each and all of the covenants set forth in the said contracts to be by him performed and the failure of defendants to keep or perform the covenants undertaken by them to be performed. Defendant United States Land Company answered, alleging full performance of the covenants of said contracts upon the part of Pigg and Spaulding agreed by them to be performed and on its own part as assignee of the interest of said Pigg and Spaulding. It also filed a cross-complaint seeking certain relief.

The court made the following findings of fact and conclusions of law:

(1) That plaintiff is not the owner in fee of the property described in the complaint, but is the owner in fee of an undivided three-fourths thereof, and Epsie G. Potter is the owner in fee of the other undivided one-fourth of said property. That their said ownership in fee is subject to the following easements, to wit: (1) A right of way of a certain named railway company, "which right of way did not constitute an objection or defect in the title because excepted by the contract." (2) A right of way for a pipe line and telephone line of the Standard Oil Company. (3) A right of way to the San Joaquin Light & Power Company for an electric pole line. (4) A right of way for a levee 100 feet wide across certain sections designated in the findings. That on December 8, 1911, plaintiff and said Pigg and Spaulding entered into the agreement of date December 8, 1911, referred to in the pleadings.

(2) That said W. R. Pigg and Henry C. Spaulding have not, nor has either of them, ever deposited in the Citizen's Bank of Visalia, or in any other bank or place, to the credit of plaintiff or to be paid to him the first payment of $1,000, mentioned and provided for in said contract, nor has defendant, said land company, so deposited said money, nor have said defendants or any or either of them ever paid or offered to pay the said plaintiff said sum or any part thereof.

(3) Plaintiff furnished and delivered to said W. R. Pigg and Henry C. Spaulding a complete abstract of title to said real property as required by and within the time provided in said contract.

(4) That said defendants W. R. Pigg and Henry C. Spaulding employed Attorneys Power & McFadzean to examine said abstract and to determine therefrom the title to said land. That they did, within 30 days after said abstract had been furnished by plaintiff, report in writing the result of their said examination to plaintiff and to said W. R. Pigg and Henry C. Spaulding, and therein pointed out all the defects in said title shown in said abstract, "except that said attorneys did not specify or point out that said title was subject to a right of way for a levee 100 feet wide across said section 29," as above referred to.

(5) That thereafter and on or about January 15, 1912, plaintiff and defendants W. R. Pigg and Henry C. Spaulding entered into a supplemental agreement referred to in the pleadings, "and at the same time plaintiff executed to W. R. Pigg and Henry C. Spaulding a bill of sale, transferring to them the title to and ownership of the personal property described in the contract of December 8, 1911, aforesaid, and they immediately entered into possession of said lands and personal property and remained in possession thereof until February 7, 1912; then said United States Land Company entered into possession thereof and remained in possession until May 22, 1913." That said Pigg and Spaulding, while they remained in possession of said property as aforesaid, appropriated to their use the rents, issues, and profits thereof, as also did the United States Land Company, while it remained in possession thereof.

(6) That on February 7, 1912, the said Pigg and Spaulding duly assigned and transferred to the said land company all their right, title, and interest to the real and personal property above described, and all their right, title, and interest in the said contracts.

(7) That upon the execution of said supplemental agreement, said Pigg and Spaulding paid to plaintiff, Potter, the sum of $11,000 mentioned in said supplemental agreement, and said Potter used the same to obtain from one Ed. Mort a release of certain claims he had in and to the real property above described.

(8) That said plaintiff immediately upon the execution of said supplemental contract employed Power & McFadzean to cure the defects in and remove the clouds from the title to said real property. That said attorneys proceeded diligently to cure said defects, "and did cure said defects and remove said clouds, and completed said work on or about March 15, 1913, and

thereupon notified plaintiff and said W. R. Pigg and Henry C. Spaulding in writing that the title to said real property was free and clear from clouds and defects and was good and merchantable. That no other abstract of title to said land was furnished by plaintiff to said defendants or either of them, except that after the commencement of this action plaintiff furnished to defendants a continuance of said abstract, which continuance included all matters of record affecting said title from the date of the original abstract to a date after said title had been made good as aforesaid. That all work of said attorneys in removing said clouds and curing said defects were done as soon as practicable and within a reasonable time, and with due diligence."

(9) That prior to entering into said original agreement, said Pigg and Spaulding "entered upon and examined the lands above described and saw the said pipe line and telephone line of the Standard Oil Company, and the pole and electric line of the San Joaquin Light & Power Company, extending across said lands on the respective rights of way of said companies, and the levee across said section 29 on the right of way therefor above mentioned; said pipe and telephone lines, and said pole and electric line, and said levee were then objects plainly visible, and were then known by said W. R. Pigg and Henry C. Spaulding to have been constructed on said lands; they made no objection thereto, or to the title to said lands on account thereof, but waived any and all objections thereto."

(10) That after plaintiff had been notified by said attorneys that the clouds upon and defects in the title to said lands had been cured and removed, and between the 15th and 24th days of March, 1913, plaintiff informed the said Spaulding, then president of said land company, that plaintiff wanted the deal closed, and that a deed conveying the said lands to W. R. Pigg and Henry C. Spaulding had been made and placed in escrow in the Citizens' Bank of Visalia. That said Spaulding replied that he had not the money and asked for further time in which to get the money required to complete the second payment on said land, to which plaintiff did not consent or agree. "Said deed was and is a grant deed made by plaintiff and his wife, Epsie G. Potter, to W. R. Pigg and Henry C. Spaulding, conveying to them the lands above described; it was deposited in said bank in the latter part of December, 1911, by said attorneys for plaintiff at his request, being handed by said attorneys to W. R. Pigg, who was then cashier of said bank, and it remained in said bank in escrow until about May 23, 1913." That at the same time plaintiff instructed said Pigg in writing that said deed be delivered to said Pigg and Spaulding on their payment to said bank of the sum of $26,125, mentioned in the original agreement, and the execution by them to said Potter and wife of the mortgage for $20,000, mentioned in said agreement, and at said time the said Spaulding was president of said land company. That neither he nor any officer or agent of the said company ever examined said deed, nor did Spaulding or any of said defendants ever make any objection to said deed or to the form thereof.

(11) That at the time of entering into said original agreement it was understood and agreed by the parties thereto that said Citizens' Bank of Visalia should receive the deed conveying said lands from plaintiff to W. R. Pigg and Henry C. Spaulding, and should deliver said deed to them on receiving from them the second payment and the mortgage mentioned in said agreement, "provided the $1,000 mentioned in said agreement had been paid, and said deed was in said bank ready for delivery to them at any time they complied with said agreement on their part from the time it was placed in said bank until May 14, 1913."

(12) That on May 14, 1913, plaintiff served a notice and demand in writing upon said Spaulding, a copy of which notice is set out in the findings and is directed to W. R. Pigg and Henry C. Spaulding. It calls attention to the contracts entered into by the parties and the provisions thereof, and states that whereas the said Pigg and Spaulding, the parties of the second part, have wholly failed to comply with the terms of said contracts, the notice proceeds: "Therefore, I declare the said agreement so far as the same relates to any obligation on my part to perform, abrogated, annulled, and canceled; and you are hereby further notified that demand is now made that you vacate and deliver up the possession of the said premises to the undersigned, or my authorized agent, together with all the personal property mentioned and described in the original agreement aforesaid, within 30 days from the date of the service on you of this notice." It is further found by the court "that plaintiff did not rescind the agreements or either of them."

(13) That on May 22, 1913, plaintiff entered upon and obtained peaceable possession of said lands and of the greater part of said personal property, but not with the consent of defendants or either or any of them, "and has ever since remained and now is in possession of said lands and the rents, issues, and profits thereof. That on the day last aforesaid and after taking possession of said personal property, he delivered possession of said personal property to said Henry C. Spaulding, who was then president of said United States Land Company, and said company has ever since retained the same and appropriated it to said company's use."

(14) That on May 24, 1913, the said defendant land company served upon plaintiff a notice and demand in writing in which attention was called to the execution of said contracts and the provisions thereof, and stating that said plaintiff had not, within a reasonable time or at all, cured the title to said property nor put the same in a good and merchantable condition, and have not as yet done so, and called attention to the assignment of said contracts to said land company. The notice proceeds: "Now, therefore, the said United States Land Company, as such assignee, as aforesaid, has elected to select said 220 acres of land and said personal property in lieu of the further performance by you of the terms and obligations of said contract, as aforesaid, and has selected the south 220 acres of said tract of land agreed to be conveyed by you, as is more fully set out and described in said contracts as aforesaid, and hereby demands of and from you, the conveyance to it, the said corporation, of the said south 220 acres of said tract of land, as aforesaid, and a bill of sale of all said personal property mentioned in said original agreement." It is found by the court that the plaintiff has refused "to comply with and has not complied with said demand in any manner or at all."

(15) "That defendants were entitled to a reasonable time in which to comply with the terms of said agreements on their part after notice was given to them as aforesaid by plaintiff. That said reasonable time had expired on May 13, 1913, and prior to the time plaintiff notified W. R. Pigg and Henry C. Spaulding that his obligations under said contracts were annulled and canceled as aforesaid. That said defendants have not nor has either of them ever been ready or able to make the payments specified in said original contract, nor have they or either of them ever paid any part of the purchase price of said property except the said sum of $11,000 paid at the time of the execution of said supplemental agreement. That plaintiff has not repaid to defendants, or either of them, any part of said $11,000."

(16) "That plaintiff was always ready, able, and willing to comply with the terms of said contracts on his part, up to the time he gave the notice and demand aforesaid, upon the per-

formance by defendants of the terms of said contracts on their part."

(17) That defendants have not, nor has either of them, been damaged in any sum whatever by plaintiff's failure to convey to them or either of them the 220 acres of land hereinbefore mentioned, nor by his failure to repay to them or either of them the said sum of $11,000, nor by any other act, failure, or omission of plaintiff.

(18) "That plaintiff herein has suffered no damage because of the defendants, or any of them, being in possession of, or having the use of, the real and personal property described in said contracts."

(19) That neither of said defendants ever notified or stated to plaintiff prior to the written notice and demand of May 24, 1913, that plaintiff was in default in the performance of the terms of said contract. That said land company did demand on October 15, 1912, "the conveyance to it of 220 acres off the south end of said tract of lands, and plaintiff refused to comply with said demand. That plaintiff was not then in default and has never been in default in the performance of any of the terms of said contract on his part."

(20) That the reasonable value of said 220 acres of land and said personal property was on January 15, 1912, the sum of $11,000.

(21) "That plaintiff herein has not been damaged by the act or acts or failure to act of defendants or any of them in any amount whatever."

(22) "All sums of money agreed to be paid on the two contracts should have been paid within a reasonable term, to wit, prior to May 14, 1913."

As conclusions of law, the court found as follows:

"That there is due and unpaid upon said contracts the sum of $36,125 for purchase money, with interest thereon from March 24, 1913, at 7 per cent. per annum, provided plaintiff and his wife, Epsie G. Potter, execute to United States Land Company, as hereinafter provided, a good and sufficient deed conveying to said company the lands described in said contract and in said complaint. That in the event said Epsie G. Potter should refuse to execute said deed or join in the execution thereof, then there is due and owing on said contracts the sum of $24,343.75 for purchase money of an undivided three-fourths interest in said lands, with interest thereon at 7 per cent. per annum from March 24, 1913."

"That plaintiff is entitled to the judgment of this court that all the rights of the defendants Henry C. Spaulding and said United States Land Company and of each of them, in and to the said contracts, and each of said contracts, and in and to the lands described in said original contract and in the complaint herein, be foreclosed, and that plaintiff recover from the defendants Henry C. Spaulding and United States Land Company his costs in this action."

"That defendant United States Land Company should be allowed a reasonable time after date of the judgment herein in which to complete the payment of all sums of money due and owing on said contracts, and said reasonable time is hereby fixed at 60 days after date of said judgment."

"That on the payment by said United States Land Company at any time within 60 days from the date of the judgment herein of the sum of $36,125, with interest thereon at the rate of 7 per cent. per annum from March 24, 1913, together with plaintiff's costs in this action, the plaintiff and his wife, Epsie G. Potter, should execute to said United States Land Company a good and sufficient deed conveying to said company the lands described in said original contract, subject to the easements mentioned in the foregoing findings; and should deliver to said company possession of said lands."

"In the event said Epsie G. Potter fails or refuses to execute a deed or join in the execution of a good and sufficient deed, as above provided, with plaintiff, to said United States Land Company, then on the payment by said United States Land Company to said plaintiff of the sum of $24,343.75, with interest thereon at the rate of 7 per cent. per annum from March 24, 1913, at any time within 60 days from the date of the judgment herein, together with plaintiff's costs, said plaintiff shall execute to said United States Land Company a good and sufficient deed conveying to said company an undivided three-fourths interest in and to the lands described in said original contract, and shall deliver possession of said three-fourths interest in said lands to said company."

"In case of the failure of plaintiff, T. W. Potter, to make or join in the making of one of the deeds hereinbefore mentioned, a commissioner shall be appointed by this court to make such conveyance."

"In case of the failure of said defendant United States Land Company to make the payments within the time hereinbefore provided, then said judgment foreclosing all the right, title, and interest of Henry C. Spaulding and the United States Land Company, a corporation, and of each of them in and to said contracts and in and to the said lands shall be and become absolute."

Judgment was accordingly entered.

Briefly stated, plaintiff seeks money damages and a strict foreclosure of the contracts with the right to retain the $11,000 paid by Pigg and Spaulding on account of the purchase price of the land. Defendant United States Land Company seeks to have a lien declared upon all the land to the extent of $11,000 and interest from January 15, 1912, and that said lien be foreclosed; that said agreements be specifically performed and plaintiff adjudged to convey to defendant United States Land Company, or such defendants as the court may find entitled thereto, said 220 acres of land. As an alternative proposition, defendant offers to receive said sum of $11,000 or such sum as the court may adjudge to be owing to it, "or to take and receive from plaintiff said 220 acres of land above mentioned, or such portion thereof as the court may adjudge should be conveyed to it by plaintiff herein," or finally, "to pay to plaintiff herein the sum of money agreed by defendants W. R. Pigg and Henry C. Spaulding to be paid to plaintiff herein under said agreements of date December 8, 1911, and January 15, 1912, on the terms and conditions set out in said agreements if this court should adjudge that the same be paid upon conveyance to defendant United States Land Company, a corporation, by plaintiff herein of a good and merchantable title to the lands described in said agreement of date December 8, 1911"; and in this regard, defendant asks the court to grant "such length of time as to this court may appear meet and proper in the premises within which to pay to plaintiff herein the sums of money agreed by said agreement to be paid to plaintiff herein and to perform each and all of the terms and conditions therein set forth to be done by defendants W. R. Pigg and Henry C. Spaulding, and that thereupon plaintiff herein shall make, execute, and deliver to defendant United States Land Company, a corporation, or to such of the defendants as may be found by this court to be entitled thereto, a conveyance of a good and merchantable title to the whole of the lands described in said agreement of December 8, 1911," and for such other relief, etc.

The court, in its findings and judgment, has apparently adopted defendant's alternative proposition in so far as to decree that upon payment by defendant United States Land Company to plaintiff of $36,125, with interest at 7 per cent. from March 24, 1913, together with plaintiff's costs of action, plaintiff and his wife shall convey to defendant United States Land Company, by sufficient deed, the lands in said original contract described, "subject to the easements mentioned in the findings herein, and deliver to said defendant United States Land Company the possession of said lands." Then follows the provision of the decree which is claimed to be wholly outside of any agreements entered into by the parties and outside any issues in the case, namely, that in the event Mrs. Potter fails or refuses to join in the execution of said deed, "then upon the payment by the United States Land Company to said plaintiff of the sum of $24,343.75, with interest thereon at the rate of 10 per cent. per annum from March 24, 1913, at any time within 60 days from the date of this judgment, together with the plaintiff's costs, said plaintiff shall execute to said United States Land Company a good and sufficient deed conveying to said company an undivided three-fourths interest in the land described in said original contract, and shall deliver possession of said three-fourths interest in said land to said United States Land Company." It is then decreed that in case defendant United States Land Company fails to make such payments within the time decreed, "then the judgment foreclosing all the right, title, and interest of said defendant Henry C. Spaulding and United States Land Company and of each of them in and to the said interests and in and to said land shall be and become absolute." Should plaintiff fail to make or join in making of one of said deeds, a commissioner is provided for to make the same.

We have examined the evidence with some care and are satisfied that it is sufficient to support the findings of fact. It is not so much the facts themselves that are questioned by appellant as the force given them by the court. For example, the court found that plaintiff cleared the title of all defects notwithstanding there were certain easements which concededly were not removed. As to these the evidence was that the defendants were familiar with the land; had gone all over it before the contracts were entered into and, as the court found, "saw the said pipe line and telephone line of the Standard Oil Company and the pole and electric line of the San Joaquin Light & Power Company extending across said lands on the respective rights of way of said companies" and the other visible evidence of these existing easements and, as the court further found, "they made no objections thereto, or to the title to said lands on account thereof." Mr. Power, of Power & McFadzean, who were the attorneys agreed upon by the parties to cure the title, testified that it was understood by all the parties to the transaction that these visible easements were not to be considered as incumbrances. Appellant, among other of its objections, claims that these defects are incurable. That is true, but it was equally true when defendants were bargaining for the property, and this fact tends to show that they were not to be considered. It is chiefly on account of these easements that appellant now urges that plaintiff was in default.

The evidence was that said attorneys notified all the parties March 15, 1913, that the title was then clear and merchantable, and it was with this knowledge in mind when plaintiff called upon Spaulding as president and manager of defendant company that the latter made no objection to the title, but asked for more time in which to raise the money necessary to meet the payments then due. It was about two months thereafter that plaintiff served written notice on defendants mentioned in the findings.

As to the objection that the deed placed in escrow by plaintiff was a quitclaim deed in form, we do not think it now necessary to express an opinion. It was known to be in escrow with the other documents in the Visalia Bank, and its form was never objected to. The court found that it was a grant deed. However, in its findings of fact and conclusions of law, the court seems to have disregarded this deed. It was withdrawn from the bank by plaintiff, with other documents, about May 14, 1913. The court, in its conclusions of law, directed that on payment by defendants, plaintiff and wife execute a conveyance of a good and sufficient title except as to said easements. The court found, and we think the evidence supports the finding, that plaintiff was at all times ready and willing to perform on his part the covenants he had agreed to perform. There was much delay in perfecting the title, but the court found upon the testimony of said attorneys that owing to the complicated condition of the title the work of clearing all defects was performed within a reasonable time. An examination of the record convinces us that this finding is amply supported. Besides, defendants had no cause for complaint on this account. Their money obligations were not drawing interest, and they were enjoying the rents and profits of the property. The transaction found itself enmeshed in many intricacies and many conflicting phases, as is plainly perceivable from the pleadings and the findings. The court, sitting as chancellor, manifestly endeavored to adjust the equities upon sound principles, and on the whole case we think the court had the right conception of the merits of the contending claims.

We are, however, unable to find support for the conclusion of law which was carried into the judgment in the same language and as to which the judgment directs defendant land company to pay what we assume is intended to represent three-fourths of the contract price, and to take in return a three-fourths interest in the property, thus leaving a one-fourth interest outstanding in Mrs. Potter, should she refuse to sign the deed with plaintiff. Mrs. Potter was not a party to the action; she is under no obligation to convey her one-fourth interest. Plaintiff's contract was to convey title to all the property, not a three-fourths interest therein. To compel defendant land company to accept a deed for less than plaintiff agreed to convey is to compel the performance of a contract which neither it nor its assignors ever entered into. We can find nothing in the record to sustain this part of the judgment. Jackson v. Torrence, 83 Cal. 521, 23 Pac. 695; Olson v. Lovell, 91 Cal. 506, 27 Pac. 765. This portion of the judgment must be reversed. The court properly adjudged that upon the payment by defendant land company of the several sums specified, plaintiff and his wife should execute to said defendant a good and sufficient deed to all the lands described in said original contract. And the court provides for plaintiff's refusal by directing the appointment of a commissioner "to make such conveyance" who, of course, could not convey more than plaintiff's interest.

In its computation of the amount of money due under the contracts, the court credits defendant with the $11,000 paid by Pigg and Spaulding, but the court makes no finding as to what disposition should be made of this $11,000 should plaintiff fail to convey or cause to be conveyed the entire interest in the property; and this may happen should Mrs. Potter refuse to execute a deed to her one-fourth interest therein. It seems to us that the court should make a finding determining who is entitled to this $11,000 in the event of plaintiff's failure to convey or cause to be conveyed by a good and sufficient deed, a title to the entire interest in said property.

That portion of the judgment specifically referred to above as not supported is reversed, with directions to the court to make findings with reference to said $11,000 payment as above suggested; the matter to be heard upon the evidence contained in the present record, and such further evidence as the parties to the action may desire to submit.

It is further ordered that each party pay his own costs on this appeal.

We concur: HART, J.; BURNETT, J.

35 Cal. App 707

POTTER v. PIGG et al. (Civ. 1728.)

(District Court of Appeal, Third District, California. Dec. 28, 1917.)

1. EXCEPTIONS, BILL OF 🔑53(3) — SETTLEMENT—MANDAMUS.

To have reviewed an order refusing to settle his bill of exceptions, plaintiff's remedy is by mandamus, and not by appeal.

2. APPEAL AND ERROR 🔑364—JUDGMENT IN CONFLICT WITH FINDINGS—REMEDY BY APPEAL.

Where the judgment is in conflict with the findings, the remedy is by an appeal from the judgment.

3. JUDGMENT 🔑305—VACATION—INCONSISTENCY WITH FINDINGS—INCORRECT CONCLUSIONS OF LAW.

The superior court has jurisdiction, on motion under Code Civ. Proc. §§ 663, 663a, to vacate a judgment as entered, which is inconsistent with and not supported by the findings of fact, and to enter proper judgment, and also where the conclusions of law are incorrect or erroneous, and not consistent with the findings of fact.

4. APPEAL AND ERROR 🔑113(1)—ORDER APPEALABLE—MOTION TO VACATE JUDGMENT.

An order denying a motion under Code Civ. Proc. §§ 663, 663a, to vacate a judgment as entered which is inconsistent with and not supported by the findings of fact, and to enter a proper judgment, is appealable.

5. VENDOR AND PURCHASER 🔑285(5)—RIGHT OF VENDOR—RECOVERY—DAMAGES FOR USE.

Where, by contract of sale, the purchasers of realty were entitled to possession of the land and personalty, and their possession was lawful until the vendor made demand for possession, and without waiting for the purchasers to comply with the demand the vendor took possession of the property, and remained in possession, in his action to foreclose the contracts of sale, the vendor was not entitled to any damages for the use of the land and personalty.

6. VENDOR AND PURCHASER 🔑285(3) — RIGHTS OF VENDOR—FORECLOSURE—CONDITIONS.

Where time was not specifically made of the essence of contracts for the sale of land, after demand made by the vendor the purchasers should have paid within a reasonable time, and, in the vendor's action for foreclosure of the contracts of sale, he was entitled only to have foreclosure ordered conditionally on the failure of the assignee of the purchasers to make full payment in accordance with the contracts.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by T. W. Potter against W. R. Pigg and others. From judgment and order made after final judgment, plaintiff appeals. Judgment and order so far as they affect plaintiff affirmed, except as to certain matters.

T. E. Clark, of Visalia, for appellant. Lamberson, Burke & Lamberson, of Visalia (Snook & Church, of Oakland, of counsel), for respondents.

CHIPMAN, P. J. Plaintiff appeals from the judgment and from an order made after final judgment. The pleadings, findings, and judgment are identical with those in Civil No. 1739, 170 Pac. 1061, this day decided, Plaintiff gave notice of a motion under sections 663, 663a, Code of Civil Procedure, to vacate the judgment and to enter another and different judgment, which motion was denied. The appeal from the order appears in part to be an attempt to have reviewed an order refusing to settle his bill of exceptions.

[1] The remedy is by mandamus, and not by appeal. Brode v. Goslin, 158 Cal. 699, 701, 112 Pac. 280. Besides, no bill of exceptions is in the record, and hence it cannot be determined whether or not the court erred. A bill of exceptions appears in No. 1739, above referred to, brought up on the appeal of defendant United States Land Company. In that appeal, plaintiff here is respondent. Plaintiff claims the right to resort to that bill of exceptions in support of his appeal from the order denying his motion to have the judgment vacated and another and different judgment entered. Where no reference is made in the record to a bill of exceptions in a separate transcript brought up on a different appeal, and no stipulation that it may be used, we doubt whether any rule of practice would authorize the appellant to resort to such bill of exceptions in order to show that the evidence is insufficient to support the findings. However, it is not necessary to consider the point, for we have, in deciding case No. 1739, reached the conclusion that the findings are supported by the evidence, and we discover nothing in plaintiff's appeal to change our opinion.

[2-4] Where the judgment is in conflict with the findings, the remedy is by an appeal from the judgment. Sharp v. Bowie, 142 Cal. 462, 76 Pac. 62. And the superior court has jurisdiction on motion under sections 663 and 663a to vacate a judgment as entered, which is inconsistent with and not supported by the findings of fact and to enter a proper judgment (Tyrrell v. Baldwin, 67 Cal. 1, 6 Pac. 867; Dahlberg v. Girsch, 157 Cal. 324, 107 Pac. 616), and also where the conclusions of law are incorrect or erroneous and not consistent with the findings of fact (Shafer v. Lacy, 121 Cal. 574, 54 Pac. 72). An order denying a motion to vacate a judgment under these sections is an order after final judgment, and is appealable. Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828.

[5] In his action plaintiff seeks damages as follows: "$5,000 for the detention by defendant and use of the real property"; $5,000 for the value of the personal property; $10,000 "on account of being deprived of the control and use of his said property and of the profits thereof, and failure of defendants to comply with the conditions of their agreements to pay the purchase price for the property in question to plaintiff within the time agreed, or at any time;" that defendants be forever enjoined from setting up any claim or right to the possession or title to the said 942½ acres of land aforesaid." The court found on sufficient evidence, and the contracts provided that defendants should go into the possession and use of the real property; and that such possession and use were to continue pending the time required in curing the title. As to the personal property, the court found on sufficient evidence that title passed by bill of sale to defendants. Upon this branch of the case the court, in its opinion, printed in the record, calls attention to the evidence, and shows very clearly that plaintiff was not entitled to damages. Said the court:

> "Plaintiff, however, is not entitled to any damages. By the terms of the contract the defendants were entitled to the possession of the land and personal property. Their possession was lawful until plaintiff made demand for possession. He served his demand on May 14, 1913, requiring defendants to give up possession within 30 days. Without waiting for them to comply with the demand, plaintiff took possession of the property on May 22, 1913. He has ever since remained in possession of the land. He is therefore not entitled to any damages for the use of the land. See Marshall v. Caldwell, 41 Cal. 611; Hannan v. McNickle, 82 Cal. 122, 23 Pac. 271. For the same reason plaintiff cannot recover for the use of the personal property by defendants, even had the title thereto remained in plaintiff. Defendants contend that title to the personal property passed to the purchasers at the time of the execution of the supplemental contract. Defendant Spaulding testified that a bill of sale of the personal property was written out with pen and ink, and executed by the plaintiff; that he (Spaulding) had it in his possession, but that it was afterwards destroyed by a fire which burned up the ranch house. Plaintiff denied the execution of any bill of sale. But he recognized defendants' title to the personal property. Spaulding sold $300 worth of hogs, and in writing to plaintiff about other matters mentioned this sale. Plaintiff made no objections thereto. Afterwards, it is true that plaintiff demanded possession of all the property. But after taking possession of all the personal property remaining unsold, he turned it over to defendants. All of the tools and farming machinery, except an engine which had already been removed, some 35 head of milch cows and some calves, plaintiff thus turned over to defendants. On taking possession of the land he recognized the ownership in a hired man of the United States Land Company in one-half the poultry, and paid the hired man therefor. This poultry was that mentioned in the original contract and the increase thereof. He did not remove the other half of the poultry, but he recognized Spaulding's or the United States Land Company's claim to the same, recognized their right to one-half the eggs, and they took their half of the poultry from the ranch. The hired man did not obtain his interest in the poultry from plaintiff, but from defendants, which plaintiff well knew."

[6] The court found that plaintiff was entitled to foreclosure of said contracts, but not to a strict foreclosure, which latter would have carried with it the forfeiture of the $11,000 payment made by defendants. The foreclosure ordered was conditioned upon the failure of defendant United States Land Company to make full payment in accordance with said contracts as shown in No. 1739. This we think gave to plaintiff the full measure of relief to which he is shown to have been entitled. Upon this point the learned trial judge in his opinion said:

"Plaintiff is entitled to foreclosure of said contracts, but defendants should be allowed a reasonable time in which to complete the payments for the lands, and on payment to receive the proper conveyances therefor. Time is not specifically made of the essence of the contracts, but after demand made by plaintiff, defendants should have paid within a reasonable time. They should have paid the $26,125 in cash not later than May 22, 1913, and executed the proper mortgage securing the final payment of $20,000 with interest thereon at 7 per cent. per annum, payable within one year from the last-mentioned date. They should also have paid the $1,000 by that date, May 22, 1913. The mortgage for $20,000 would have been due as early as May 22, 1914, and plaintiff should not now be required to accept a mortgage for that sum, but should be paid in cash. The defendant Spaulding or the United States Land Company should be granted sixty days from the date of judgment within which to pay the plaintiff the sum of $36,125, with interest thereon from May 22, 1913, at 7 per cent. per annum, compounded annually."

The judgment and order, so far as they affect plaintiff, except as to matters considered and decided in case No. 1739, are affirmed.

We concur: HART, J.; BURNETT, J.

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35 Cal. App. 688

PORTER v. BRYSON. (Civ. 2497.)

(District Court of Appeal, Second District, California. Dec. 27, 1917. Rehearing Denied by Supreme Court Feb. 25, 1918.)

1. APPEAL AND ERROR ⚷957(1)—REVIEW—DISCRETION—OPENING DEFAULT.

An order setting aside a default judgment under Code Civ. Proc. § 473, authorizing the court to relieve a party from a judgment or order taken against him through his mistake, inadvertence, surprise, or excusable neglect, will not be disturbed, unless it very clearly appears that the trial judge has abused his discretion.

2. JUDGMENT ⚷143(11)—OPENING DEFAULT—MISTAKE OF COUNSEL.

An order setting aside a default judgment against a public administrator will not be disturbed, where it was shown by affidavit that the deputy county counsel to whom the administrator delivered the summons made a mistake as to the date of service, and indorsed thereon an incorrect date, and that the deputy counsel to whom the case was assigned was thereby misled as to the time for answering, and where defendant promptly moved to set aside the judgment, and evidenced no desire to hinder or delay the prosecution of the action, and filed an answer raising substantial issues of fact, as the court could not say that the mistake was inexcusable.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Florence A. Porter against Frank Bryson, as administrator of Wallace James Joyce, deceased. From an order setting aside defendant's default, and a default judgment for plaintiff entered thereon, plaintiff appeals. Affirmed.

Edward W. Cunningham, of Los Angeles, and Abe Hart, of San Francisco, for appellant. A. J. Hill, County Counsel, and David R. Faries, Deputy County Counsel, both of Los Angeles, for respondent.

JAMES, J. The sole question presented by this appeal is as to whether the trial court abused its discretion in setting aside the default of the defendant and judgment entered thereon. Three affidavits were presented by the defendant in support of his motion to set aside the default and the judgment; also an answer the allegations of which raised material issues of fact, which answer was filed after the court had made the order which is sought to be reversed upon this appeal. The affidavit of the defendant set forth that the summons and complaint in the action were served upon him on the 19th day of November, 1915; that he delivered said summons and complaint on the same day to Robert B. Murphey, a deputy county counsel, and requested that the county counsel appear on his behalf in the action; that he did not know why no appearance was entered within the ten days prescribed by law. The affidavit of defendant further contained the statement that he had fully and fairly stated the facts and circumstances of the case to a deputy county counsel, one of his attorneys, and had been advised that he had a good and substantial defense on the merits of the action; that he believed the same to be true. Murphey's affidavit, being one of the three filed, reads as follows:

"Robert B. Murphey, being first duly sworn, deposes and says: That he is an attorney, duly admitted to practice law in the courts of the state of California; that he is, and at all times mentioned herein has been, a deputy county counsel in and for the county of Los Angeles, state of California; that Frank Bryson, public administrator, the defendant herein, delivered to affiant a copy of the summons and complaint herein, and that affiant informed said defendant that he would turn the matter over to A. J. Hill, county counsel of Los Angeles county, who would assign said matter to one of the deputies in his office; that at the time said summons and complaint were handed to affiant, he inquired of said defendant as to the time of service of the same upon him, and understood defendant to say November 21, 1915, and further understood said defendant to say that it was on a Monday; that affiant thereafter indorsed upon the back of said complaint and summons the words and figures, 'Served Monday, November 21, 1915'; that on the same day that the said defendant handed said summons and complaint to affiant, affiant delivered the same to Emily W. Wussow, secretary to said A. J. Hill, county counsel."

David R. Faries, a deputy county counsel, made affidavit that he was one of the attorneys for the defendant, and that about November 24, 1915, the matter of attending to the particular case referred to was assigned to him in the office of the county counsel; that it was customary to indorse upon the back of any pleading the date of service, and that when he received the complaint and summons there was indorsed on the back thereof the words, "Served Monday, November 21, 1915"; that he relied upon the indorsement as showing the correct date of service, and believed that he had up to and including December 1st in which to plead to said complaint; that he was preparing to and expected to plead to the complaint on December 1st, and was surprised to learn on November 30th that default of the defendant had been entered. It will be noted that the defendant in his affidavit asserted that he delivered the complaint and summons to Murphey on the day of their receipt by him, with a request that the county counsel appear on his behalf in the action. Murphey's affidavit by inference contradicts this statement in that he asserts that at the time the summons and complaint were handed him be understood defendant to say that service had been made on November 21, 1915. As to whether Murphey actually received the summons and complaint on the 19th cannot be told, but it does appear that when he indorsed thereon the words, "Served Monday, November 21, 1915," he made an error as to the date by reason of which error the second deputy in the office of the county counsel to whom the handling of the case was assigned was misled as to the expiration day of the time for pleading in the action. The motion to set aside the default and judgment was promptly made, and immediately after the court had granted that motion the defendant moved to set the cause for trial; but owing to the plaintiff's desire the date for the trial was not fixed, but this appeal was prosecuted.

[1, 2] Action of the kind here taken by trial judges under the authority given by the provisions of section 473, Code of Civil Procedure, as our Supreme Court has repeatedly said, will not be disturbed, unless it very clearly appears that the trial judge has abused his discretion. Orders granting such relief are more to be favored than those denying the same. "Relief in such cases is said to be within the discretion of the court; but 'the exercise of the mere discretion of the court ought to tend, in a reasonable degree at least, to bring about a judgment on the very merits of the case, and, where the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application.' * * * Such orders 'rest very much in the discretion of the court below, and will not be disturbed by this court unless we are satisfied that the order is so plainly erroneous as to amount to an abuse of discretion.'" Miller v. Carr, 116 Cal. 378, 48 Pac. 324, 58 Am. St. Rep. 180; Melde v. Reynolds, 129 Cal. 308, 61 Pac. 932; Nicoll v. Weldon, 130 Cal. 666, 63 Pac. 63. In the latter case the court remarked:

> "Section 473 of the Code of Civil Procedure is a remedial provision, and is to be liberally construed so as to dispose of cases upon their substantial merits, and to give to the party claiming in good faith to have a substantial defense to the action an opportunity to present it (citing cases). It is for this reason that we more readily listen to an appeal from an order refusing to set aside a default, than where the motion has been granted, since in such case the defendant may be deprived of a substantial right, whereas it may be assumed, if nothing to the contrary is shown, that the plaintiff will be able at any time to establish his cause of action. If, for any reason, he will be unable to do so, that fact should be made to appear; but if he is merely subjected to delay or inconvenience by having the default set aside, he can be compensated therefor by the terms which the court will impose as the condition of granting the motion."

See, also, Williamson v. Cummings, etc., Co., 95 Cal. 652, 30 Pac. 762; Morton v. Morton, 117 Cal. 443, 49 Pac. 557.

Appellant, admitting that the affidavits of the defendant show that a mistake had been made as to the date of service, argues that the affidavits are not sufficient in their showing that such mistake was excusable. In view of the settled disposition of the appellate courts in viewing the action taken under section 473, Code of Civil Procedure, and as is held in the cases cited, the question is rather as to whether the affidavits show that the mistake was inexcusable, and that we are not prepared to hold. Deputy county counsel Murphey, it is not disputed, indorsed the wrong date of service upon the complaint and summons, and the deputy to whom the handling of the cause was assigned had no other information to guide him in determining when appearance was due than this indorsement. The defendant acted with promptness throughout, evidencing no desire to hinder or delay plaintiff in the prosecution of her action, and filed an answer which raised substantial issues of fact to be tried. We think that the order as made should not be disturbed.

The order appealed from is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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35 Cal. App. 728

COUNTRYMAN v. CALIFORNIA TRONA CO. (Civ. 2262.)

(District Court of Appeal, First District, California. Dec. 31, 1917. Rehearing Denied by Supreme Court Feb. 28, 1918.)

1. Appeal and Error ⟹1002 — Review—Conflicting Evidence.

Where the evidence was in substantial conflict as to whether an unauthorized contract by the general manager of a corporation was made known to and approved by a majority of the directors and whether with such knowledge and approval plaintiff was permitted to proceed with the performance of the services therein specified so as to constitute a ratification of the execution and terms of the agreement, the jury's finding in plaintiff's favor would not be disturbed.

2. Corporations ⟹426(5) — Officers — Unauthorized Acts—Ratification.

An agreement of a corporation, entered into by its manager without authority sufficiently ample to enable him to execute it, may be approved and ratified so as to become binding upon the corporation through the knowledge, approval, and consent of a majority of the directors acting individually and informally, particularly where a person has been permitted to continue in the open and active capacity and service of attorney for the corporation without objection or inquiry as to the existence or terms of his engagement so to do.

3. ATTORNEY AND CLIENT 🔑143—CONTRACTS AS TO COMPENSATION—VALIDITY.

The rule that, where the relation of attorney and client already exists when a contract is made respecting the attorney's fees, he is precluded from recovering more than a reasonable sum for his services without regard to the attempted fixing of their value by the agreement, is not a rule of universal application, and only applies where there are special reasons for its application, as where the written contract provides for greater compensation than was expressly or impliedly agreed upon prior to the existence of the confidential relation, or where special relations of confidence exist, or where the client had no other independent legal adviser, or where there was some failure on the part of the attorney to make full disclosure to the client as to the extent of the services required.

4. TRIAL 🔑296(11)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

In an attorney's action for services, an instruction that, if a written contract was made fixing the amount of compensation, the verdict should be for the full sum provided for in such contract, without considering or going into the matter whether the services were reasonably worth such sum, was not misleading or sufficiently prejudicial to require a reversal, though such contract was made after the relation of attorney and client had commenced, where the court gave every instruction requested by defendant, and in so doing fully and repeatedly instructed the jury that the utmost limit of plaintiff's recovery was the reasonable value of his services.

5. ATTORNEY AND CLIENT 🔑165 — ACTIONS FOR COMPENSATION—PLEADING AND PROOF.

Where an attorney was discharged without cause, and before the full measure of the services, contemplated by his written agreement, had been performed, he was not required to allege or prove the reasonable value of his services which he was not permitted to perform, but was entitled to count upon the contract.

6. APPEAL AND ERROR 🔑1040(10)—HARMLESS ERROR—OVERRULING DEMURRER.

In an attorney's action for services, the uncertainties in the complaint with respect to the specific services performed did not injure defendant where, at some time during the pendency of the action, defendant was furnished a bill of particulars setting forth specifically the services upon which the claim for compensation was based, and the items of such bill were made the subject of exhaustive examination during the trial, and hence the overruling of a demurrer to the complaint was not ground for reversal.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Robert H. Countryman against the California Trona Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Charles W. Slack, Chauncey S. Goodrich, and Perry Evans, all of San Francisco, for appellant. Chapman & Trefethen, of Oakland, and Wm. P. Hubbard and R. H. Countryman, both of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff for the sum of $39,000 and costs, and from an order denying defendant's motion for a new trial.

The action was instituted for the recovery of the sum of $40,000, less the sum of $1,000 paid on account, alleged to be due from the defendant to the plaintiff as counsel fees. The complaint is in two counts, one upon an express contract for the payment of the above-named sum; the other a count for the recovery of said sum as the reasonable value of the plaintiff's professional services. The answer of the defendant denies the existence of any express contract for the employment of plaintiff to render any professional services whatever; and also denies that any such services which the plaintiff may have rendered to the defendant were of the reasonable value of $40,000 or any other sum whatever, and alleged that for any services which the plaintiff may have rendered to the defendant he has been fully paid. The defendant also pleads the bar of the statute of limitations to the action.

The cause was tried before a jury demanded by the defendant. The trial before such jury occupied nine days, at the conclusion of which the jury unanimously rendered a verdict in plaintiff's favor for the full sum demanded in his complaint. The defendant moved for a new trial upon the grounds of insufficiency of the evidence to justify the verdict; that said verdict was against law; and also upon the ground of errors of law occurring at the trial and fully specified in the bill of exceptions. The entire record of the trial is before us, and is very voluminous.

The facts of the case, in so far as their recital may be necessary for its decision upon appeal, are as follows: The defendant is a mining corporation organized under the laws of the state of Califorina, with a capitalization of $1,000,000, and owning or claiming to own locations embracing 41,200 acres of mineral lands in the counties of San Bernardino and Inyo, in said state, containing deposits of potash, soda, and trona of vast and variously estimated value. The corporation began its operations for the development of these properties in the year 1908, and in the month of August of that year entered into an agreement with the Foreign Mines Development Company an English corporation, for the purpose of having provided the necessary capital for such development, giving its mortgage upon the properties to the latter corporation to secure such advances and expenditures as it might have and also such bonuses as under the agreement it was entitled to receive. After the development work had proceeded for a little more than a year the mortgagee gave notice of its election to consider all moneys secured by said mortgage to be due and payable, and of its intention to proceed to a sale of the property under the terms of the mortgage. Thereupon the mortgagor, the appellant herein, commenced an action in the superior court of Alameda county to enjoin the proposed sale, and secured a temporary injunction to that effect; whereupon the defendant therein, the Foreign Mines Development Company, filed its answer and cross-complaint, praying for the foreclosure of its said mortgage, and also filed its application for the transfer of the cause to the federal courts. This transfer being accomplished, the suit was referred to the master in chancery to take testimony therein. In the meantime and during the pendency of said action the California Trona Company granted to one E. H. Merrill an option to purchase all of its said properties for the sum of $1,000,000. At that time the plaintiff in this action was the attorney for said E. H. Merrill, while the defendant herein had been theretofore and continued to be represented by one J. Harwood. The existence of the foregoing option in the said Merrill, together with the various involvements of the defendant herein accruing out of or coincident with its financial and legal difficulties with its mortgagee, brought the said E. H. Merrill and his counsel into the close relations of a common interest with the defendant herein in an effort to extricate the properties of the defendant from its several imminent dangers of being lost to it. The plaintiff herein and the counsel for the defendant herein were thus brought into association for the protection of this common interest of their clients, in the course of which the plaintiff co-operated with the defendant's counsel in the preparation of certain affidavits by the president and directors of said corporation for use in the course of their pending suit in the federal court, and also participated in certain hearings therein. About this time also some trouble seemed impending with jumpers upon the property, in the course of which the plaintiff was called into consultation with Mr. Dolbeer, the general manager and one of the directors of the defendant, and performed some services in that connection and also in the way of advising and preparing relocations of certain of the defendant's claims. While these matters were impending the plaintiff in the month of September, 1910, received a telegram from Mr. Dolbeer requesting him to be formally associated with Mr. Harwood in the pending action in the federal court, and he thereafter appeared as representing the plaintiff (this defendant) therein, and also acted as its counsel in the various other difficulties in which it either was or was likely to become involved. In the month of December, 1910, the defendant held a corporate meeting in the city of San Francisco, at which its board of directors was filled out so as to consist of directors Boyes, Dolbeer, Simon, Philips, and Bartholomew, Dr. Boyes being elected president of the corporation, and Mr. Dolbeer vice president and general manager. A few days thereafter Mr. Dolbeer and director Philips visited the plaintiff's office in said city for the purpose of making an agreement covering his compensation for his past and future services, at which time the plaintiff said to Dolbeer and Philips that his fee would be $40,000 for his past services and his future services in the foreclosure suit. After some discussion a written contract was executed on behalf of the California Trona Company by said Dolbeer as its manager, which provides as follows:

> "That for and in consideration of the legal services heretofore rendered by said Countryman to said California Trona Company, and for the legal services to be rendered by said Countryman as such attorney at law, in the suit pending before the United States Circuit Court in and for the Northern District of California to foreclose the mortgage of the Foreign Mines Development Company on the property of said California Trona Company in San Bernardino county, California, there shall be paid to said Countryman the sum of forty thousand ($40,000) dollars in full settlement and discharge and satisfaction of all of said legal services.
>
> "In witness whereof the parties hereto have executed these presents the day and year herein first above written.
>
> "California Trona Company,
> "By C. E. Dolbeer, Mgr.
> "R. H. Countryman."

There is no evidence that Mr. Dolbeer was ever formally authorized by any resolution or other formal action of the board of directors of the defendant herein to enter into or execute this contract on its behalf, but there was evidence presented on the plaintiff's behalf tending to show that the subject and substance of this contract was made the subject of discussion and approval in various conversations between the plaintiff and a majority of the members of the defendant's board of directors, and was also discussed among themselves and with other persons. On January 17, 1911, at a general meeting of the stockholders and directors of the defendant, a resolution was offered by manager Dolbeer, and seconded by director Bartholomew, providing for the borrowing of the sum of $1,000 from Colonel Merrill and the giving of the corporate note therefor. The said resolution, as appears from the minutes of said meeting, certified to by its secretary, contained the following words:

> "Said money is for the purpose of making a partial payment to Robert H. Countryman on account of his agreement for his legal services rendered to this company."

There is evidence both ways as to whether the above-quoted clause was a part of said resolution at the time of its adoption, and there is also much evidence pro and con with reference to the several conversations with and among the directors of the corporation with reference to the existence and terms of the plaintiff's written agreement. During the year 1911 the defendant was passing through a series of internal convulsions arising out of the efforts of contending factions among its stockholders to obtain control of it, the faction seeking to overthrow its existing board of directors being led by one Guy L. Wilkinson, who was counsel for the Foreign Mines Development Company in its litigation with the defendant. This faction at length succeeded in accomplishing its object in the month of May of that year, and, after electing a board of directors to its liking, proceeded to notify the plaintiff herein and others who had been acting as counsel for the defendant that their services would be no longer required. The respondent herein admits receiving such a notice on October 4, 1911. This action was commenced on May 17, 1913.

As to the first contention of the appellant with respect to the insufficiency of the evidence as to the amount and value of the services of the plaintiff to the defendant to justify the general verdict of the jury rendered herein, and also as to the creation and ratification of the aforesaid written agreement, we are of the opinion, after a careful review of the entire record, and a consideration of the extended comments of counsel thereon, that the evidence in respect of these matters is in such general and substantial conflict that we would not be justified in any attempt to review or overthrow the unanimous verdict of the jury in favor of the plaintiff upon these contested issues; nor to attempt to review or reverse the order of the trial judge who, after hearing all of the evidence which was presented to the jury and all of the objections and arguments urged by the defendant against its sufficiency, denied the defendant's motion for a new trial.

[1, 2] The defendant further contends that the plaintiff herein was not entitled to recover upon his first cause of action for two main reasons, the first of which is that the written agreement upon which the plaintiff predicates his first count or cause of action was not shown to have been executed on behalf of the corporation defendant by any one having authority so to do. It is conceded by the respondent that Mr. Dolbeer, the general manager of the defendant, would not have been authorized by the scope of his powers as such to bind the corporation by such an agreement; but the respondent maintains that there is sufficient evidence in the record to show that the agreement was after its execution discussed with and made known to and approved by a majority if not all of the directors of said corporation, and that with such knowledge and approval the plaintiff was permitted to proceed with the performance of the services specified therein under such circumstances and for such length of time as to constitute a ratification of the execution and terms of such agreement. Upon these matters of fact the evidence, as we have seen, is in substantial conflict, and hence the finding of the jury in plaintiff's favor thereon will not be disturbed. It is well settled as a matter of law that the agreement of a corporation entered into by its manager without authority sufficiently ample to enable him to execute the same may be approved and ratified so as to become binding upon such corporation through the knowledge, approval, and consent of a majority of the membership of the board of directors acting individually and informally, particularly where, as in this case, the plaintiff has been permitted to continue in the open and active capacity and service of an attorney for the corporation without objection or inquiry as to the existence or terms of his engagement so to do. Brown v. Crown Gold Milling Co., 150 Cal. 376, 89 Pac. 86; Scott v. Superior Sunset Oil Co., 144 Cal. 140, 77 Pac. 817; Gribble v. Columbus Brewing Co., 100 Cal. 67, 34 Pac. 527; Goodwin v. Central Broadway Building Co., 21 Cal. App. 376, 131 Pac. 896; Reardon v. Richmond Land Co., 21 Cal. App. 357, 131 Pac. 894; Allen v. Central Counties Land Co., 21 Cal. App. 164, 131 Pac. 78.

[3] The second contention of the appellant with respect to the plaintiff's first cause of action is that, even conceding the due execution or subsequent ratification of the plaintiff's written contract, he would not be entitled to recover the sum specified on its face as the agreed amount of his compensation, but at most only the reasonable value of his services rendered thereunder; and the appellant urges in support of this contention that since at the time of the execution of said written agreement the relation of attorney and client had already been created between the plaintiff and defendant the law governing such relation requires that the attorney, standing already in a confidential relation to his client, is bound to the exercise of the utmost good faith in the matter of making a formal contract for his fees, and hence would be precluded from the recovery of more than a reasonable sum for any services rendered or to be rendered under and by virtue of his written agreement, without regard to its attempted fixation of their value.

It would be a sufficient answer to this contention to say that, conceding the law to be as counsel for the appellant asserts it to be, there is sufficient evidence in the record before us to sustain a finding of the jury that the amount of the plaintiff's claim was the reasonable value of his services, were it not for the fact that, as the appellant points out, the court in its instruction numbered 2 to the jury seems to lay down a different rule. In that instruction the court stated to the jury that if they should find from the evidence that there was a written contract, whereby the defendant corporation agreed to pay the plaintiff the sum of $40,000, and if they should also find that the plaintiff fully performed all of the services he was to perform under said written contract, then they need not consider or go into the matter as to whether the plaintiff's services were reasonably worth said or any other sum, but their verdict should be for the full sum provided for in said contract less whatever sums had been paid on account thereof. It is true that the trial court gave this instruction, and it is also true that it is in seeming variance with the equitable rule governing the relations of attorney and client invoked by the appellant as above set forth; but an examination of the cases cited by the appellant's counsel in support of this rule satisfies our minds that the equitable principle it embodies, however sound in the abstract, is not to be given universal application to every agreement made between attorney and client while the relation exists, but only to those agreements where the circumstances under which they are entered into disclose some special reason for its application—as where the written contract provides for greater compensation than was either expressly or impliedly agreed upon prior to the existence of the confidential relation (4 Cyc. 961); or where special relations of confidence exist; or where the client had no other independent legal adviser; or where there was some failure on the part of the attorney to make full disclosure to the client as to the extent of the services required. None of these special conditions requiring an equitable scrutiny of the written contract between plaintiff and defendant herein exists in this case. The latter was already possessed of other counsel as of a time prior to the inception of the plaintiff's services, and was thus in a position to be fully advised as to their past as well as prospective value. Both of the parties to the contract understood what legal services plaintiff had already performed, and what further services he was to perform in the particular action to which the contract referred. The parties stood in no special confidential relation to each other which would give rise to either opportunity or imputation of any undue influence attending the making of the written agreement as to the amount of plaintiff's fees. It may well, therefore, be questioned whether the abstract principle for which the appellant contends is to be given application to the facts of the case at bar so as to relieve the appellant from compliance with the precise terms of its written contract.

[4] But, aside from these considerations, we are satisfied from an examination of the whole body of the trial court's instructions that the jury could not have been misled by any defect in the foregoing instruction, for the reason that the court gave every instruction requested by the defendant, and in so doing fully and repeatedly instructed the jury that the utmost limit of the plaintiff's recovery in this action was the reasonable value of his services. In the light of these repeated admonitions to the jury, we cannot say that the alleged defect in the instruction which the appellant especially assails was sufficiently prejudicial to require a reversal of the case.

[5] In addition to this, it may be stated that it was a conceded fact in the case that the plaintiff was discharged by the defendant without cause and before the full measure of the services contemplated by the written agreement had been performed. Under these conditions plaintiff would not be required to allege or prove the reasonable value of services which he was not permitted to perform, but would be entitled to count upon his contract; and in this connection we think the trial court correctly instructed the jury that if they should find from the evidence that the plaintiff had been discharged without cause, and thus prevented from the full performance of his agreement, he would be entitled to recover the full amount agreed upon by its terms.

Without undertaking herein to review the entire body of the instructions of the trial court in this case, or to consider in detail the several other criticisms which the appellant aims at them, we will dispose of this branch of the case with our conclusion that, taken as a whole, the instructions given by the court to the jury were in a remarkable degree full, fair, lucid, and free from confusion, and that we are entirely satisfied that the jury were in no way misled thereby to the appellant's injury.

[6] The appellant makes the further contention that its demurrer to the plaintiff's complaint upon the ground of uncertainty should have been sustained. There are some uncertainties in the allegations of both counts of said complaint with respect to the specific services performed by the plaintiff which might well have been removed by a further amendment to his complaint; but the record shows that at some time during the pendency of the action the defendant was furnished by plaintiff with a bill of particulars which set forth specifically the services upon which his claim for compensation was based, and which in that respect eked out the uncertainties in his pleading. The items of this bill of particulars were made the subject of exhaustive examination during the trial; and there can be no contention that the defendant was in any way injured by the alleged uncertainties in the plaintiff's original pleading. This being so, the objection which is now urged thereto cannot be relied upon for a reversal of this case.

There are a large number of other exceptions and objections to the regularity of the trial of this cause which it would be unprofitable, not to say impossible, to review in detail. It is sufficient to say that in our opinion none of these go to the substantial merits of this controversy, or furnish a sufficient reason for the reversal of this cause upon appeal. The case was fully, fairly, and ably presented before an impartial judge and before a jury called at the defendant's own suggestion, and against the fairness of which no hint of bias or prejudice is urged. This being the case, we have been able to discover no sufficient reason why the verdict of the jury and the judgment and order of the trial court should be disturbed upon appeal.

Judgment and order affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(35 Cal. App. 681)

LONDON & LANCASHIRE INDEMNITY CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 2350.)

(District Court of Appeal, First District, California. Dec. 27, 1917. Rehearing Denied by Supreme Court Feb. 25, 1918.)

MASTER AND SERVANT 🔑375(1)—WORKMEN'S COMPENSATION ACT—INJURY ON HIGHWAY —"TRAVELING EMPLOYÉ"—"EMPLOYÉ."

An employé of an iron works, whose duties were to assist in the manufacture and assembling of machinery, and who, whenever the works secured a contract for the installation of machinery in any particular place, was required to go to that place for such purpose, was a "traveling employé," so that he was entitled to compensation under Workmen's Compensation Act (St. 1913, p. 279), for injuries sustained on the public highway while traveling to a town in course of his employment in an automobile.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

Proceedings for compensation under the Workmen's Compensation Act by S. M. Summers, the employé. Compensation was awarded by the Industrial Accident Commission, and the London & Lancashire Indemnity Company, etc., the insurer, and another petition for certiorari to review the order of the Commission. Writ denied.

Redman & Alexander, of San Francisco, for petitioners. Chris. M. Bradley, of San Francisco, for respondents.

PER CURIAM. The facts of this proceeding are these: The respondent S. M. Summers was employed by the California Iron Works as a millwright. His duties were to assist in the manufacture and assembling of machinery. Whenever his employer secured a contract for the installation of machinery in any particular place Summers was required to go to that place for that purpose. He thus traveled from place to place for his employer, and was allowed pay for the time consumed in making these journeys, and also was allowed a sum to pay his traveling expenses. In going and coming he was allowed to use any means of conveyance he desired. At the time of the injuries for which he sought compensation he had been directed to go to the town of Alhambra, and undertook to make the journey in an automobile belonging to his son. During the trip Mr. Stamm, the manager of the employer, preceded Mr. Summers and his son in another machine, directing the journey and showing them the road. While on the way the automobile in which Summers was riding turned over and he sustained the injuries for which he seeks compensation. The Industrial Accident Commission allowed him compensation upon a showing of the foregoing facts.

The petitioner herein seeks to have reviewed the order of the commission in that regard, basing its application upon the contention that the undisputed evidence showed that the injury did not arise out of the applicant's employment, for the reason that the risk of injury to which the applicant was exposed was one of those common risks to which the public generally are exposed, and to which every employé who travels the streets or highways in any sort of vehicle going to or returning from his work is exposed. On behalf of the respondent herein it is conceded that the general rule governing ordinary cases arising under the Workmen's Compensation Act is that for which the petitioner herein contends; but the respondent herein argues, we think convincingly, that the facts of this case bring it within the exceptions to the general rule. The exceptional cases are those wherein the employment itself is one in which the employé is required to travel from place to place at the will of the employer, and hence where the risks of such travel are directly incident to the employment itself, and hence wherein the accident occurring by reason of such risk is one arising out of the employment, and therefore a proper subject of compensation under the Employers' Liability Act.

The evidence in this case shows that the employment of the employé was in the nature of a traveling employment. It differed from the employment in the case of Hopkins v. Michigan Sugar Co., 184 Mich. 87, 150 N. W. 325, L. R. A. 1916A, 310—upon which the petitioner herein strongly relies—in the respect that in that case the injured employé was chief engineer of his employer supervising the installation and operation of machinery in six of its plants located in different cities, and that his injuries occurred while returning from a tour of inspection of one of these plants, and for which injury he was denied compensation; and also in the respect that the several places of his employment and service were at all times defined—the fact that there were several of them instead of one not preventing the application of the general rule; while on the other hand, in the case at bar the particular destination to which the employé should go from time to time in the course of his duty was not defined in advance, but was the subject of selection and direction from time to time by the employer to an extent which rendered the travel of the employé to such places a part of the employment itself sufficient to bring him within the category of a traveling employé, and thus to make this case one of those exceptional cases to which the general rule for which the petitioner herein contends has no application.

We are of the opinion that the evidence in this case fully sustains the position for which the respondent herein contends, and that the following authorities as a matter of law support that contention: Garratt-Callahan Co. v. Industrial Accident Commission, 171 Cal. 334, 153 Pac. 239; Brown v. Indr. Acc. Comm., 163 Pac. 664; Cameron v. Pillsbury, 173 Cal. 83, 159 Pac. 149; Kunze v. Detroit Shadetree Co., 192 Mich. 435, 158 N. W. 851, L. R. A. 1917A, 252; Milwaukee v. Althoff, 156 Wis. 68, 145 N. W. 238, L. R. A. 1916A, 327.

It follows that the writ should be denied, and it is so ordered.

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35 Cal. App. 684

PRINCE v. SELBY SMELTING & LEAD CO. (Civ. 2247.)

(District Court of Appeals, First District, California. Dec. 27, 1917.)

Brokers ⟹64(2)—Right to Commissions—Failure of Purchaser to Perform.

After a contract was made for the sale of property providing for payment in installments, and that the vendor's obligations thereunder should cease on the purchaser's default, an agreement was made between the vendor and a broker, providing for payment of the broker's commission when payments of $5,000 and $10,000 were made by the purchaser, and specifically providing that, if the purchaser failed to carry out his contract, the broker should not be entitled to commission beyond the amount due at the time of the purchaser's default. *Held* that, where the purchaser was unable to make the payments of $5,000 and $10,000, and the vendor extended the time of payment on condition that if the payments were not made at the time as so extended the contract would lapse, and the payments were never made, the vendor was not liable to the broker for commissions because of the extension of time or because the broker had no notice thereof when the extension was made.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Charles M. Prince against the Selby Smelting & Lead Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Finlay Cook, of San Francisco, for appellant. Chickering & Gregory, of San Francisco, for respondent.

PER CURIAM. This is an action by plaintiff as a real estate broker to recover commission alleged to be due him for effecting a sale of real estate belonging to the defendant.

There is no dispute as to the facts, and the proposition of law involved is simple. The following is a brief synopsis of the steps in the transaction: On May 28, 1914, the defendant gave to the plaintiff a letter which in effect provided that if certain options theretofore given to plaintiff by the defendant, and which by their terms expired on June 15, 1914, were accepted, plaintiff should be allowed 5 per cent. commission, of which, should the sum of $7,500 be received by defendant, on account of a sale of the land made pursuant to said option, on or before June 15, 1914, $1,500 should be paid to plaintiff on account of said commission. On June 8, 1914, the defendant entered into a contract with A. D. Bowen, a prospective purchaser introduced by the plaintiff, for the purchase of the property involved, which contract departed from the terms of said options, and stipulated that the total purchase price should be $63,500, payable as follows: June 11, 1914, $1,000; September 1, 1914, $5,000; November 1, 1914, $10,000; November 1, 1915, $23,750; November 1, 1916, $23,750; and also provided that if the purchaser should fail to make the payments due on or before the 1st day of September, 1914, or on or before the 1st day of November, 1914, any payment theretofore made should become the property of the vendor, and all obligations under the agreement should cease and determine. Bowen paid the $1,000, the first amount due, but no further payment was ever made on account of the contract. On June 12, 1914, the defendant wrote to the plaintiff a letter which, after referring to the options held by plaintiff, and to which the letter of May 28th referred, set forth in detail the terms and dates upon which plaintiff's commission would become payable under the contract with Bowen—this rearrangement of terms and dates following the particulars in which the contract entered into with Bowen departed from the options upon which the letter of May 28th covering plaintiff's commission had been based—and stated that the first payment of commission would be made when the $5,000 due from Bowen on September 1, 1914, was paid, and that plaintiff was to receive the balance of his commission when Bowen made the further payment of $10,000 on November 1, 1914. It also specifically provided that if Bowen failed to carry out his contract concerning the payments due on November 1, 1914, and prior thereto, then the plaintiff should not be entitled to commission beyond the amount that might have been due at the time of Bowen's default. The terms of this letter as a modification of his original agreement as to commission were accepted by the plaintiff in writing. It thus appears that the obligations assumed by defendant to plaintiff by its letter of May 28th were by consent of both parties concerned superseded by the obligations created by the new agreement.

On September 1, 1914, the date upon which there became due from Bowen to the defendant the sum of $5,000, an extension of 30 days was granted to Bowen to make this payment upon his representation that he was unable to make it upon its due date. On November 1, 1914, the $5,000 still remaining unpaid, Bowen informed the defendant that he was unable to make either that payment or the one of $10,000 then also due, whereupon an extension of time until January 1, 1915, was granted upon the condition, however, that if these sums were not paid at that time, Bowen's contract would finally lapse.

As before stated, the payments were never made; so it appears clear that under the plain terms of the letter of June 12, 1914, the rights of the plaintiff terminated by the final default of Bowen. We see no merit in plaintiff's contention that the defendant, by granting to Bowen an extension of time in which to make his payments, became immediately liable to the plaintiff for his entire commission. It will be recalled that under this commission agreement the plaintiff was not entitled to anything unless Bowen paid $5,000 on September 1st. Therefore on that date, since Bowen had not made the payment, the defendant had a perfect right to terminate the contract, and by the express terms of the commission agreement the plaintiff would thereby have lost his rights to any commission; but, since the defendant did not elect to then declare the contract forfeited, but, on the contrary, gave Bowen some extensions of time, it is claimed that thereby the plaintiff acquired some rights superior to those which he would have enjoyed if the extensions had not been granted. Stress is here laid upon the point that the plaintiff was not informed of these extensions, at least at the time they were granted; but this is immaterial. The defendant could have declared Bowen's contract forfeited on September 1st, and there was no necessity on its part of notifying the plaintiff of that fact. Of course, if Bowen had paid his money during the time as so extended, then the plaintiff would have been entitled to his commission. In other words, this act of extension, so far from being in contravention of any of the rights of the plaintiff, was distinctly for his benefit. Before a party can complain of any modification to his agreement he must show some prejudice.

The case of Seymour v. St. Luke's Hospital, 28 App. Div. 125, 50 N. Y. Supp. 993, is referred to by plaintiff's counsel in his brief. On the particular points now under discussion that case is against him, because it was there held that the fact that the owner extended the time of the purchaser in which a payment must be made did not give the broker any additional rights, for it is only a change in the contract which puts it out of the power of the owner to convey that would cause injury to the broker. The court said:

> "The extension of the time, while it was a modification of the contract, was one which caused no injury to the plaintiff, but rather tended to benefit him, because the indulgence to Samuel rendered it more likely that he would have been able to carry the entire contract into effect; and when, after the modification, he failed to make any effort to perform the contract as modified, his position with regard to it was precisely the same as it would have been had he failed to perform the whole contract, and entitle himself to a delivery of the deeds on the 2d of January, 1895. In each case the contract was at an end if the defendant chose to consider it so. The plaintiffs surely can have no greater right to insist that the defendant violated its contract with Samuel to his hurt, because he forfeited the contract for failure to perform a part of it on the 2d of January, 1895, than he would have done had he failed to perform the whole of it. * * * The only thing that it [the vendor] bound itself to do by its contract with Seymour was not to do any act which would put it out of its power to carry a contract into effect when Samuel should offer to perform it, and, if it continued able and ready to perform so long as Samuel desired the performance to be had or was willing to perform on his part, it did all that Seymour could require. The modification of the contract therefore, did not affect the rights of the parties."

The Seymour Case was affirmed without opinion, and is reported in 159 N. Y. 524, 53 N. E. 1132. It was cited with approval in Larson v. Burroughs, 131 App. Div. 877, 116 N. Y. Supp. 358, in which the court said:

> "Before the plaintiff could recover, he must show either that the contract was carried out as indicated, or that nonperformance was the fault of the defendant."

The judgment is affirmed.

(35 Cal. App. 724)

GRAZER v. FLANAGAN et al. (Civ. 2241.)

(District Court of Appeal, First District, California. Dec. 29, 1917. Rehearing Denied Jan. 28, 1918.)

1. Landlord and Tenant ⇐150(1)—Landlord's Liability—Repairs.

At common law, a lessor is not bound to make repairs to a dwelling house, unless so required by express contract or covenant, the tenant taking the premises as they are, and having no right to involve the landlord in expenses for repairs without his consent.

2. Landlord and Tenant ⇐106, 150(5) — Failure to Make Repairs—Remedies of Tenant—Statute.

Civ. Code, § 1941, requiring the landlord to make a dwelling house fit for its purpose, which is limited by section 1942, giving the tenant the option, after notice, to make repairs at the landlord's expense, or to vacate the premises, control in the absence of express contract to repair, and thereunder the tenant may treat the landlord's failure to repair as a breach of the lease and vacate, or may himself make the repairs at the landlord's expense, after notice, provided they do not exceed one month's rent.

3. Landlord and Tenant ⇐154(2)—Failure to Make Repairs—Personal Injury—Liability.

A tenant or any member of his family sustaining personal injury from a breach of the landlord's covenant to repair cannot recover damages therefor in an action for breach of covenant.

4. Landlord and Tenant ⚷169(3)—Failure to Make Repairs—Personal Injury—Sufficiency of Complaint.

Complaint, in an action, construed as an action ex delicto to recover damages for personal injury to a tenant's child resulting from the landlord's negligent failure to make repairs, alleging the defect causing the injury to have been obvious and to have existed when the tenancy began, without alleging facts and circumstances which would relieve the plaintiff of the inference of contributory negligence, was insufficient.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Harold F. Grazer, by Annie M. Grazer, his guardian, against Theresa Flanagan and others. From a judgment entered upon an order sustaining the demurrer to plaintiff's amended complaint, plaintiff appeals. Affirmed.

Ostrander, Clark & Carey and A. J. Woolsey, all of Oakland, for appellant. Fitzgerald, Abbott & Beardsley, of Oakland, for respondents.

KERRIGAN, J. This is an appeal from the judgment entered upon an order sustaining defendant's demurrer to plaintiff's amended complaint in an action brought to recover damages for personal injuries.

The action is through the plaintiff's guardian, and the injuries are alleged to have been sustained by plaintiff as a consequence of an explosion of gas occurring upon certain premises which had been rented to the plaintiff's parents by the owners thereof to be occupied as a dwelling.

Stripped of legal verbiage, it appears from the complaint that on the 23d day of March, 1915, the plaintiff's mother and a real estate agent, one of the defendants, visited the house in question, and after an inspection of the same and some negotiations, it was agreed that the plaintiff's parents should become the tenants of the property at a monthly rental of $18.50; that while the rent should not commence until April the tenant should have the privilege of taking possession on the 25th of March, and it was further agreed that the owners of the property represented by the agent should place the premises in proper repair for habitation, and that they, through their said agent, "in particular did promise to place in proper condition for use a certain gas pipe in said dwelling house * * * which was at the time without a cap or other appliance to prevent the escape of gas." It is also alleged in the amended complaint that on said 25th day of March, while the plaintiff was assisting his parents in moving into the dwelling house, and while in that portion of the house in which said uncapped gaspipe was situated, there was an explosion of escaped gas from the uncapped pipe, which explosion caused the personal injuries set forth in the complaint. The demurrer was general and special, and the question presented by the record and the briefs is, Does the complaint state a cause of action against the defendants?

[1, 2] At the common law a lessor is not liable to make repairs to a structure rented as a dwelling house unless by force of an express contract or covenant; the tenant takes the premises for better or worse, and cannot involve the landlord in expense for repairs without his consent. Van Every v. Ogg, 59 Cal. 563. The Civil Code, however, in section 1941, provides that the lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it in a condition fit for such occupation, and repair all subsequent dilapidations thereof which render it untenantable. The succeeding section (1942) gives the option to the tenant, after notice to the landlord, to make repairs not requiring an expenditure of more than one month's rent, the same to be deducted from the rent, or to vacate the premises and be discharged from performance of the conditions of the lease. In the absence of an express contract relating to repairs, sections 1941 and 1942 control; and in such case it is held that the statutory liability of the lessor declared in 1941 is limited by the provisions of 1942, so that for failure to repair the lessee has either one of two remedies, viz.: (a) Treat the failure to repair as a breach of the lease and vacate the premises; or (b) himself make the repairs at the expense of the landlord after notice to him, providing they do not entail an expenditure of more than one month's rent. Van Every v. Ogg, supra; Sieber v. Blanc, 76 Cal. 173, 18 Pac. 260; Gately v. Campbell, 124 Cal. 520, 57 Pac. 567.

[3] If this is to be regarded as an action for damages for breach of the landlord's covenant to repair, the great weight of authority agrees that in such an action on the part of the tenant or any member of his family damages for personal injuries are not recoverable. 2 Underhill on Landlord and Tenant, p. 849; 18 Am. & Eng. Ency. of Law, 234, 235; Jones on Landlord and Tenant, § 592; Anderson v. Robinson, 182 Ala. 615, 62 South. 512, s. c. 47 L. R. A. (N. S.) 330, Ann. Cas. 1915D, 829.

[4] On the other hand, if this is to be taken to be an action ex delicto to recover damages resulting from the negligent failure of the landlord to perform his legal duty by making the repair in question, then we are satisfied that the complaint fails to state a cause of action, and hence that the demurrer was properly sustained. The defect to which the plaintiff attributes the injuries complained of is alleged to have been an obvious defect, and to have been known to exist before the tenancy in question began. Having thus averred the defect to have been obvious, it was incumbent upon the plaintiff to have further set forth in the complaint such of the

facts and circumstances attending and explaining the accident, if such exist, as would have relieved the plaintiff's case of the inference of contributory negligence, which otherwise would arise from his express averment of the obvious nature of the defect which was the immediate cause of the injuries complained of. Having failed or being unable to do this, the complaint did not state a cause of action. Hatch v. McCloud River L. Co., 150 Cal. 111, 88 Pac. 355; Callahan v. Loughran, 102 Cal. 476, 36 Pac. 835.

It follows that the trial court correctly sustained the demurrer to the amended complaint. The judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

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35 Cal. App. 380

TOWN OF SUISUN CITY v. PACIFIC GAS & ELECTRIC CO. (Civ. 1678.)

(District Court of Appeal, Third District, California. Aug. 6, 1917. On Petition for Rehearing, Sept. 5, 1917. On Rehearing, Nov. 22, 1917. Rehearing Denied by Supreme Court Jan. 21, 1918.)

1. Municipal Corporations ⚷285 — Franchise for Supplying Electricity—Validity.

Under St. 1901, p. 265, § 1, as to granting by municipality of privilege to locate poles or wires for transmitting "heat and power" and sections 3 and 5 as to publication of the application for the franchise and percentage to be paid to the municipality, an ordinance, purporting to grant a franchise to construct and maintain poles and wires for the purpose of transmitting and selling electricity for "light and power" was void, in so far as it attempted to confer the privilege of furnishing electricity for lighting purposes, and a charge could only be made for the latter or "power" franchise, in view of Const. art. 11, § 19, granting to public service corporations engaged in the sale of electricity the right to enter the streets of a city and use the same for laying down pipes, etc., for the purpose of supplying electricity to the inhabitants for "illuminating" purposes.

2. Municipal Corporations ⚷285—Validity of Ordinance—Estoppel.

As plaintiff town had no power to charge a percentage on the gross annual receipts arising from the operation of an electric system for lighting, defendant, owner of the system, would not be estopped to deny that so much of an ordinance as attempted to impose such charge was unenforceable.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Town of Suisun City against the Pacific Gas & Electric Company. From the judgment rendered, defendant appeals. Modified and affirmed.

Wm. B. Bosley and Leo H. Susman, both of San Francisco, for appellant. Theodore W. Chester, of Sacramento (George J. Raymond, of Sacramento, of counsel), for respondent.

BURNETT, J. This appeal is from a judgment for $927.84 and interest upon an agreed statement of facts submitted to the superior court of Solano county pursuant to section 1138 of the Code of Civil Procedure. Since 1884 the town of Suisun City has been a municipal corporation of the sixth class, and has never owned nor controlled any public works for supplying artificial light. From September, 1900, until June 1, 1910, one Leonard Prior owned and operated an electric distributing system embracing poles and wires suspended therefrom, constructed on the streets and highways of said town, and used for supplying the town and its inhabitants with electric light and power. On January 3, 1905, the board of trustees adopted an ordinance purporting to grant to Prior and his assigns the franchise to construct and maintain poles and wires upon said streets for the purpose of transmitting electric energy, and to sell and dispose of electricity for light and power. Section 12 of the ordinance provides that the successful bidder and his assigns must, during the life of the franchise, pay to said town 2 per cent. of the gross annual receipts arising from the use, operation, and possession of said electric system. On June 1, 1910, Prior sold to defendant said electric plant and business connected therewith and all the rights granted to him by section 19 of article 11 of the Constitution of this state, and whatever franchise he received by virtue of said ordinance of January 3, 1905. Ever since said June 1, 1910, the defendant has owned and operated all of said property for the purpose of supplying said town and its inhabitants with electric light and power, no poles or wires being used exclusively for light or power purposes, the electricity for power and for light being delivered, measured, and charged for separately, and the receipts therefor being kept in separate accounts.

The contention of defendant, as set forth in said agreed statement of facts, is that said ordinance could and did legally grant only a franchise for the purpose of transmitting electric power, and obligated the holder thereof to pay to said town 2 per cent. only of the gross annual receipts from the sale of said power, and could not, and did not legally, obligate the holder thereof to pay any percentage for the sale of electricity for lighting purposes, as the franchise and privilege of using said streets and highways for the purpose of furnishing illuminating light were granted by section 19 of article 11 of the state Constitution. On the other hand, plaintiff contends that said ordinance could and did legally grant the franchise to construct, erect, and maintain said poles and wires for both of said purposes, and obligated the holder thereof to pay said percentage of the sales for power and light to said town and its inhabitants.

Another position taken by respondent is "that, even if the lighting privilege is covered by the Constitution, the gas company admittedly received a franchise it was not entitled to under the Constitution, to wit, the power privilege, and this is ample consideration for the obligation to pay 2 per cent. of the total receipts, as provided in the franchise, which is a contract between the parties. Furthermore, the gas company is now estopped from attacking the validity of this provision." As indicating the scope and purpose of said provision, reference is made by respondent to the debate in the constitutional convention wherein was no allusion to electricity, but the subject was treated as though the privilege of furnishing gas and water were the only consideration in the minds of the members of the convention. It is claimed, furthermore, that in consonance with a familiar rule of construction, the particular provision in the Constitution—"and of laying down pipes and conduits therein and connections therewith"—is a specific limitation upon the general words, "have the privilege of using the streets," and that "laying down pipes and conduits therein" cannot reasonably be construed as authorizing the construction and maintenance of poles and wires, and to so hold is to read into the Constitution something that its language does not import. In this connection, it is further asserted that "the provisions of the Constitution are mandatory, and the mode prescribed is the measure of power," and in further support of its contention, this general principle of construction is invoked, "that grants of franchises and special privileges by the state to private persons or corporations are to be construed most strongly in favor of the public, and that where the privilege claimed is doubtful, nothing is to be taken by mere implication as against public rights."

[1] The position of respondent is clearly stated, strongly argued, and imposingly supported by respectable authority, and there is much reason for the view that it constitutes a correct exposition of said constitutional provision, but the question has been decided otherwise by the Supreme Court, and we are bound by that decision.

In Pereria v. Wallace, 129 Cal. 397, 62 Pac. 61, the Supreme Court held that said constitutional section included electric lights. It declared unconstitutional the sale of franchise act of 1897 in so far as it attempted to make the right or franchise to erect poles or wires for lighting purposes the subject of competitive bidding; and it affirmed the judgment of the lower court, ordering a writ of mandate to issue, requiring the defendants to grant to plaintiff the privilege of erecting and maintaining poles and wires along the streets of said town for the purpose of conveying electricity for power and lighting purposes to be furnished to the inhabitants thereof.

It is claimed by respondent that the question before us was not raised or discussed in that case, and, therefore, the decision should not be considered as controlling. It is true that appellant claimed a reversal on other grounds, and to them the opinion was specifically addressed, but whether the constitutional provision was broad enough to include the franchise in question was so fundamental and obtrusive as necessarily to challenge the attention of the court. It could hardly be overlooked, and it is altogether probable that of its own accord and for that reason the court would have reversed the cause if it had deemed the franchise not embraced within said provision of the Constitution. In the course of said opinion it is declared:

> "The Legislature, therefore, cannot modify or change the provisions of said section 19, article 11, above quoted, as to the privilege or franchise of supplying the town of Etna with artificial light. The Constitution intended that there should be no restriction upon competition in supplying these prime necessities as would necessarily result if the privilege could only be granted to the highest bidder, for such bidder would necessarily secure an exclusive right to the exercise of the franchise; the only condition imposed by the Constitution being the right of the municipality 'to regulate the charges thereof.'"

If the franchise to erect and maintain poles and wires for the purpose of furnishing electricity for lighting purposes was conferred by said provision of the Constitution, the attempted grant of said privilege by said ordinance of respondent was necessarily ineffective and void, and the only franchise thereby conveyed was for the construction and maintenance of pole and wire lines for transmitting electric power, and it would follow, of course, that a charge could be made by the city only for the latter franchise, and that no burden or obligation could be legally imposed upon appellant for the lighting franchise other than what is permitted by said section of the Constitution, which does not include the payment of any percentage or other sum, but is limited to enacting measures relating to damages to the streets and indemnity therefor. In Re Johnston, 137 Cal. 115, 69 Pac. 973, it is said:

> "The designation of 'damages and indemnity for damages' as the subject upon which the municipality may prescribe regulations in regard to laying the pipes is a limitation upon its authority over the matter, and a prohibition from prescribing regulations upon any other subject connected with the exercise of the privilege. When the sovereign authority of the state, either in its Constitution or through its Legislature, has created a right and expressed and defined the conditions under which it may be enjoyed, it is not within the province of a municipality, where such right is sought to be exercised or enjoyed, to impose additional burdens or terms as a condition to its exercise."

And it was held by this court in Town of St. Helena v. Ewer, 26 Cal. App. 191, 146 Pac. 191, that the rule is not affected by the fact that the applicant for a franchise granted by said section of the Constitution agrees to pay a certain percentage of his gross earnings arising from its use to the municipality which attempted to grant such franchise. Therein it is said:

> "The contention that the claim may be enforced as the subject of private contract between

Ewer and the town cannot be maintained. The facts alleged show beyond dispute that in dealing with the public, * * * the municipality was acting in its legislative capacity, and that its action is not referable, for its support, to the power of making contracts. * * * Plaintiff cannot avoid the restraining effect of the Constitution by attempting to convert its legislative acts into the contracts. * * * We cannot escape the fact that the grant was made on condition that the grantee pay for the privilege granted—a condition, as we have seen, which is beyond the power of the municipality to impose."

But it is not disputed that by said ordinance the board of trustees granted to Prior and his assigns a franchise to erect and maintain poles and wires for the purpose of furnishing electric power, and that the right existed to charge for this privilege as provided by the statute in force at the time of said grant, and the inquiry then is whether any part of the receipts from the exercise of the lighting franchise may be included in the consideration for the grant of this power privilege. The statute itself provides the terms and conditions upon which said franchises may be granted, and it will not be disputed that the municipality must be guided and controlled by the provisions found therein. The first of these acts, commonly known as the "Sale of Franchise Acts," was passed by the Legislature in 1893 (St. 1893, p. 288). It is entitled "An act providing for the sale of railroad and other franchises in municipalities, and relative to granting of franchises," and it provided for the public advertising of the fact that an application for a franchise had been made, and that the franchise must be awarded to the highest bidder. This was followed by the enactment of 1897 (St. 1897, p. 135), entitled "An act providing for the sale of street railroad and other franchises in municipalities, and providing conditions for the granting of such franchises by the legislative or other governing bodies, and repealing conflicting acts." This act also provided for public advertising of the fact that an application for a franchise had been made, that no bids will be received of a single sum or amount stated, but that all bids must be for the payment of a stated per cent. of the gross annual receipts of the person to whom the franchise is awarded, arising from its use, operation, or possession, but such percentage shall in no case be less than 3 per cent. per annum of such gross receipts. The statute, in so far as it provided for offering lighting franchises for sale to the highest bidder, was declared in Pereria v. Wallace, supra, to be unconstitutional, as conflicting with said section 19, art. 11, of the Constitution. The next act, and the one under which the sale was made in the present instance, was passed in 1901 (Stats. 1901, p. 265) and is entitled "An act providing for the sale of street railroad and other franchises in municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies, and repealing conflicting acts."

Section 1 of said act is as follows:

"Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street railroads upon any public street or highway, to lay gas pipes for the purpose of carrying gas for heat and power, to erect poles or wires for transmitting electric heat and power along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by boards of supervisors, boards of trustees or common councils or other governing or other legislative bodies of any city and county, city or town within this state, except steam railroads and except telegraph or telephone lines doing an interstate business, and renewals of franchises for piers, chutes or wharves shall be granted upon the conditions in this act provided, and not otherwise."

It is to be seen that no mention is made therein of any franchise for laying water pipes or laying or erecting pipes or structures for furnishing light. This, no doubt, was in consequence of the decision in the Pereria Case, supra.

Said act provides also for public advertising of the application, and in section 3 thereof is this language:

"The publication must state the character of the franchise or privilege purposed to be granted, * * * and if it be a street railroad, the route to be traversed; that sealed bids therefor will be received up to a certain hour and day named therein, and that the successful bidder and his assigns must, during the life of said franchise, pay to the municipality two per cent. (2%) of the gross annual receipts of the person, partnership or corporation to whom the franchise is awarded, arising from its use, operation or possession. No percentage shall be paid for the first five years succeeding the date of the franchise, but thereafter such percentage shall be payable annually."

Section 5 of said act provides:

"Said advertisement shall also contain a statement that the said franchise will be granted to the person, firm or corporation who shall make the highest cash bid therefor; provided only, that at the time of the opening of said bids any responsible firm or corporation present, or represented, may bid for said franchise or privilege a sum not less than ten per cent. above the highest sealed bid therefor, and said bid, so made, may be raised ten per cent. by any other responsible bidder present, and said franchise or privilege shall finally be struck off, sold and granted by said governing body to the highest bidder therefor, in gold coin of the United States, and said successful bidder shall be required to deposit with said governing body, or such person as it may direct, the full amount of his or its said bid, within twenty-four hours thereafter; and in case he or it shall fail so to do, then the said franchise or privilege shall be granted to the next highest bidder therefor."

From the foregoing, it is quite apparent that the consideration for the sale, as far as it is to be determined by the action of the governing body of the municipality, is to be for a stated amount to be paid in cash immediately. In other words, in case there be competitive bids, the municipal authorities have no discretion as to whom they shall sell the franchise, or upon what basis. They must sell—if they sell at all—for cash and to the highest bidder. Thompson v. Alameda

County, 111 Cal. 553, 44 Pac. 230. If there be no competitive bids, however, or no cash offer, they may grant to any applicant the franchise upon such reasonable regulations as they may prescribe, and upon the condition provided by the statute that the applicant pay to the municipality a certain percentage of the gross proceeds arising from the business of operating the franchise. The municipality has no contol over this percentage. It is not the subject of contract, but is fixed at 2 per cent. by the law. The basis upon which it is to be computed is equally clear. It is to be taken from the gross proceeds of the use and exercise of the franchise which is granted by said municipality. This means, of course, from the proceeds of the franchise which is *legally* granted by the authorities. No percentage can be charged against a franchise which already belongs to the applicant.

It is quite plain though, that by said ordinance the city board of trustees attempted to impose this percentage charge upon the applicant for the privilege of supplying electric light as well as the electric power. But the charge for the power was in excess of the allowance provided by the law, and is therefore void to that extent.

The fact is the sale of the franchise was not made for cash at all. The record does not even show that any bid was received for the same. Prior was and had been for years operating the plant, and there was probably no disposition to exact of him anything more than the percentage provided by the statute.

To recapitulate: The board of trustees attempted to grant two franchises. One of these, however, already belonged to the grantee by virtue of the provision of the Constitution, and, therefore, as to it said ordinance was inoperative. The franchise which was the subject of bargaining between Prior and the municipality was not sold for cash, but was transferred in consideration of the percentage provided by law. It is unimportant that said percentage was recited in the ordinance, as this added nothing to what is fixed by the statute. The case is exactly as though two separate ordinances had been passed, in one of which a franchise was granted to furnish electric light, and in the other, to supply electric power, and in each it was provided that the grantee should pay 2 per cent. of the gross proceeds to the city. Under the authorities, as we have seen, the attempted charge for the first would fail and only the second could be collected.

[2] As we have already intimated, Prior and the trustees no doubt believed that the town had the legal right to grant or withhold the lighting franchise. The parties, in other words, were acting under a mutual mistake as to their legal rights in the premises, and this accounts for the charge attempted to be imposed upon the exercise and operation of the electric light franchise. The mistake, though, would not prevent appellant from taking advantage of its legal rights when they were disclosed unless the doctrine of estoppel could be successfully invoked. But we can see no room for the application of such principle. Respondent cites, in this connection, such cases as Mayor, etc., of Borough of Rutherford v. Hudson River Traction Co., 73 N. J. Law, 227, 63 Atl. 84, wherein a street railroad franchise provided that the railroad company do certain macadamizing, and it was contended that the provision was ultra vires and void. Therein it was said:

> "But in our view it is not open to the traction company to raise the question that the grant of its local privileges and franchises was ultra vires the municipal corporation, while at the same time the company retains and enjoys those privileges and franchises. The plea of ultra vires is not admitted in such circumstances, except where it is practicable to restore the status quo ante, and we therefore think the present respondent is estopped from setting up that plea."

But herein the only privilege secured by Prior through the action of the board of trustees was to operate the plant for the purpose of furnishing electric power, and appellant does not claim that therein was the act ultra vires. If such claim were made, it is probable that it could not be maintained by virtue of the principle of estoppel. The doctrine, however, does not preclude the assertion of a right and privilege obtained from an entirely different source, nor does it affect contracts entered into beyond the range of municipal authority. In City of Arcata v. Green, 156 Cal. 759, 106 Pac. 86, it was said:

> "A party contracting with a city regarding a subject-matter within the scope of the city's powers may, where he has received the benefit of the contract, be precluded from asserting that the contract was not, on the part of the city, executed in the manner required by law. The doctrine, however, cannot be made to cover contracts entirely beyond the range of the municipal authority."

See, also, Foxen v. City of Santa Barbara, 166 Cal. 77, 134 Pac. 1142; Town of St. Helena v. Ewer, supra.

We can see no merit in the last two contentions of respondent, and as to the first, the law has been construed in this state in favor of appellant's claim.

The judgment should be reduced to $57.98, and as thus modified, it is affirmed, appellant to recover its costs.

We concur: CHIPMAN, P. J.; HART, J.

On Petition for Rehearing.

PER CURIAM. For the first time on petition for rehearing our attention has been called to the case of City of Hanford v. Hanford Gas & Power Co., 169 Cal. 749, 147 Pac. 969, L. R. A. 1915E, 165. It is claimed by the respondent that this case is directly in point and is at variance with the opinion heretofore filed by this court in the case at bar. There seems to be merit in the contention; and, in order that the important question herein involved may be further considered, especially in the light of the said recent decision of the Supreme Court, the petition for rehearing is granted.

On Rehearing.

PER CURIAM. A rehearing was granted in this case for the purpose of considering the case of City of Hanford v. Hanford Gas, etc., Co., 169 Cal. 749, 147 Pac. 969, L. R. A. 1915E, 165, which was called to our attention for the first time in the petition for a rehearing. We find nothing in said case which, in our judgment, militates against the views expressed and the conclusion reached in our former opinion. The question as to the right of a municipality to exact from lighting and other like public service corporations the payment of certain sums for a franchise to operate its business in municipalities was not raised, considered, or discussed in the Hanford Case, and it is therefore no authority for the position that municipalities may impose upon such corporations a charge upon gross receipts arising from the use of gas or electricity for lighting purposes. The cases cited in the original opinion filed herein seem clearly enough to hold that no charge for the use of gas or electricity for lighting purposes may, under the terms of section 19 of article 11 of the Constitution, as that section read when the franchise here involved was granted, be exacted from corporations furnishing the same in municipalities. Indeed, since the Constitution itself directly grants to public service corporations engaged in the generation and manufacture and sale of electricity and gas the right to enter the streets and other thoroughfares of a city and use the same for the laying down of their pipes, etc., for the purpose of supplying gas and electricity to the inhabitants of such city for lighting or illuminating purposes, we cannot see how it may or could consistently be held that the right so granted may in any way be hampered or impaired or qualified by any act of such city; and certainly such might well be held would be the effect of a ruling that the city may exact a charge from such corporations for supplying gas or electricity, or both, to the inhabitants of such city for use for illuminating purposes.

Therefore after a full consideration of the whole case, as it is submitted here, the justices of this court are of the opinion that the conclusion heretofore arrived at by this court, as expressed in the former opinion filed herein, is correct, and we, therefore, approve and adopt the opinion prepared by Justice BURNETT, and which was handed down and filed herein.

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35 Cal. App. 711

REYNOLDS v. E. CLEMENS HORST CO.

(Civ. 1731.)

(District Court of Appeal, Third District, California. Dec. 28, 1917. On Rehearing, Jan. 28, 1918. Rehearing Denied by Supreme Court Feb. 25, 1918.)

1. MASTER AND SERVANT 🔑281(7)—INJURY TO SERVANT—OBVIOUS PERIL—EVIDENCE.

In an action by a servant for injuries, due to her dress being caught by a revolving shaft while she was working on a hop-picking machine, *held*, under evidence, that plaintiff did not voluntarily place herself in way of an obvious and well-understood peril, so that she could not recover.

2. MASTER AND SERVANT 🔑204(1)—ASSUMPTION OF RISK—STATUTE.

Under Employers' Liability Act (St. 1911, p. 796), assumption of risk is no defense in an action by a servant for injuries.

3. MASTER AND SERVANT 🔑281(1, 8) — CONTRIBUTORY NEGLIGENCE — SUFFICIENCY OF EVIDENCE.

In an action by a servant for injuries, due to her dress being caught by a revolving shaft while she was at work on a hop-picking machine, evidence *held* to show that plaintiff did not voluntarily select an unsafe place in which to work, or adopt a dangerous method to discharge her duties.

4. MASTER AND SERVANT 🔑276(4)—CAUSE OF ACCIDENT—GUARDING SHAFT—EVIDENCE.

In an action for injuries sustained by a servant when her dress caught in a revolving shaft in a hop-picking machine evidence *held* to show that the accident would not have occurred if the shaft had been suitably protected.

5. MASTER AND SERVANT 🔑278(13)—DUTY TO PROTECT SHAFT—EVIDENCE.

In an action by a servant for injuries, due to her dress being caught by a revolving shaft, evidence *held* to warrant the conclusion that defendant employer should have protected the shaft.

6. MASTER AND SERVANT 🔑101, 102(10) — DANGEROUS MACHINERY—DUTY TO GUARD.

That the servant knew that the shaft was unprotected would not affect the duty of the master to properly guard the same; such fact bearing only on questions of contributory negligence and assumption of risk.

7. TRIAL 🔑260(8)—INSTRUCTIONS SUBSTANTIALLY GIVEN—REFUSAL.

Refusal of instruction that, if a witness has willfully and knowingly testified falsely, you may disregard, etc., was not prejudicial, where court instructed, in addition to elaborate instructions on credibility, that a witness false in one part of his testimony is to be distrusted in others.

8. TRIAL 🔑252(11)—INSTRUCTIONS—ASSUMPTION NOT SUPPORTED BY EVIDENCE.

Where there was no room for an inference that plaintiff servant, at the time of the accident, was at a place where she should not have been, an instruction based upon an assumption that such was the case was properly refused.

On Rehearing.

9. MASTER AND SERVANT 🔑349—INJURY TO SERVANT—LAW APPLICABLE.

Workmen's Compensation Act 1913 (St. 1913, pp. 279, 320) § 91, providing that the compensation provisions shall not apply to injuries sustained prior to the taking effect of the act, continues existing laws in force as to injuries sustained prior to the date the act became effective.

10. Constitutional Law ⇐106 — Master and Servant ⇐347 — Vested Rights — Workmen's Compensation.

Plaintiff employé's right to compensation under Employers' Liability Act of 1911 for injuries was a vested right, which could not be taken away by a repeal of such act, which constituted a part of plaintiff's contract with her employer.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Susan M. Reynolds against the E. Clemens Horst Company. Judgment for plaintiff, and defendant appeals. Affirmed.

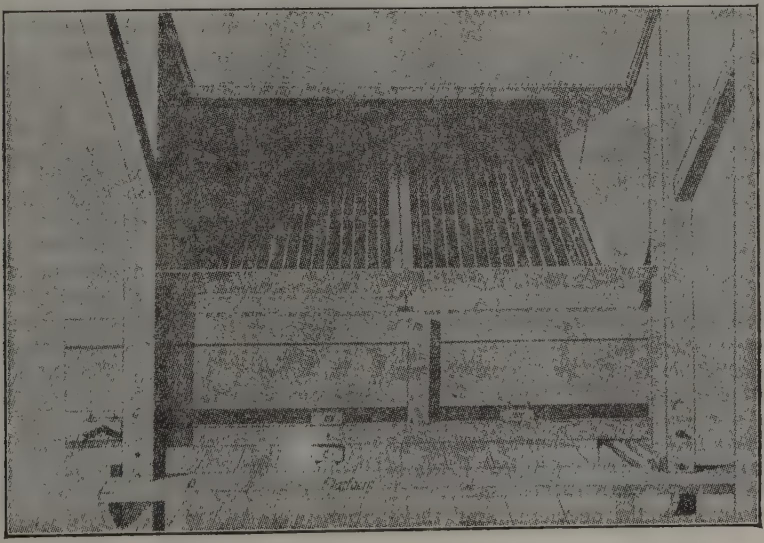
H. P. Andrews and W. A. Fish, both of Red Bluff, and Edward C. Harrison and Maurice E. Harrison, both of San Francisco, for appellant. Frank Freeman, of Willows, and James T. Matlock, of Red Bluff, for respondent.

BURNETT, J. Plaintiff had the verdict in an action for damages resulting from personal injuries. The accident was caused by her dress being caught by a revolving iron shaft while she was engaged at work on a hop-picking machine, and she was seriously hurt. We attach hereto a diagram to illustrate the situation and to make clearer the testimony to which we shall refer. "A" represents the platform on which plaintiff stood, "B" the shaft on which her dress was caught, "C" the south post, close to or against which she stood when her clothing came into contact with the shaft, "D" the grate, with its iron bars, on which the hops fell from above, "E" the post at the north end of the platform and distant from "C" nearly eight feet, "F" the brace to post "C." The platform was 20 inches, and the shaft 29¾ inches, from the floor. The south post, "C," was 5½ inches thick, the shaft was 4 inches distant from it, and it was 7 inches to said post from the bottom of the most southern iron rod in said grate.

That plaintiff's version of the accident may be understood, we quote from her testimony as follows:

> "I was standing upon that platform that comes along there in front of that grate, and my job was to pick the sticks and leaves off this grate and throw them behind me on the floor, and the hops was to be left on the grate, and that was my orders, and this stick was furnished to us to poke the hops down when they come on the machinery, and if the hops caught above the machine we were to take the stick and shake it along until the hops went through, and we was to walk up and down on this thing and pick these hops out. We were not pickers, but we was to walk backwards and forwards and see the hops went through, and if any stems or sticks, to throw them off on the floor, and when we got that done, to go back on the other end and clean it out the same way, and so I was walking from this end to this end, and up in the corner sometimes they would fall in bunches as big as that (illustrating), and there was a big bunch sticking there that didn't fall down, and so I took this stick here and was reaching up like that to pull the hops down, and when I came back from pulling the hops down, when the bunch fell in front of me on the grate, I felt something pull on the left-hand side of my dress, and of course you would always think something, and I thought somebody went along there and touched me, and I never thought of the machinery I was tangled up in, and when I felt that, I turned to see who was behind me, and just at that I noticed my dress was on the shaft, and I didn't think then or realize my dress was tangled in the shaft, and just as I felt it pull I looked around and felt myself going, and put my hands up, thinking I would grab something to save myself falling, and I was pitched up in the air and came down on the floor as hard as I could come."

She testified that she had seen this shaft and others, but had no idea that she could ever get connected with it in any way; that she never thought about it, it had never entered her head that there was any danger there; that she thought the foreman who put a lady to work there would not put her where she could get connected with any machinery; that anybody could see the



shaft. There was nothing to prevent her from seeing it when she was on the floor, but, when she was working on the platform, she could not see it unless she leaned over, but she could not do that. Being a short woman, she had to come to the end of the platform to reach up and pull the hops down, and sometimes had to "reach quite a bit to take them down." And in answer to the question by appellant's counsel, "Will you explain to me why it was necessary for you to go so close to that revolving shaft at the extreme south end of that bin that your clothing could in any way become caught in that revolving shaft?" she replied:

> "When I was just as far as I could get to the end of these grates here, and had that stick, I couldn't possibly reach this place up here; I had tried it, and even had to get on my tiptoes several times to hammer at a bunch of stuff up there to compel it to come down. I didn't know the distance from there up there, because I never measured it; but when I was standing as near as I could get to this end, I have often stuck my shoulder under that thing—that is how high it was to me—I have often stuck my shoulder under that thing there, and reached this way (indicating) to get those things down, and when I would do that, sometimes I would have to reach four or five times, and hammer at it to get it started down. That is the reason why I had to go up so close to that end."

[1] She also testified that she was not warned of any danger, and that she had to work rapidly at her task to keep the grate clear. We do not think it can be said that respondent "voluntarily placed herself in the way of an obvious and well-understood peril," and must therefore suffer the consequences of her conduct. The case seems quite different from those like Brett v. Frank Co., 153 Cal. 267, 94 Pac. 1051, Ergo v. Merced F. G. & E. Co., 161 Cal. 334, 119 Pac. 101, 41 L. R. A. (N. S.) 79, Bressette v. Stone, 162 Cal. 74, 121 Pac. 312, and Andrews v. Valley Ice Co., 167 Cal. 11, 138 Pac. 699. The situation here is more like that presented in Davis v. Pacific Power Co., 107 Cal. 563, 40 Pac. 950, 48 Am. St. Rep. 156, and kindred cases. It may indeed be said that the danger here was not so obvious as in the Davis Case. The shaft that caught plaintiff's clothing was not quite an inch and a half in diameter, and it projected about six inches beyond the easterly side of the post "C." It was revolving rather slowly, and it did not present a necessarily dangerous aspect. Indeed, it is quite likely that, if it had been a man whose clothing was brought into contact with the shaft, no injury would have been produced. And it is safe to say that plaintiff might have been placed in a similar position many times without suffering any inconvenience. It is to be remembered that what is called the shaft, as far as the exposed portion is concerned, was a mere rod exhibiting but small centripetal force, and not presenting any complication by reason of cogs or a belt or other mechanical contrivance. The chances were rather against the happening of such an accident, and there would probably be more reason for the contention that appellant was not guilty of negligence in leaving the shaft exposed than for the position upon which so much emphasis is laid that the situation presented "an obvious and well-understood peril." However, as to this, we are satisfied that there was ground for the holding that appellant was derelict in not more carefully guarding against such contingency as was developed. In this connection we may state that the probability of an accident was somewhat increased by the irregularities on the surface of said shaft, it having been "chewed up with a Stilson wrench," as stated by one of the witnesses.

But if we concede that, to one familiar with machinery and the laws appertaining to mechanics, the situation might appear obviously dangerous, it does not follow that plaintiff understood, comprehended, and appreciated the peril. It is a reasonable conclusion from her evidence that her lack of understanding of whatever peril existed was such as to relieve her of the charge of contributory negligence in continuing her employment in such close proximity to the shaft; for at the time plaintiff was injured, in order to charge her with culpable conduct according to the requirement of the existing law, it was necessary for her, not only to know the unsafe condition of the machine, but that she consented to work in the place of danger after full comprehension of the risk which she thereby incurred. Jacobson v. Oakland M. & P. Co., 161 Cal. 425, 119 Pac. 653, Ann. Cas. 1913B, 1194.

[2] Again, it is quite apparent that the position which she occupied while employed has an important bearing upon the question of the imminence of the peril. It was manifestly less dangerous than if she had been working nearer or over the shaft. Considering her position on the platform and the innocent appearance of the shaft, the danger should be denominated a hidden rather than an obvious one. But, after all, this contention of appellant resolves itself into the legal proposition that she assumed the risk of a known hazard; but this fact, as pointed out in Crabbe v. Mammouth Channel Gold Mining Co., 168 Cal. 500, 143 Pac. 714, and other cases, affords no defense under the Employers' Liability Act (St. 1911, p. 796) in effect at the time of the accident. Upon the theory that there was an obvious peril, the other important consideration is not whether she assumed the risk, but whether she was chargeable with negligence that contributed to her injury, and this depends upon what she was doing at the time. To determine this question, we must consider the character of the danger and other circumstances as we shall presently see.

We can see no merit in the point that she "voluntarily chose an unusual and more dangerous method to perform her duties when there were two or more safe ways known by and open to her." The declaration of appellant simply amounts to a specification of the manner in which she failed to exercise due care, and displayed a reckless disregard for her own safety. There are many cases illustrating such an exhibition of negligence, and no one would deny that she should not recover if her conduct was thus properly characterized by appellant. But we cannot say that the method employed by her in doing the work was unreasonable or improper or that she was not following in good faith the directions given her by the employer. Her explanation of the occurrence is not improbable, and we must hold that she was acting as an ordinarily careful person would under the circumstances. In considering her account of the affair, we cannot lay out of view the circumstance that she was called upon to work rapidly, and that the emergency of the situation required her to move back and forth upon the platform in order to reach with the short stick which she used the different portions of the grate above. Even if she stationed herself closer to the shaft than appears now to have been necessary, the stress of the circumstances surrounding her would excuse the mistake. As to this, indeed, appellant attempts to demonstrate that she would have been nearer to the hops if she had stood several inches from said south post. This may be true, but, in view of the haste required, we cannot hold her to an exact computation of the respective distances.

[3, 4] Besides, her statement that it was necessary to take advantage of the brace is not unreasonable. We are satisfied it cannot be said that plaintiff voluntarily selected an unsafe place in which to work, or adopted a dangerous method to discharge her duties. Guided by her statements, we must conclude that she was without fault, and that the accident would not have occurred if said shaft had been suitably protected. "Just how this thing occurred," as said in the Davis Case, supra, may not be known. There is no doubt, however, that plaintiff's clothing came in contact with the shaft. This may have been caused by a sudden gust of wind, or by her sudden movement in reaching for the hops, and she may even have been standing close to the last rod on the grate, instead of against the post, as plaintiff thinks; but, at any rate, we cannot say that she did not act with due circumspection.

What has been said is probably a sufficient answer to the next proposition of appellant, that "no obligation rested on appellant to warn its employés of patent and obvious dangers." The principle may be accepted, but its application must be rejected. "The shaft was not a menace, in the sense that the likelihood of its catching her dress while she was at work in her bin was constantly, or occasionally, or ever, before her." The fact is that the position appeared to be safe, but in fact was somewhat hazardous, as shown by the accident. In principle the case is not unlike Crabbe v. M. C. G. M. Co., supra.

[5, 6] Nor do we think there is merit in the contention that, "under the facts established, no duty rested upon appellant to place guards on or around the shaft, and respondent was not unaware that guards had not been so placed." The latter clause may be accepted as true, but whether it was the duty of appellant to so protect the shaft is at least susceptible of an honest difference of opinion, and it is not an unreasonable conclusion, in view of the circumstances, that appellant should have taken this precaution for the safety of its employés. The fact that respondent knew that the shaft was unprotected does not affect the duty of appellant in the premises, but bears upon the consideration of "contributory negligence" or "assumption of risk," and of this nothing more needs to be said.

As to such duty of appellant, it is sufficient to cite Silveira v. Iversen, 128 Cal. 192, 60 Pac. 687; Davis v. Pacific Power Co., supra; Jacobson v. Oakland M. & P. Co., 161 Cal. 425, 119 Pac. 653, Ann. Cas. 1913B, 1194; Perry v. Angelus Hospital Ass'n, 172 Cal. 311, 156 Pac. 449. It is quite clear that the accident would not have happened if the shaft had not projected beyond the bearing, or if it had been protected by some simple device. This particular danger could easily have been obviated, and we think it not unjust to hold appellant to the requirement of such care and foresight.

The fifth and sixth contentions of appellant are based upon the theory that respondent is chargeable with contributory negligence. We think it cannot be so held, in view of the evidence on behalf of the plaintiff. This consideration has already received sufficient attention as we conceive it. Of course, if we were bound to accept the testimony of defendant's witnesses as to the accident, the conclusion would follow that the injury was the result of plaintiff's negligence; but we must adopt the theory supported by the evidence for the other side, and that evidence leads inevitably to the conclusion that the only negligence in the case was on the part of appellant. Upon the theory that plaintiff was telling the truth, there is no room even for an application of the doctrine of comparative negligence.

Appellant attaches much importance to the matter of instructions. The court gave this instruction, taken from the Code:

> "You are instructed that a witness false in one part of his testimony is to be distrusted in others."

Appellant requested a more elaborate instruction, containing this amplification:

> "If you believe that a witness has testified falsely, and has done so knowingly and willfully

as to any material matter, you may disregard," etc.

In People v. Plyler, 121 Cal. 160, 53 Pac. 553, it was said that an instruction similar to the one herein requested by appellant was an accurate expression of the statute's meaning and should have been given. However, the case was not reversed for that error, as the court declared that a new trial should be had in consequence of the refusal of the lower court to continue the trial on the defendant's motion. Under the circumstances herein, we do not think the action of the court in this particular involves prejudicial error. It was not error at all to give the instruction in the language of the Code. People v. Dobbins, 138 Cal. 694, 72 Pac. 339. Nor would it have been prejudicially erroneous to refuse it. Medlin v. Spazier, 23 Cal. App. 242, 137 Pac. 1078. This follows from the consideration that it pertains to a mere commonplace matter, that juries are presumed to know about and act upon in the absence of such instruction. People v. Delucchi, 17 Cal. App. 96, 118 Pac. 935. But the proposed instruction involved in no less degree a platitudinous truism to which the jury, unless lacking in average intelligence, did not need to have their attention called. And if they were so deficient in mind, the instruction could have been of no value to them. It should certainly not be deemed of vital importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar. It may be further said that the court gave elaborate instructions upon the credibility of witnesses which were amply sufficient to cover this very consideration.

[8] The court refused the instruction, requested by defendant, of which the important part is as follows:

> "If plaintiff was not at the time of the accident at the place where she was directed or required to be, and where she should have been in the discharge of her duty, but of her own volition was at some other place in the mill, to suit her own convenience or for her own purpose, then I instruct you that plaintiff cannot recover, and your verdict must be for the defendant."

The reason for this was that certain witnesses for appellant testified that the plaintiff, at the time of the accident was not engaged in her work, but was participating on the floor in a playful diversion and heedlessly backed into the shaft. But we think the instruction was properly refused for several reasons, one of which is: It was based upon the assumption that plaintiff was at a place where she should not have been. There is no room for that inference. The only possible conclusion is that she was at work, or else she was away from the bin because there was no work to do at the time. Assuming that it is true, as stated by some of the witnesses for appellant, that the machinery was not in operation by reason of the lack of hops, plaintiff was not required to remain at the bin, but had a right to go upon the floor for rest or recreation. Therefore, if we concede that the instruction embodied a correct statement of the law, it was properly refused as applicable to a theory without support in the evidence. Sill v. Ceschi, 167 Cal. 698, 140 Pac. 919.

Again, if plaintiff was on the floor, it cannot be disputed that she was ready and waiting to take her place at the bin when the hops should arrive and her work begin. In either event, therefore, she was really engaged in the line of her duty and the course of her employment, and the defendant's responsibility for her safety falls within the general rule already stated. Davis v. Pacific Power Co., supra; Cordler v. Keffel, 161 Cal. 475, 119 Pac. 658. Moreover, at the request of appellant, an instruction applicable to the theory that plaintiff was not at work was given by the court as follows:

> "The court instructs you that if an employé sustains injuries while he or she is voluntarily and unnecessarily absent from his or her post of duty, and neglects to exercise ordinary care for his or her own safety, he or she cannot recover damages for said injuries. If, therefore, you find from the evidence that at the time of the injury to plaintiff she was voluntarily and unnecessarily absent from the place where the defendant company had assigned her to work, and that while so absent she neglected to exercise ordinary care for her own safety, by reason of which her dress came in contact with said shaft, resulting in the injuries complained of, then I instruct you that plaintiff cannot recover, and your verdict must be for defendant."

The foregoing is certainly as favorable to appellant along that line as the law would permit.

Appellant is at a loss to understand why the court refused to give this instruction:

> "The court instructs you that persons of such age and experience as to be capable of exercising discretion and of appreciating dangers in the work in which they are engaged cannot recover damages for injuries caused by their inattention to their surroundings, and failure to take due precautions against known or obvious dangers."

We think the instruction was properly refused, for the reasons, among others, that it was based upon the unsupported hypothesis that the danger was known and obvious to the plaintiff, it implied that the doctrine of the "assumption of risk" was applicable to the case, and it ignored the principle of "comparative negligence."

There is some other criticism of the action of the court in reference to the instructions, but we hardly think it advisable to notice it specifically. The court eliminated some redundant matter and corrected some inaccuracies in several instructions that were proposed, and gave them as corrected. Upon an examination of the whole charge, we are satisfied that every necessary legal principle applicable to any just theory of the evidence was presented to the jury, and it appears to us that therein is found no substantial reason for complaint.

The case was tried upon the theory that

the so-called Roseberry Act of 1911 and section 1970 of the Civil Code were and are applicable to the cause. This situation was also conceded in the opening brief of counsel for appellant, but in the closing brief of Messrs. Harrison & Harrison, substituted attorneys, the point is made that they were repealed by the Workmen's Compensation Act of 1913, which went into effect before the commencement of this action. There is no question, though, that the accident happened before said act of 1913 became operative, and, without following the argument of appellant in detail, we deem it apparent that section 91 of the act—"the compensation provisions of this act shall not apply to any injury sustained prior to the taking effect thereof"—constitutes a saving clause, and continued in force as far as this case is concerned, the said Roseberry Law and said section of the Code, the last introducing the condition that the employé must "fully understand, comprehend and appreciate" the danger to bar his recovery in case of an obvious peril, and the Roseberry Act having made a part of our liability law the doctrine of "comparative negligence."

There is a contention in the opening brief of appellant that the verdict is excessive, and should be set aside for that reason; but the point does not seem to be insisted upon in the final brief. We may say, however, that a complete answer to the suggestion is found in Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 Pac. 513, and Scragg v. Sallee, 24 Cal. App. 153, 140 Pac. 706.

The case, as we view it, was fairly, conscientiously, and ably tried by the learned judge who presided, and, after an examination of the whole record, we are satisfied that the verdict should not be disturbed.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

On Rehearing.

BURNETT, J. We have given careful attention to the forcible and instructive petition for rehearing filed herein by appellant. The position urged with the strongest reason relates to the effect of the so-called saving clause in the said Workmen's Compensation Act of 1913. It may be admitted that the language was not very happily chosen to express the intention of the Legislature that the law in force at the time should apply to an accident occurring prior to January 1, 1914, but that such was the intention of the Legislature we feel reasonably satisfied. Otherwise, said section 91 of the act of 1913 could have no purposeful and effective operation.

If we adopt the reasoning of appellant, we must hold that there is no statutory law in force in this state whereby respondent may secure any remedy for the wrong that she suffered. The said act of 1913 was intended to present and embody a complete scheme for the enforcement of a cause of action like that before us, and it is apparent that all prior legislation on the subject is inconsistent with the provisions of said act. But this statute manifestly can be of no value or benefit to respondent, since by express provision the vital part of the act can have no application to any negligence occurring prior to January 1, 1914.

[9] We do not think the Legislature intended that there should be no statutory provision whereby persons in the class of the plaintiff might secure redress for their injuries; but that a fair and just construction of said saving clause leads to the conclusion that respondent's case was to be controlled by the law as it existed when she was injured.

[10] We also think it should be held that plaintiff's right of action was a vested right, which could not be taken away by the repeal of said Roseberry Act. At the time the accident happened she was at work under the operation of a law which provided that, if injured by the negligence of her employer, she was entitled to damages for the same, although she might be guilty of slight negligence herself. In other words, the law provided that a certain class of persons was entitled to be compensated by the employer for personal injuries suffered by the former. Plaintiff showed that she belonged to that class, and therefore had a vested right to such compensation. The subject was carefully considered by this court in the case of James v. Oakland Traction Co., 10 Cal. App. 785, 103 Pac. 1082, in which a petition for hearing by the Supreme Court was denied. Therein it was held, in an opinion written by Justice Hart, that:

> "Where section 501 of the Civil Code, as it stood at the time of the injury, regulated the speed of the car so as not to exceed eight miles per hour, such section as it then stood entered into and became part of the contract between the carrier and passengers, which conferred a vested right to recover for breach of such contract, and the subsequent repeal thereof in 1903 cannot operate retroactively to destroy or affect such vested right."

We think the same principle is applicable here. The conditions prescribed in the said Roseberry Act constituted a part of plaintiff's contract with defendant, and the question is not, therefore, one of abrogating or changing a statutory remedy; but the construction upon which appellant insists involves an interference with and the destruction of a vested right of an employé sustaining a certain relation to the employer.

The cases cited by appellant—at least, most of them—can be reconciled with our position herein as they involve a purely statutory right, whereas we are dealing with an obligation based upon the common law which is made definite and enforceable by the provisions of the statute. We may repeat that, if plaintiff's right to recover for damages was derived wholly from the statute, the Legislature, no doubt, while said right was inchoate and not reduced to possession or perfected by final judgment, might repeal the statute and destroy the remedy; but a different rule seems to apply where, as herein, the right is really derived from the common law.

We think the said Roseberry Act and section 1970 of the Civil Code were applicable to the case of the plaintiff, and on the other points we adhere to the views heretofore expressed.

The petition for rehearing is denied.

We concur: CHIPMAN, P. J.; HART, J.

(35 Cal. App. 744)

MORENO v. NEW GUADALUPE MINING CO. et al. (Civ. 2254.)

(District Court of Appeal, First District, California. Dec. 31, 1917. Rehearing Denied by Supreme Court Feb. 28, 1918.)

1. Death 🔑76 — Cause of Death — Evidence.

In action for death, evidence *held* to warrant a finding that a certain accident, and not typhoid fever, was the cause of death.

2. Evidence 🔑471(24)—Opinion—Declarations.

Declarations of deceased as to how an accident happened, made 30 minutes after the accident, were but expressions of opinion.

3. Evidence 🔑126(2)—Res Gestæ.

Such declarations were no part of the res gestæ.

4. Trial 🔑85—Objections—Grounds.

A general objection to admission of evidence cannot be considered unless the evidence was evidently inadmissible for any purpose within any conceivable legitimate view of the case.

5. Evidence 🔑243(4)—Admissions—Declarations in Presence of Adverse Party.

A declaration by a servant, in the presence of one joined as defendant, of the reason for an accident, made 30 minutes after the accident, was admissible, under Code Civ. Proc. § 1870, subd. 3, relating to declarations made within the observation of a party and his conduct in relation thereto.

6. Witnesses 🔑219(5)—Physicians—Waiver of Privilege.

The privilege given by Code Civ. Proc. § 1881, subd. 4, before amendment, providing that physicians could not testify as to information acquired from the relationship, is waived in a personal injury or death action by the patient or his administrator putting other witnesses on the stand or going on the stand to testify as to the nature of the injuries.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Jessie Moreno, as administratrix of the estate of Frederick Moreno, deceased, against the New Guadalupe Mining Company, a corporation, and Fred Porta. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Crittenden & Simmons, of San Francisco, and C. L. Witten and H. W. McComas, both of San Jose, for appellant New Guadalupe Mining Co. William A. Nunlist, of San Francisco, for appellant Porta. George K. Ford, of San Francisco, for respondent.

LENNON, P. J. In this action, the plaintiff Jessie Moreno, as administratrix of the estate of her husband, Frederick Moreno, deceased, sought and secured a judgment against the defendants, New Guadalupe Mining Company and Fred Porta, one of its employés, for the death of the deceased, alleged to have been caused by the negligence of said defendants. The case was tried with a jury, and a verdict returned in favor of plaintiff and against both defendants in the sum of $8,000. From the judgment entered thereon and from the order denying a new trial, the defendants have appealed.

Briefly stated, the facts of the case are these: The defendant New Guadalupe Mining Company was a corporation engaged in the working of a mine in the county of Santa Clara. On the 3d day of August, 1913, the decedent, Frederick Moreno, was employed by the corporation defendant as a "tool nipper." In such capacity it was his duty to carry powder and the sharpened drills and tools used in the working of the mine down to the various levels of the mine and to bring such tools and drills as had been dulled by use to the surface. The shaft from the surface to the various levels of the mine ran at an angle of about 42 degrees from the horizontal plane of surface, and installed in it were two parallel tracks on which cars or "skips" were operated from the surface by cables attached to a drum, which was in turn operated by an engine. The cars or skips were used by employés of the corporation defendant to enter and leave the mine and also for the lowering of supplies into and the taking of ore from the mine. On August 3, 1913, the decedent, Frederick Moreno, was directed to take certain supplies down into the mine. At about 2 p. m. of that day the defendant Fred Porta, who was employed by the corporation defendant as a shift boss, but who was then operating the mechanism which controlled one of the cars, undertook to let the deceased down into the mine. When the car upon which the decedent was riding had descended about 450 feet into the mine it stopped suddenly, but what actually happened then to the decedent was known to, and witnessed by, no one save himself. The circumstances attending the descent of the decedent into the mine were narrated by one Celaya, who was the "hoistman" regularly employed at the mine to operate the engine which controlled the car, and who was called as a witness for the plaintiff. He testified in part and to the effect that the car in which the decedent was descending, and which at the time was operated and controlled by the defendant Porta, was going down very fast, "at a very rapid rate of speed" and that it was stopped "instantly by the jerk" at about 40 or 50 feet from the station below, because the defendant Porta threw in the clutch which controlled the speed of the car. About 30 minutes after this sudden stop of the car in which the decedent was descending into the mine this witness hoisted the decedent to the surface. The witness said that the decedent was pale, and that upon coming to the surface the decedent in the presence of the defendant Porta narrated how and why the car stopped and what happened to him at the time. Shortly thereafter the decedent went to his home, but returned the next day to his work and again descended into the mine, but remained there only a small portion of the day when he went home.

The plaintiff, Jessie Moreno, testified:

> That she was the wife of deceased; "that on the day of the accident decedent came home and said he felt pretty bad; that she gave him some salt water, and that he threw up a small quantity of blood, although not very much; that decedent did not return to work that day, but he did the following day; that he did not stay very long; he came back right away and went to bed and did not get out of bed any more; he stayed in bed until he died; that she saw him every day; upon the day of the accident decedent showed witness his left side, which was bruised; that thereafter it became black and remained black until the time of his death; she observed a bruise on his left side; thereafter it kept getting blacker every day; they gave her a little liniment to run on it, which she rubbed on the bruise and side as directed; that from the first day after the accident decedent made frequent exclamations of pain; that he groaned lots and could not keep still in bed, the pain was so bad, and had difficulty in taking a long breath because the pain would hurt him lots."

Other members of the deceased's family and household testified that he had a black and blue bruise on the left side of his body, and that he complained of pain in that side; that on the evening of the day of the accident the left side and back of the deceased showed a big red spot; that there were no scratches or cuts on the body, and that the skin was not torn; that the following day the spot or bruise turned black and blue; that the discolored portion of the deceased's body was about a foot in diameter and extended around on the back about, but not quite, to the spinal column; that the deceased vomited very little and had little fever and no chills; that he was not delirious; that he did not get out of bed and was unable to get out of bed without assistance; that he continually complained of pain in the side and never complained of pain in the head.

Dr. Gober was first in attendance upon the deceased, and later Dr. Blair was called in. Both doctors made an examination of the body and the condition of the deceased. They continued in attendance upon the deceased until the time of his death. But neither doctor was called as a witness for the plaintiff.

[1] The insufficiency of the evidence to show the cause of death of the deceased is the first point made in support of the appeal. In response thereto we deem it sufficient to say that, although the evidence relied upon for the plaintiff to show the cause of death was wholly circumstantial, nevertheless we deem it sufficient to have warranted the court below in submitting the case to the jury, and we are not prepared to say that the jury could not have legitimately drawn from such evidence the inference that the accident in question was the cause of the death of deceased.

The point is made that the trial court erred to the prejudice of the defendants, and particularly the corporation defendant, in its ruling which permitted in evidence, over objection, the declaration of the deceased, made some 30 minutes after the accident in the presence of the plaintiff's witness Celaya and the defendant Porta, and which declaration the record shows was addressed to both the witness and the defendant Porta. With reference to that phase of the case the record shows that Mr. Ford, one of the counsel for plaintiff, questioned the witness as follows:

> "Q. What, if anything, did Mr. Moreno say to Mr. Porta in your presence? A. He said, 'You let me down pretty fast; he almost killed me'; he said, 'You stopped the skip on the jerk and threw on the clutch and dragged me quite a ways;' and he had his clothes all torn.
>
> "Mr. Simmons (counsel for the defendants): That is objected to; merely opinion evidence. I ask that that be stricken out, as to whether or not he almost killed him.
>
> "The Court: There are some expressions of opinion. It is not responsive to your question at all. He asked him what he said and he answered 'he had his clothes all torn.'
>
> "Mr. Ford: The answer generally was referring to the remark that Mr. Moreno said, 'You almost killed me.'
>
> "The Court: That may stand; that is what the conversation was. 'He had his clothes all torn' may go out.
>
> "Mr. Simmons: Even as to the remainder of that answer, as to the words 'you almost killed me,' I object to that also.
>
> "The Court: Did he say that?
>
> "Mr. Simmons: He said, 'You let me down pretty fast; you almost killed me.'
>
> "The Court: It may stand."

[2, 3] It must be conceded, as counsel for the defendants contend, that the statements of the deceased which the trial court permitted in evidence were but the expression of an opinion as to the cause and consequence of the accident, and, having been made some 30 minutes after the accident, were clearly the narrative of a past event, and consequently were no part of the res gestæ.

[4] But, even assuming that it may be said that the trial court considered the objection to the evidence in question as having been seasonably made, still it must be noted that the objection as made was rested solely upon the single ground that the evidence elicited from the witness was "merely opinion evidence." The purpose of the rule which ordinarily requires that an objection to be available must be made upon specific grounds

which point to the vice of proffered proof is to call the trial court's attention to the defect in such proof, and thereby enable the court to rule upon the objection with such defect in mind. Ordinarily, therefore, the mere statement by a party that he "objects" to certain evidence is not entitled to consideration unless it can be clearly seen and said that such evidence is utterly incompetent and wholly inadmissible for any purpose within the issues of the case. In other words, when the evidence objected to is plainly prejudicial and palpably incompetent, and so evidently and absolutely inadmissible for any purpose within any conceivable legitimate view of the case, then a general objection should suffice to specify the evidence. Doubtless, if the question objected to in the present case had called for and elicited the personal opinion of the witness on the stand, the objection as made, namely, "that it was merely opinion evidence," would have sufficed. But plainly that was neither the purpose nor the effect of the question, and it cannot be said that the evidence sought and elicited thereby was wholly incompetent and inadmissible for any purpose in the case; for it must be remembered that the question objected to called for a declaration of the deceased made in the presence of and to one of the defendants in the case. It is the rule that:

> "Evidence may be given upon a trial of * * * an act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto." Code Civ. Proc. § 1870, subd. 3.

[5] Clearly, therefore, the evidence sought and elicited by the question objected to was admissible, at least as against the defendant Porta, for the purpose stated in the statutory rule, and consequently it must be held that the objection relied upon was rightly overruled whether considered as a mere general objection or limited, as perhaps in strictness it should be, to the ground upon which it was made.

That the plaintiff's case was presented upon the theory that the deceased died from "urosepsis" caused by an injury to the kidneys is indicated by plaintiff's cross-examination of the medical witnesses who were called and testified for the defendant. The action was defended in part upon the theory that the deceased died directly as the independent result of typhoid fever, and not as the result, directly or indirectly, of any injuries which he had received as the result of the accident.

In support of this defense Dr. Albert Charles Jayet, a physician and surgeon, was called as a witness, and testified that he saw the body of Frederick Moreno, the deceased, about the 15th or 18th of August, 1913, at the Almaden mines, and assisted Dr. Gerlack in performing an autopsy on the body of the deceased; that such autopsy involved the opening and examining of all of the cavities of the body; that the kidneys were cut open and found to be in a normal condition; that had the kidneys been impaired in such a manner as to cause the death of the deceased it would have been discovered upon the autopsy; that the heart and lungs and all of the vital organs of the deceased were examined and found to be in a normal condition, save and except the brain, which, when removed and sliced, showed the presence of "a large pulpified mass of tissue," which was an abscess of the brain.

Dr. Gober was called as a witness for the defendants, and his testimony as an expert witness was in part and without objection:

> "That he had had experience with typhoid fever during practically every year of the last 30 years; that during the months of July and August, 1913, he had three cases of typhoid fever at the New Guadalupe mine; that each of the cases was normal and ran in the normal and average course of typhoid fever; that one of these cases proved fatal; that in the usual case of typhoid fever the patient complained of being tired and dull, weak and some headache, backache, and occasionally nosebleed; that the patient sometimes vomited; that the temperature is usually one or two degrees higher in the evening than in the morning, and as the disease progresses the temperature each day becomes a little higher; that the disease usually runs a very definite course; that it affects particularly the small intestines which become infected, and the glands of the small intestines become swollen and ulcerated; * * * that the condition of the intestines causes more or less pain, usually referred to as being in the stomach, although it is more probably located on the right-hand side, between the prominence of the pelvic bone and the navel, up midway between the two, and the pain at this point generally continues throughout the whole course of the disease; that the patient sometimes vomits, and occasionally perforation of the intestine takes place where the ulceration eats through the intestine, causing a shock and collapse followed very shortly by death; that the largest majority of perforations take place about the beginning of the third week of the disease, sometimes in the latter part of the second week."

On cross-examination this witness further testified that he had knowledge of a disease "urosepsis," which consists of infection of the urinary tract; that he had never encountered the latter disease; that the disease of urosepsis was to be distinguished from typhoid fever because of the difference in range of temperature; that urosepsis was generally caused by injury to the kidneys; that the symptoms in case the patient died from typhoid fever would be somewhat similar to those of a patient who died from urosepsis, but that there would be sufficient different symptoms to distinguish the two diseases; that peritonitis might set in following the perforation of an intestine in typhoid fever, and might set in as a result of an injury to a kidney.

Dr. Gober further testified, apparently as a fact witness and without objection, that he had attended the deceased four or five times during the month of July, 1913, and a number of times during the month of August, 1913; that he had occasion to visit, and did visit, the deceased once on the 5th and 6th of August, 1913, twice on the 7th, 8th, 9th, 10th, 11th, 12th, and 13th of August, 1913, and three times on the 14th and once on the 15th of August, 1913. Ultimately this witness further testified, also without objection:

> "That he usually examined the body of the deceased every day throughout the time he was in attendance upon him, particularly the abdomen; that in making said examination he did not observe any black and blue marks or any spot whatsoever upon the body of the deceased. * * *"

But when counsel for the defendant sought to elicit from this witness whether or not he had taken the temperature of the deceased, objection was made and sustained, in effect, upon the ground that whatever information the witness had obtained concerning the condition of the deceased during his illness was acquired in a professional capacity and for the purpose of enabling the witness to prescribe professionally for the deceased, and could not, under the provisions of subdivision 4 of section 1881 of the Code of Civil Procedure, be revealed without the consent of the plaintiff.

Dr. Blair, called as a witness for the defense, testified apparently in part as an expert and in part as a fact witness. His expert testimony covered the symptoms and results of an injury to the kidneys and the symptoms and results of typhoid fever. With reference to the results of an injury to the kidneys he testified:

> "That in case a kidney were torn loose in the body the injured condition would be indicated by the general symptoms of shock, collapse, and blood in the urine; that if a kidney were torn loose or ruptured or contused, the patient would be practically incapable of carrying any load at all; if a kidney were injured by a blow or otherwise, it would cause pain, and within a day after the accident the pain would be markedly noticeable by the patient; that if a kidney were injured to such an extent as to result in death, the death would probably occur in one of the three following manners: By a severe hemorrhage or a stoppage of the urine, or, in case of a less severe injury, general weakness following lingering sickness; that it would require a very considerable injury to a kidney to cause death within 10 days or 2 weeks after the injury was received; that in case of death resulting 13 days from the injury to a kidney you would expect to find general swelling of the kidney and an entire stoppage of water, together with signs of hemorrhage in the kidney itself; that typhoid fever frequently causes abscesses which might occur in any part of the body; that typhoid fever is a disease of the blood; the chief localization is in the bowel, but might localize in any part of the body and cause an abscess; for instance, it might localize in the brain and cause an abscess there. * * *"

This witness Dr. Blair without objection further testified to the fact:

> That he "called upon and attended Fred Moreno, the deceased, with Dr. Gober about 11 o'clock in the night of August 14, 1913; that Moreno was then in a house at the New Guadalupe mines; that he obtained the history of the case from Dr. Gober and made a thorough physical examination of the deceased, including an examination of the heart and lungs, and a general examination of the body of the deceased; that he failed to find any black and blue marks, bruises, or any discolorations whatever upon any part of the body of the deceased, either upon the left side or on the back or elsewhere; * * * that he found no injury or bruise on the head of deceased."

Finally Dr. Blair was asked by counsel for the defendant if he had determined from his observation and physical examination of the deceased what was the cause of the latter's death, and, if so, to state the cause of death. An objection to this question was sustained upon the ground that it was privileged within the purview of subdivision 4 of section 1881 of the Code of Civil Procedure. It is now insisted that this ruling and the ruling rejecting the evidence of Dr. Gober concerning the temperature of the deceased during his last illness were prejudicial error.

[6] This contention, we think, must be sustained. The statute (Code Civ. Proc. § 1881, subd. 4) relied upon to support the rulings complained of, as it was written at the time of the trial of the present case, provided that:

> "A licensed physician or surgeon cannot without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe * * * for the patient: Provided, however, that after the death of the patient * * * the administrator * * * or the surviving spouse of the deceased * * * may give such consent, in any action or proceeding brought to recover damages on account of the death of the patient, caused by the negligent or wrongful act of another."

The purpose of the privilege thus granted by the statute is to protect the patient against the disclosure and consequent publicity of his bodily ailments, and thereby safeguard him against the humiliation and annoyance which would often follow such disclosure. Therefore the privilege given by the statute is purely personal to the patient and may be waived by him.

Admittedly the deceased, if he had been alive, could have consented to the giving of the testimony objected to, and clearly such consent might have been expressly or impliedly given. It has been said in effect by a recognized and respected authority upon the law of evidence that:

> "Waiver of the privilege may be implied from the conduct of the patient, and that a finding of such waiver must depend upon two considerations: (1) The interpretation to be placed upon the actual conduct of the patient with reference to the exercise of the privilege and the fairness of the situation created by that conduct. In other words, as the author referred to puts it, 'a waiver is to be predicated not only when the conduct indicates a plain intention to abandon the privilege, but also when the conduct (though not evincing that intention) places the claimant in such a position with reference to the evidence that it would be unfair and inconsistent to permit the retention of the privilege. It is not to be both a sword and a shield.'" 4 Wig. on Evidence, § 2388, p. 3358

In keeping with this enunciation of the principles underlying the privilege it has been judicially declared that the privilege granted by statutes analogous in spirit, purpose, and phrase to the statute under consideration here is waived by the patient taking the witness stand and voluntarily testifying in detail concerning the facts, the nature and the extent of his ailments, or by calling other persons as witnesses in his behalf and requiring them to testify to the same facts. Woods v. Incorp. Town of Lisbon, 150 Iowa, 433, 130 N. W. 372; Lane v. Boicourt, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442; Epstein v. Pa. Ry. Co., 250 Mo. 1, 156 S. W. 699, 49 L. R. A. (N. S.) 394, Ann. Cas. 1915A, 423. This is so because:

> "It is only the secrets of the sick room or of the consultation * * * that the physician is forbidden to reveal, and what is made public by pleadings and by evidence in a court of justice can by no possibility be privileged to benefit the party who thus gives it such wide publicity." Lane v. Boicourt, supra.

We are aware that there are to be found authorities dealing with the doctrine of waiver which declare a rule contrary to the rule declared in the authorities here cited and relied upon, but in our opinion the latter rule is more in consonance with the spirit and purpose of the privilege, and certainly more in accord with the exact administration of justice, for clearly a patient should not be permitted to describe—

> "at length to the jury in a crowded courtroom the details of his supposed ailment and then neatly suppress the available proof of his falsities by wielding a weapon, nominally termed a privilege." 4 Wig. § 2389, p. 3360.

Any other construction and application of the privilege would, as is aptly illustrated by the author last cited, permit a patient suing for damages for personal injuries to make and sustain a claim obviously unfair somewhat as follows:

> "One month ago I was by the defendant's negligence severely injured in the spine and am consequently unable to walk; I tender witnesses A., B., and C., who will openly prove the severe nature of my injury. But stay! Witness D., a physician, is now I perceive called by the opponent to prove that my injury is not so severe as I claim. I object to his testimony because it is extremely repugnant to me that my neighbors should learn of my injury, and I can keep it secure if the court will forbid his testimony." 4 Wig. § 2389, p. 3359.

This brings us now to a consideration of the question as to whether or not the plaintiff in the present case was permitted and by her conduct did impliedly waive the privilege granted by the statute. It will be noted that the statute under consideration as it existed at the time of the trial of the present case provided that in actions brought to recover damages on account of the death of the patient caused by the negligence or wrongful act of another the administrator of his estate or his surviving spouse may consent to the testimony of a physician or surgeon who attended the patient. Code Civ. Proc. § 1881, subd. 4. The statute itself therefore in terms expressly and affirmatively answers the query as to whether or not the plaintiff was permitted to waive the privilege, and if, as we believe we have shown, the deceased himself might had he lived have waived the privilege by taking the witness stand and voluntarily narrating the nature, extent, and results of his injuries or by calling other persons to testify to the same effect, then by a parity of reasoning it must be held that the plaintiff here, in the dual capacity of surviving spouse and administratrix of the estate of the deceased, by taking the witness stand and in conjunction with other persons whom she called as witnesses in her behalf voluntarily testifying to the nature and extent of the deceased's injuries and all of the facts and circumstances occurring in the sick room and attending the last illness of the deceased, likewise impliedly waived the statutory privilege which had been transmitted and committed to her care and keeping. And it cannot be said that by so testifying herself and calling other persons to testify likewise she did not thereby open wide the door to the testimony of the physicians merely because she did not in so many words tell or attempt to tell the cause of the death of the deceased.

This must be so, for it would be indeed inconsistent and unfair to refuse to permit the physicians to testify concerning the temperature of the deceased during his illness and the cause of his death after permitting the plaintiff and her witnesses to narrate not only the physical signs and symptoms of the last illness of the deceased, including the condition of his temperature, but also all of the facts and circumstances attending his illness which, by indirection, were intended and tended to show the cause of the death of the deceased.

The plaintiff and her witnesses by so testifying fully and freely gave publicity to all that ailed the deceased, and thereby, it seems clear to us, broke the seal of privacy privileged by the statute. The procedure thus pursued by the plaintiff being a voluntary exploitation of the condition of the deceased and the claimed cause of his death, we are constrained to hold that the inquiry into the symptoms exhibited by the deceased and the cause of his death thus initiated by the plaintiff could have legitimately been brought to a close only by the testimony of the attending physicians concerning the same subject-matter.

Our conclusion upon this phase of the case makes it unnecessary for us to discuss the effect upon the rulings referred to of the amendment to the statute in question (Code Civ. Proc. § 1881, subd. 4), made after the trial of the case in the court below and pending the perfection of an appeal from the judgment to this court, which expressly provides:

"That the bringing of an action, to recover for the death of a patient, * * * by the administrator of his estate, or the surviving spouse of the deceased, * * * shall constitute a consent by such * * * administrator, surviving spouse * * * to the testimony of any physician who attended deceased." Stats. 1917, c. 611, p. 954.

Of course, upon the going down of the case for a new trial, the amendment to the statute just quoted will be the statute in force at the time of the trial, and therefore will cover and control the question of the admissibility of the evidence of the physicians who attended the deceased. It may not be amiss, however, to say that the amendment last referred to indicates that the Legislature has finally concluded that:

> "In actions for personal injury the permission to claim the privilege is a burlesque upon logic and justice." 4 Wig. § 2389, p. 3359.

Judgment reversed and cause remanded for a new trial.

We concur: RICHARDS, J.; KERRIGAN, J.

(35 Cal. App. 757)

HUBBARD et al. v. JURIAN et al.

(Civ. 2150.)

(District Court of Appeal, First District, California. Dec. 31, 1917. On Petitions for Rehearing, Jan. 12 and 29, 1918. Rehearing Denied by Supreme Court Feb. 28, 1918.)

1. MECHANICS' LIENS 🔑125—LIABILITY OF OWNER FOR MONEY PREMATURELY PAID.

Under St. 1911, p. 1315, amending Code Civ. Proc. § 1184, so as to provide that it shall be lawful for the owner to withhold from his contractor sufficient money due or that may become due to answer any lien that may be filed for labor or material, where there was furnished a bond equal to one-half of the purchase price, the owners of the building were not liable to laborers or materialmen for premature payments made to contractor after notice to withhold.

2. MECHANICS' LIENS 🔑132(4)—CLAIM OF LIEN—TIME FOR FILING.

Under mechanic's lien statute, the time for filing liens, where no notice of completion or cessation from labor has been filed, is 90 days after actual completion.

3. MECHANICS' LIENS 🔑132(7)—TIME FOR FILING.

Under statute providing that continued cessation from labor for 30 days is deemed equivalent to actual completion for purpose of fixing time within which liens may be filed, where labor on a building ceased for 30 days, the time for filing liens was limited to 90 days after expiration of the 30 days.

4. MECHANICS' LIENS 🔑279—BURDEN OF PROOF—INDEFINITE ALLEGATION.

Where plaintiff alleged that the building was completed on June 20th, and defendant squarely denied such allegation, that defendant also alleged that work was abandoned "on or about March 10th" would not relieve plaintiff from the burden of showing that his lien filed on July 2d was filed in time, or within 120 days.

5. MECHANICS' LIENS 🔑132(8)—FILING—TIME.

Under mechanic's lien statute, the subsequent completion of a building by the owner after 30 days' cessation from labor thereon by the contractor does not operate as an extension of time for filing liens.

6. MECHANICS' LIENS 🔑161(4)—INTEREST—TIME OF ACCRUAL.

Where all the claims were for labor and materials furnished under contracts fixing no time for payment, interest should be allowed from commencement of actions to foreclose liens.

7. CONSTITUTIONAL LAW 🔑89(3)—FREEDOM OF CONTRACT—LIABILITY OF SURETIES.

Code Civ. Proc. § 1183, providing that no modification of a building contract between the owner and contractor shall relieve any surety on the bond required to secure payment of claims, is not unconstitutional, in that it is impossible for the owner, contractor, and surety to enter into a contract, the obligation of which is definitely established in advance.

8. MECHANICS' LIENS 🔑74—CONTRACTS—"MODIFICATION"—FILING.

Under Code Civ. Proc. § 1183, requiring the filing of the original building contract, together with the bond to secure payment of claims to relieve the owner from liability in excess of the contract price, a contract for the construction of a second story to be "added to the building in course of construction" was a modification of the original contract not required to be filed.

9. PRINCIPAL AND SURETY 🔑117—BONDS—RELEASE OF SURETY—"MODIFICATION."

Under bond given to secure performance of building contract and containing a covenant that the owners would keep and perform the contract, the premature payment of an installment by the owners to the contractor would not release the surety as to lien claimants in view of Code Civ. Proc. § 1183, providing that no modification of the contract between the owner and the contractor shall relieve the surety; a premature payment being no more than a modification of the contract.

10. MECHANICS' LIENS 🔑128—FAILURE TO FILE CLAIM—RELEASE OF SURETY.

Only those laborers and materialmen who have perfected their claims by filing verified liens within the time specified by Code Civ. Proc. § 1187, are entitled to recover upon bond given pursuant to section 1183 as to bond conditioned to pay claims of laborers and materialmen, in view of the rule that parties claiming the benefit of a statutory bond must show a substantial compliance with the statute under which the bond was given.

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Consolidated actions by T. B. Hubbard and others against A. Jurian and others. From the judgment rendered, and from an order denying motion for new trial, defendants appeal. Modified and affirmed.

Rogers & Bloomingdale, of San Jose, for appellants Jurian and others. James Walter Scott, of San Francisco, for appellant Maryland Casualty Co. Beggs & McComish, of San Jose, for respondents Hubbard and others. R. V. Burns, of Mountain View, and C. L. Witten and H. W. McComas, both of San Jose, for respondent Guth. John W. Sullivan, of San Jose, for respondent Mathewson. Owen D. Richardson, of San Jose, for respondent Minton.

LENNON, P. J. These are consolidated actions for the foreclosure of several liens, claimed for labor and materials furnished in the erection and construction of a building upon the premises of the defendants Odell and Jurian.

The facts are as follows: On the 23d day of September, 1912, the defendants Odell and Jurian entered into a written contract with one H. A. Spreen for the erection by the latter of a one-story concrete building upon the premises of said defendants for the contract price of $5,260 payable in four installments, as follows: First payment of $1,315 when the first floor joists were in place and wall one-half story high; second payment of $1,315 when the plastering was completed on the inside; third installment of $1,315 35 days after completion of the building. The contract further provided that the building should be constructed under the supervision of an architect, and payments made upon certificates from him. In connection with this contract, a bond was executed by the contractor, Spreen, as principal, with the defendant Maryland Casualty Company as surety, in the sum of $2,630 (being one-half of the contract price), conditioned for the faithful performance of the contract on the part of the contractor, and for payment in full of claims for labor and materials furnished in the construction of the building, and further stipulating that if the act of the Legislature of 1911, amending the lien laws, should be held invalid, then the bond should remain in full force and effect for the protection of the obligee. This bond was attached to the contract, and by its terms refers to and makes said contract a part thereof. Said contract and bond were duly filed on the 30th of September, 1912. Work was commenced under this contract about the middle of October, 1912.

On the 10th day of December, 1912, while said building was in course of construction, the defendants Odell and Jurian entered into a further contract with the contractor, Spreen, for the construction of a second story to be "added to the building [then] in course of construction." The contract price for this second story was $3,600, payable in four equal installments of $900 each as the work progressed. In connection with this contract a bond was executed by the contractor, Spreen, with the defendant Maryland Casualty Company as surety for the sum of $1,800 (being one-half the contract price), and containing provisions substantially the same as the first bond. This supplemental contract and bond were filed in the office of the county recorder of Santa Clara county on the 26th of December, 1912.

It appeared from the evidence that the defendants Odell and Jurian paid, on November 25, 1912, the contractor the first installment of $1,315 called for by the original contract, and on February 26, 1913, the second installment of $1,315 called for by said contract. They paid the first installment of $900 called for by the contract for the erection of the second story on or about the 30th of December, 1912. All of these payments were made upon certificates of the architect to the effect that they were due and payable, and no contention is made on the part of the lien claimants as to the propriety of any of these payments, except as to the second payment of $1,315 upon the original contract on February 26, 1913, which payment the lien claimants contend, and the trial court found, "was prematurely made."

The court further found that on the 1st day of March, 1913, the contractor, Spreen, abandoned work upon the building and ceased labor thereon for more than 30 days thereafter. On April 21, 1913, the defendants Odell and Jurian began the work of completing the building, and did complete it about the 16th of June 1913, at an expenditure of $4,744.59, which the court found to be the reasonable cost of such completion. The court also found that there was extra work upon the building amounting to $362.60, thus making the amount of the contract price actually remaining in the hands of the owners, Odell and Jurian, including the amount due for extras, $948.01. The court charged the account of said defendants with the $1,315 paid as the second installment upon the first contract, upon the theory that such payment had been prematurely made, and determined that the lien claimants were entitled to personal judgment against said Odell and Jurian in the sum of $2,263 with interest, "to be ratably distributed among them according to their respective claims."

The evidence showed, and the court found, that the several claims of lien involved in the consolidated actions were filed upon the dates following, viz.: The claim of O'Brien Lumber Company, June 25, 1913; the claim of Hubbard & Carmichael, July 2, 1913 (embraced in the Hubbard action); the claims of G. J. Guth, Fred L. Peterson, Dudfield Lumber Company, and McDonald and Burke (embraced in the suit of G. J. Guth), April 1, 1913; the several claims involved in the suit of Walter G. Mathewson (Ayrer, Peterson, Graybill, Conti, Judson, McDaniel, and Taylor) were filed partly on the 28th and partly on the 29th of March, 1913; the claim of E. C. Power, July 19, 1913, and the claim of Charles C. Minton, July 23, 1913.

From the findings made the trial court deduced the conclusion of law that the several parties plaintiff were entitled to judgment foreclosing their respective claims of lien in the following amounts, viz.: T. B. Hubbard, $1,972.28; E. C. Power, $125; G. J. Guth, $627.55; W. G. Mathewson, $678.60; C. C. Minton, $337.90. It was further adjudged that the several parties plaintiff were entitled to interest upon their respective claims of lien from the 10th day of April, 1913. Judgment was also entered against the defendant Maryland Casualty Company for the full amount of each and all of the claims, with interest, which aggregated the sum of $2,522.27, and the judgment provided that the liens should be first satisfied to the extent of that sum by sale of the premises, and that execution should thereupon issue against the surety for the deficiency, if any, remaining.

The appeal is from the judgment and from the order denying motion for a new trial by the defendants Odell and Jurian, as owners, and the Maryland Casualty Company, as surety.

[1] The contention made upon behalf of the owners, Odell and Jurian, that the judgment is against law in so far as it charges the owners, defendants Odell and Jurian, with the sum of $1,315 found to have been "prematurely" paid to the contractor in advance of the time stipulated therefor in the contract and after notice to withhold payment had been served upon the defendants is based upon the fact that section 1184 of the Code of Civil Procedure does not now, as it did prior to its amendment in 1911 (Stats. 1911, p. 1315), expressly make it "the duty of the person who contracted with the contractor to * * * withhold from his contractor * * * sufficient money due, or that may become due such contractor, * * to answer" the claim of any person and any lien that might be filed therefor for labor or material or both furnished to the contractor, when such claim was evidenced by a written notice to the owner showing the character and value of the material or labor furnished the contractor. Instead of making it the duty of the owner upon receipt of such notice to withold a sufficient sum out of the money due or to become due to the contractor to satisfy the claim, the statute now provides that "upon such notice being given it shall be lawful for the owner to withhold," etc. Because of this change in the wording of the statute, it is argued that it was not the legislative intent to make it mandatory upon the owner to withhold payment after notice, and that therefore the doctrine of "premature payments" as formerly applied in mechanic's lien cases has no application to the facts of the present case. This contention, we think, must be sustained.

Construing the statute in question as amended in 1911, our Supreme Court, in the case of Roystone v. Darling, 171 Cal. 526, 154 Pac. 15, declares that it permits the owner "to contract freely" for such improvements as he desires to make upon his property "upon such terms as he may deem to his best interest. All it exacts from him as an exemption from such liability, and in order to make his contract effective, is that it shall provide a reasonable security for the constitutional lien given for labor and materials furnished to his contractor." In short, as pointed out by Mr. Justice Henshaw in a concurring opinion in the case last cited, the owner is not prohibited by the statute as it exists to-day, and as it existed at the time of the execution of the contract and the furnishing of the labor and materials, from paying the whole amount of the contract price in advance of the completion of the work. This being so, it follows that the statute as amended does not now, save at the option of the owner, secure unto persons giving the requisite notice an equitable garnishment upon the moneys due or to become due to the contractor, and consequently it must be held that the trial court erred when, in effect, it adjudged that the defendants Odell and Jurian, as owners, were as a matter of law estopped from asserting that they did not have in their hands the sum of $1,315, which they had in fact paid to the contractor, even though the same was not due at the time of its payment or at the time of the service of the notice to withhold. As previously pointed out, the claim of lien of Hubbard & Carmichael was filed for record on July 2, 1913, that of E. C. Power on July 19, 1913, and that of C. C. Minton on July 23, 1913. It is contended that the trial court erred in allowing these particular claims because it was shown that they were not filed within the time limited by law.

[2, 3] The plaintiff Hubbard sues as assignor to foreclose two liens, one the Hubbard & Carmichael claim for $557, and the other the O'Brien Lumber Company claim for $1,415.28. It will be noted that no attack is made upon the O'Brien claim. The limit of time fixed by statute for the filing of liens where no notice of completion or cessation from labor has been filed is 90 days after the actual completion of the building, and continued cessation from labor for a period of 30 days is deemed to be equivalent to completion for the purpose of fixing the time within which liens may be filed. It has been held that this time allowance for the filing of liens as prescribed by the section last cited is limited to 90 days after the expiration of 30 days from the date of cessation of labor. In other words, the lien claimant has 120 days from the cessation of labor within which to file his lien. Sunset Lumber Co. v. Bachelder, 167 Cal. 512, 140 Pac. 35, Ann. Cas. 1916B, 664.

The plaintiff Hubbard's complaint, in so far as it concerned the claim of lien of Hubbard & Carmichael, alleged that the building was completed on June 20, 1913. The answer of the defendants squarely denied the allegation of the complaint that the building was completed on June 20, 1913, and then averred "the fact to be that on or about March 10, 1913, both of the contracts theretofore entered into by said contractor * * * were abandoned by said contractor, and that said contractor * * * ceased work upon said building and that the defendants A. Jurian and G. W. Odell were compelled to, and did proceed to, complete the erection and construction of said building." The evidence, however, shows, and the trial court found, that work ceased upon the building on March 1, 1913.

[4] It is contended upon behalf of the respondent Hubbard that the claim of lien of Hubbard & Carmichael which was filed on

July 2, 1913, was within time because it was filed within 120 days from March 10, 1913, "on or about" which date the answer alleged work on the building was abandoned. In this behalf it is urged that this date, by reason of the averments of the answer, was admitted by the defendants to be the date when work ceased upon the building, and that as a consequence the trial court should have accepted that date as the time of cessation of labor despite evidence to the contrary, and that the finding of the trial court that work ceased upon the building on March 1, 1913, was, in so far as the Hubbard & Carmichael claim was concerned, unauthorized, and cannot therefore be permitted to prevail over the admitted fact.

In support of this contention we are cited to the familiar rule that an admission made in the pleading is binding on the party making it; that a fact admitted by the pleadings of an opponent need not be proved; and that any evidence introduced contrary to such admission must be disregarded by the trial court when making its finding. In our opinion this rule has no application of the situation presented by the pleadings in the present case. The burden of proof was upon the plaintiff to show that his assignor, Hubbard & Carmichael, had filed their claim of lien within the statutory time after constructive completion of the building. Bloom's Law of Mechanics, Supp. p. 258. The answer of the defendants squarely and sufficiently denied the allegation of the complaint that the building was completed on June 20, 1913. This denial made it incumbent upon the plaintiff to proffer proof showing that the claim of lien had been filed within time. Moreover, the phrase "on or about March 10th," as used in the answer, is indefinite and uncertain, and might therefore consistently mean several days before or after that date, and, inasmuch as the exact date of the completion of the building or the cessation of work thereon was a material fact to be determined by the court below as a foundation for the allowance or rejection of the claims of lien, it cannot be said that the allegation in question was such a definite admission of fact as would preclude the necessity for the taking of evidence or the making a finding thereon.

The finding of the trial court that work on the building ceased on March 1, 1913, and that such cessation continued for more than a period of 30 days, being sufficiently supported by evidence, it follows that the Hubbard & Carmichael lien, which was filed July 2, 1913 (123 days after March 1, 1913), was just 3 days too late, and therefore should not have been allowed. The condition of the pleadings, evidence, and findings with reference to the Power and Minton claim of lien is identical with the condition of the pleadings, evidence, and findings concerning the Hubbard & Carmichael claim of lien, and, inasmuch as the Power and Minton claim were filed for record respectively on July 19 and July 23, 1913, manifestly they were respectively filed 20 and 24 days too late, and should not therefore have been allowed.

It is claimed that because the building was actually completed by the owners, Odell and Jurian, after the abandonment by the contractor, and no notice of completion having been filed, that the three claims of lien of Hubbard & Carmichael, Power, and Minton, having been filed within 90 days after actual completion of the building by the owners, were filed in time, notwithstanding the fact as shown by the evidence and found by the court, that there had been a continued and uninterrupted cessation of labor on the building commencing March 1, 1913.

[5] In response to this contention, it will suffice to say that it has been held that a subsequent completion of the building by the owner after a 30 days' cessation from labor thereon by the contractor does not operate as an extension of time for the filing of liens claimed under and created by the original contract. Johnson v. La Grave, 102 Cal. 324, 36 Pac. 651.

If our conclusion concerning the status of the several claims of lien and stop notices be correct, it follows that the judgment was correct only to the extent of allowing and foreclosing the liens included in the Mathewson suit, aggregating the sum of $678, and the several claims of lien involved in the Guth action aggregating $627, and the claim of lien of O'Brien included in the Hubbard action, amounting to $1,415.28, all of which make the sum total of $2,720.28. Incidentally it should be noted that defendants Odell and Jurian make some contention that the Minton claims should not have been allowed in full because the evidence shows that only a part of the materials furnished by Minton was used in the construction and completion of the building. The record shows that all of the materials included in this claim were furnished to be used in the building, and that the portion which was not used in the building was left on the premises at the time of the abandonment of the work by the contractor, and that the owners refused to permit Minton to remove them. Therefore it may be fairly said that to all intents and purposes all of the materials included in the Minton claim were not only furnished to be used, but were retained by the owners in the completion of the building.

It is contended upon behalf of the defendants Odell and Jurian that the claim of lien filed by Fred L. Peterson and embraced in the suit of Guth is insufficient in form and substance, and should not therefore have been allowed. This particular claim of lien states that "said claimant furnished plumbing work and materials at the agreed price of $130; * * * that said plumbing work and materials amount to the sum of $130." The evidence shows that the agreed price of that work was $165, but that Power was prevented from finishing his contract because of the abandonment of the original contract and that the reasonable value of the labor and material furnished by Power up to the time of the cessation of labor was $130. The statement of the character and value of the materials furnished in Power's claim of lien was substantially true, and that is all that is required to give it validity. Barrett-Hicks v. Glas, 14 Cal. App. 289, 111 Pac. 760.

[6] It is contended that the trial court erred in allowing interest upon the several claims of lien commencing April 10, 1913. We think the point is well taken. Counsel for the respective parties have not indicated to us in their briefs why interest was allowed from this particular date, and our investigation of the record has not disclosed the reason for fixing that date as the time from which interest should commence to run, and so far as we have been able to ascertain, all of the claims were for labor or materials furnished under contracts where no time of payment was fixed other than that which might be implied from the transaction itself. Interest, therefore, should have been allowed upon the several claims of lien which were properly proved only from the time each action was commenced to foreclose the several liens. And this is so because at the time the several actions were commenced to foreclose the several claims of lien, the lien claimants' right to recover upon the open account upon which the liens rested was vested in them, and was capable of being made certain by calculation. Consequently they were entitled to recover interest upon their several claims from the date of the commencement of the several actions. Pacific Mutual, etc., Co. v. Fisher, 106 Cal. 224, 39 Pac. 758.

A cursory examination of the record shows that the several actions were not all instituted on one and the same day, and we do not feel called upon to make a detailed search of a voluminous and poorly indexed record for the purpose of ascertaining when the several actions were respectively instituted. In view of the fact that the judgment must be modified, as will be hereinafter indicated, the task of ascertaining the exact date of the institution of the several actions for the purpose of computing interest upon the liens which were properly allowed, and the character of the contract upon which they depend, will be more readily and perhaps more accurately performed by the court below and counsel for the respective parties.

[7] Upon behalf of the defendant Maryland Casualty Company it is urged that the provisions of section 1183 of the Code of Civil Procedure require that a bond be given to secure the payment of claims arising under a building contract in order to relieve the owner from liability to lienors in excess of the stipulated contract price is unconstitutional in that the Legislature has not only exacted a bond, but it has gone further and prescribed as well that:

> "No change or alteration of the work or modification of any such contract between the owner and his contractor shall release or exonerate any surety or sureties upon a bond given under this section."

In other words, the surety must give a bond conditioned that lienors will be paid irrespective of what changes may be made in the original contract. Counsel argues that if this law is held to be valid, there is then one contractual field in which it is impossible for three persons, owner, contractor, and surety, to enter into a contract the obligations of which are definitely established in advance. The constitutionality of this section was upheld in the case of Roystone Co. v. Darling, 171 Cal. 526, 154 Pac. 15, and while this particular point was not discussed, what was there said will, we think, answer the objection made here, viz.:

> "The penalty of the bond is to be not less than one-half the amount of the contract price. This measures the obligation and the liability of the surety."

Clearly this removes any doubt as to the definite character of the surety's obligation.

[8] Another point urged by counsel for the surety company is that the bond given in connection with the contract for the erection of the second story of the building is void upon the ground that work was commenced upon this second story before the bond and contract were filed. This point is determined adversely to the contention of counsel in the case of Hammond Lumber Co. v. Willis, 171 Cal. 565, 153 Pac. 947. In that case neither the bond nor the contract was filed. The court held that the burden of the surety is not increased by the omission of the owner to record the bond, nor is the bond rendered void by such omission. Upon this phase of the case, also, it is contended that the two building contracts, dated, respectively, September 23, 1912, and December 10, 1912, were separate and distinct contracts and the two bonds given to secure the same were equally separate and distinct obligations on the part of the Maryland Casualty Company, and the trial court erred in refusing to treat them as separate contracts.

The contract for the second story is, we think, a modification of the original contract. In Barrett-Hicks Co. v. Glas, 9 Cal. App. 491, 99 Pac. 856, the facts were similar to the present case. In that case a contract was made for adding a second story to a building in course of construction, and, this having been done without the consent of the surety, the court held it to be such an alteration of the original contract as to discharge the surety from liability. It is manifest that if the court had regarded this contract for the second story as an entirely separate and independent contract, it would not have affected the liability of the surety upon the original contract in any manner. It was for the very reason that the court considered it an alteration or modification of the original contract that the surety was held to be discharged from liability. In the case at bar, the surety company did consent to this alteration or modification of the original contract and signified its assent thereto by uniting in the execution of the contract for the second story. This contract for the second story being simply a modification of the original contract, it was not required to be filed at all, and therefore it is inconsequential whether it was filed before or after work on the second story was commenced, as it is only the original contract which the statute requires to be filed. Section 1183, Code Civ. Proc.

[9] It is contended that the surety was released by the owner from all obligation under its bond given to secure the performance of the contract dated September 23, 1912, by reason of the alleged premature payment of the installment of $1,315 by the owners to the contractor, which money was used by the contractor to pay his own personal debts, and that such payment was in contravention of the terms of the contract, and resulted in prejudice to the surety. This contention is based upon the fact that the bond in suit contained a covenant that the obligee (defendants Odell and Jurian) would "keep and perform each and every of the matters and things set forth in said contract to be by the obligee kept or performed, at the times and in the manner as in said contract specified."

It is the rule generally that a surety has the right to stand upon the terms of his contract of suretyship, and that he will be exonerated to the extent that he has been prejudiced by any violation of the covenants of the contract, but we are forced to the conclusion that this general rule cannot be made to apply to the contract of suretyship in suit here. And this is so, we think, because of the fact that the bond in question was executed pursuant and in obedience to the requirements of a statute which, although it permits such a bond to contain conditions for the performance of the contract, nevertheless also expressly provides that:

> "No * * * modification of any * * * contract between the owner and his contractor shall release or exonerate any surety * * * upon any bond given under this section." Code Civ. Proc. § 1183.

It will thus be seen that the covenant of the bond in suit concerning premature payments by the owner was, in so far as it may have been intended to limit the right of lien claimants to recover on the bond, in excess of and contrary to the letter and spirit of the statute. Therefore, in so far as the lien claimants are concerned, it must be regarded as surplusage. Assuming that the evidence shows a premature payment, as found by the trial court, still such payment was, in effect, no more nor less than a modification of the terms of the contract, and consequently will not avail in the face of the express statutory inhibition, as against the lien claimants to defeat the bond. The surety attacks the judgment on the ground that it is made liable for any deficiency arising after the sale of the property. This is expressly provided for in the Code (section 1194, Code Civ. Proc.). Spreen, the contractor, was personally liable for the whole amount due, and it follows that the surety is liable to the same extent.

[10] Finally it is contended upon behalf of the surety company defendant that only those persons who have perfected claims of lien are entitled to recover upon the bond. This contention, we think, must be sustained. The bond in suit was executed in response to the requirements of the statute. It is therefore a statutory bond in the strictest sense, and under the familiar and well-settled rule parties claiming the benefit of the obligation of the bond must show a substantial compliance with the conditions of the statute under which the bond was given. Section 1183 of the Code of Civil Procedure, under which the bond was given, is part and parcel of title 4, chapter 2, of that Code, which relates exclusively to "liens of mechanics and others upon real property," and section 1187 of the same Code and chapter requires that every person claiming the benefits of the provisions of the designated chapter must file a verified lien within the time specified by that section. Obviously, the several Code sections of the chapter in question must be considered and construed together, and when so considered and construed, it must be held that the provision of section 1183 that the required bond shall "in addition to any conditions for the performance of the contract, be also conditioned for the payment in full of the claims of all persons performing labor, or furnishing materials," etc., has reference to the "claims" of lien specified in section 1187 and required to be filed for record within a designated time and to the "claims" which the statute further says must be verified by the oath of the claimant or some other person. Richardson, etc., Co. v. Chicago, etc., Co., 170 Pac. 856.

The bond exacted by the statute in question has direct relation to the lien provided for and permitted in the fundamental law of the state (Roystone v. Darling, 171 Cal. 542, 154 Pac. 15), and the requirement of the statute that the bond shall be so conditioned as to give "any and all persons who perform labor upon or furnish materials * * * a right of action to recover upon said bond in any suit brought to foreclose the liens provided for in this chapter or in a separate suit * * * on said bond" evidently was intended to give to the lien claimant the right to resort to the sum secured by the bond as an additional lien fund or security for the satisfaction of the lien. That such was the legislative intent and purpose is indicated, we think, by the remainder of the sentence just quoted from the Code section last referred to, which declares that:

> "Then [upon the giving of the required bond] the court must, where it would be equitable so to do, restrict the recovery under such liens to an aggregate amount equal to the amount found to be due from the owner to the contractor, and render judgment against the contractor and his sureties on said bond for any deficiency or difference there may remain between said amount so found to be due to the contractor and the whole amount found to be due to claimants for such labor or materials or both."

While the first portion of the quoted sentence of the Code section under consideration makes mention only of the "claims" of persons performing labor, etc., nevertheless, when read and construed in its entirety, it is manifest that the "claims" referred to are claims of lien, and contemplate only the claims of lien created in the manner and within the time specified by section 1187. It must be conceded, of course, that the mere furnishing of labor or material to be used in the construction of a building while giving the right to claim a lien will not alone suffice to create the lien, for until the claim of lien is perfected in compliance with the statute "it is a mere inchoate right personal to the individual, which he may choose to perfect or not at his pleasure, and which, until perfected, has no tangible existence. * * *" Mills v. La Verne Land Co., 97 Cal. 254, 32 Pac. 169, 33 Am. St. Rep. 168. This being so, then the proviso of the statute that the required bond shall be conditioned for the payment in full of "claims" of all persons who furnish labor or material and to give to such persons a right of action to recover in any suit brought to foreclose the liens provided for or in a separate suit brought on the bond must mean that only perfected claims of lien may be litigated either in a single suit against the property and the bond, or in a separate suit against the bond alone. In other words, the statute contemplates that the plaintiff may at his option embrace within an action to foreclose his lien against the property a cause of action resting upon the claim of lien against the bond; or at his option he may institute separate actions—one to foreclose his lien against the property, and the other for the satisfaction of his lien against the bond—but whether combined or separately instituted, the fundamental basis of the cause of action in each instance is the existence of a perfected claim of lien.

Under this construction of the statute the surety will be liable only for the excess of the amount of the lien, if any, over the sum found to be due to the contractor. Any other construction would ignore the settled constitutional and statutory conception of the scope, purpose, and effect of the mechanic's lien law of this state; would violate the familiar equitable rules regulating the relative rights of principal and surety, and also offer opportunity and incentive to collusion between materialmen, etc., and the contractor whereby, if so minded, they could readily and without fear of redress agree to the obvious detriment of the surety that no liens would be perfected against the property to the end that the contractor might be paid in full and the surety alone resorted to for the satisfaction of outstanding claims.

Our conclusion, therefore, is that the failure of the several lien claimants in the present case to perfect their liens within the statutory time operated to defeat their right to recover upon the bond in suit just as effectively as such failure operated to defeat their right to recover upon the claim of lien itself.

It follows from what we have said that the judgment must be and it is hereby modified by striking therefrom the sum of $1,019.90, which is the aggregate sum of the several claims of lien which we have found were filed too late, and also by striking therefrom the sum of $1,315, which the court erroneously charged to the defendants Odell and Jurian as a premature payment. As thus modified the judgment will stand affirmed in favor of the plaintiff Guth in the sum of $627, the plaintiff Mathewson $678, and in favor of the plaintiff Hubbard & Carmichael in the sum of $1,415.28, which is the amount of the O'Brien Lumber Company's lien. Interest, of course, is to be computed upon the claims of lien to have been duly perfected from the date of the institution of the action in each instance.

We concur: RICHARDS, J.; KERRIGAN, J.

On Petition for Rehearing, Jan. 12, 1918.

PER CURIAM. In the original opinion heretofore filed in this case it was stated that:

> "The condition of the pleadings, evidence, and findings with reference to the Power and Minton claims of lien is identical with the condition of the pleadings, evidence, and findings concerning the Hubbard & Carmichael claim of lien, and inasmuch as the Power and Minton claims were filed for record respectively on July 19 and July 23, 1913, manifestly they were respectively filed 20 and 24 days too late, and should not therefore have been allowed."

This statement was inaccurate in so far as it applies to the Minton case.

A further investigation of the record shows that Minton filed a claim of lien on July 23, 1913, for the sum of $337.90, which recited that the lien was claimed for materials furnished to Odell and Jurian, the owners, on or about March 31, 1913. This claim of lien against the owners was made and based, apparently, upon the fact that the owners had used a portion of the material which had been furnished in the first instance to the contractor and left upon the premises when the building was abandoned by the contractor, and which the owners subsequently refused to return to Minton upon demand. The theory of this claim of lien, in other words, was that it was founded upon an implied contract directly with the owners.

The record apparently sustains this theory, and there is some evidence that the materials remaining upon the abandonment of the building and retained by the owners were valued at $126.50. The record shows that the building was actually completed by the owners June 15, 1913, and therefore, upon the theory stated, the claim of lien in question, filed July 23, 1913, was perfected within time and to the extent of the established value of the materials shown to have been retained, namely, $126.50, was properly allowed and should be included in the judgment against the owners, but not in the judgment against the surety company defendant, because Minton did not sue said defendant on this claim.

On Petition for Rehearing, Jan. 29, 1918.

PER CURIAM. In the above-entitled action the lien claimants Mathewson and Guth, whose actions to foreclose their respective liens were consolidated with those of several other lien claimants, have filed a petition for rehearing in which the only point made is that the opinion as originally filed failed to directly make any award for costs incurred upon the appeal, and that, inasmuch as the judgment of the lower court was materially modified as to some of the lien claimants, the costs of appeal, unless otherwise directed, would fall upon all of the respondents under the provisions of the rules of the Supreme Court and District Court of Appeal, which provide that:

> "In all cases in which the judgment or order appealed from is reversed or modified and the order of reversal or modification contains no directions as to the costs of appeal, the clerk will enter upon the record and insert in the remittitur a judgment that the appellant recover the costs of appeal." Rule 23 (119 Pac. xiii).

While it is true that the judgment appealed from was materially modified by the original opinion in so far as certain designated lien claimants were concerned, nevertheless it was the intent and purpose of the opinion to affirm the judgment in so far as it related to the claims of Guth, Mathewson, and the O'Brien Lumber Company, and while that intent and purpose is fairly inferable from the concluding paragraph of the opinion, nevertheless to the end that there may be no doubt upon that point we will say that the judgment allowing the Guth, Mathewson, and O'Brien Lumber Company claims was affirmed in all of its substantial features, and therefore it is directed that these particular claimants should be and they are hereby relieved from the costs of appeal.

The petition for rehearing is denied, as is also the petition of the defendant Maryland Casualty Company.

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175 Cal. 51; 177 Cal. 93

In re McCOWAN. (Cr. 1988.)

(Supreme Court of California. May 3, 1917.
On the Merits. Dec. 28, 1917.)

1. COURTS 🔑485 — SUPREME COURT — JURISDICTION OF DISBARMENT PROCEEDINGS ON TRANSFER FROM DISTRICT COURT OF APPEAL.

On transfer from a District Court of Appeal, the Supreme Court has jurisdiction of disbarment proceedings against an attorney.

On the Merits.

2. COURTS 🔑488(1)—DISBARMENT PROCEEDINGS—TRANSFER FROM DISTRICT COURT OF APPEAL TO SUPREME COURT—ACCEPTANCE OF DETERMINATION OF ISSUES OF FACT.

The Supreme Court, on transfer from a District Court of Appeal of disbarment proceedings against an attorney, will accept the opinion of the Court of Appeal as a correct determination of the issues of fact.

3. ATTORNEY AND CLIENT 🔑42—SUSPENSION OF DISTRICT ATTORNEY—HAMPERING ADMINISTRATION OF CRIMINAL LAW — ABUSIVE LANGUAGE REGARDING JUDGE—STATUTES.

Where a district attorney, instead of prosecuting for rape, exerted his best efforts to secure provision for prosecutrix and her child from defendant on the promise that he would use his influence to have defendant put on probation, thus hampering and subverting the administration of the criminal law, and also used abusive and offensive language regarding the judge of the superior court without a shadow of justification, for such violation of his duties as attorney, as defined by Code Civ. Proc. § 282, subds. 1, 2, he will be suspended from practice for a year, section 287, subd. 2, specifying as a ground for disbarment any violation of the oath taken by an attorney or of his duties as such, the extreme penalty of disbarment not being called for, because the misconduct arose rather from ignorance of fundamental legal ethics than from deliberate intention to accomplish evil ends.

Shaw, J., dissenting.

In Bank. In the matter of the disbarment of Barclay McCowan. On transfer from the District Court of Appeal. Ordered that respondent be suspended from practicing in any of the courts of the state for a year from final judgment.

C. V. Anderson, C. L. Claflin, Geo. E. Whitaker, F. E. Borton, and C. E. Arnold, all of Bakersfield (John S. Partridge, of San Francisco, of counsel), for petitioner. Barclay McCowan, of Bakersfield, in pro. per. James F. Farraher, Francis J. Heney, and Marshall Stimson, all of Los Angeles (Alfred Siemon, of Bakersfield, of counsel), for respondent.

PER CURIAM. [1] This matter was first presented to this court for its hearing and determination. By this court it was transferred to the Court of Appeal of the Second Appellate District. There it was heard and decided. Thereafter application was made that the matter be transferred to this court for hearing and determination, which application was granted. At the time set for hearing respondent interposed a preliminary objection to this court proceeding with the hearing, based on the contention that it was without jurisdiction so to do. The matter was submitted upon briefs of the respective parties to be filed. While the matter was thus pending this court had occasion to consider and determine it in the matter of the admission of Alonzo Wells to practice law. 163 Pac. 657. The detailed and exhaustive treatment there given to the question relieves from the necessity of doing more than making a reference to that decision. For the reasons therein expressed the preliminary objection to the jurisdiction of this court to hear and determine the matter is overruled, and the cause is ordered placed upon the July, 1917, calendar of the court for hearing and determination on the merits.

On the Merits.

SLOSS, J. This is a disbarment proceeding which was heard by the District Court of Appeal for the Second Appellate District. In the course of a trial consuming several days a great mass of testimony was presented to that court, which thereafter rendered its judgment denying the relief prayed for in the accusation. On the application of the Kern County Bar Association, which had preferred the charges, the proceeding was transferred to this court. A preliminary objection to our jurisdiction was overruled, and the matter was brought on for hearing on its merits. Both parties agreed to submit the proceeding upon the testimony introduced before the District Court of Appeal.

The opinion filed by that court reads as follows:

"An accusation filed in the Supreme Court and later transferred to this court for hearing charged the respondent with having been guilty of acts and conduct which were not only in violation of his duty as an attorney at law, but also such as involved moral turpitude on his part while holding the office of district attorney of the county of Kern. The accusation first charged that respondent solicited money from the defendant in a criminal case pending in the superior court, which money was to be paid in consideration that the official conduct of the respondent as district attorney should be influenced thereby. It is further charged that when the matter of the alleged misconduct of respondent was brought to the attention of the grand jury, and while the matter was under investigation, respondent attempted to intimidate, coerce, and control the members of the grand jury with reference to the action that they should take therein; that he charged that one of the jurors had been indicted for a felony in the state of New Mexico and was not a fit or proper person to sit on the jury, notwithstanding that respondent knew that the juror referred to had been acquitted of the charge in New Mexico; that he attempted to influence others of the jurors by statements designed to intimidate them; that he stated to the foreman of the grand jury that four of the jury members were in a conspiracy to deprive him of his office; that that conspiracy was made with one of the judges of the superior court; that during the time that charges against him were being investigated the respondent insisted upon being present in person or by deputy before the grand jury, and that he or his deputy caused to be prepared certain reports which it was urged that the grand jury should adopt in exoneration of respondent, and that as a result of the intimidation and coercion a report of the jury was finally made as prepared by the deputy of respondent. Another of the charges made in its specifications alleged that while the grand jury was investigating the McCowan matter respondent stated and charged that one of the judges of the superior court was 'nothing but a crook'; that at a later date respondent caused to be published and circulated a certain paper called the Kern County Liberator, which was owned and published by the said respondent, and which paper in the issue of July 31, 1915, contained slanderous references to the judge of the superior court and his action in the matter of the case of People v. E. W. McCutchen, which was the case wherein respondent was accused of having solicited money. The particular details of these charges were fully set out in the accusation, to which an answer was filed raising issue by denial as to any improper act having been committed in connection with the McCutchen Case, and setting forth various statements by way of claimed justification as the same appear more particularly illustrated by the testimony of respondent, which is hereinafter in general substance set out.

"Preliminarily, the following facts may be stated as to which there was no dispute either in the pleadings or testimony: In August, 1914, one E. W. McCutchen was indicted by the grand jury of Kern county for the crime of rape alleged to have been committed with a girl named Effie Thompson, who was at that time about the age of fifteen years; that the said McCutchen left the state of California and remained away from the state about six or seven months; that his whereabouts were unknown to the district attorney; that he returned to Bakersfield about the 20th of April, 1915; that both he, his brothers and wife, had several conferences with respondent as district attorney; that McCutchen was released on bail acceptable to the district attorney; that before McCutchen made any appearance in court for arraignment or other proceedings on the indictment, the father of Effie Thompson brought a civil action as guardian ad litem for the girl, claiming a large amount of damages alleged to have been suffered by reason of the criminal act of the said McCutchen; that respondent consulted with the attorneys in the civil action with the end in view that they should abandon that cause; that the defendant McCutchen made his appearance in the criminal action, and that thereafter copies of certain affidavits were presented to the judge of the superior court, in which it was charged on behalf of the McCutchens that the respondent had solicited money from them as a condition to favorable action being taken in the McCutchen Case; that the grand jury proceeded to investigate the matter; that during the investigation the deputy of respondent insisted that it was the right of the district attorney to be present at the hearing, and that such deputy did remain during all of the time that testimony was being taken; that thereafter a new indictment was presented against McCutchen for the same charge, and that, after two trials had resulted in a disagreement of the juries, defendant on his third trial was acquitted.

"The foregoing matters, as mentioned, were among the facts about which there was no dispute. It may be added that there was no denial made by the respondent as to the statement attributed to him as having been uttered against the judge of the superior court. In support of the accusation, the testimony of J. B. McCutchen, a brother of E. W. McCutchen, was in substance as follows: That some time in the spring of 1915 he had a conversation with respondent, the district attorney of Kern county, when respondent asked him if he knew where his brother E. W. McCutchen was; that upon his replying that he did not know of his whereabouts respondent had said that E. W. McCutchen was a good man, a friend of his, and ought to be there, as it was his place and home, and that if he did return he would make it as easy for him as he could; that the witness had told the wife of E. W. McCutchen of this conversation; that at a later time, in an interview had with the district attorney, the latter had said that he needed money and that the McCutchen brothers would all have to 'dig up'; that he wanted money from them. The testimony of at least one other brother of McCutchen was corroborative of this testimony, and all suggesting directly the inference that the respondent proposed to assist E. W. McCutchen to escape punishment for the crime with which he was charged in consideration that money should be paid for the service.

"Mrs. Kate McCutchen, wife of E. W. McCutchen, testified that about the 1st of April, 1915, she telephoned to the district attorney and arranged for an appointment with him at 3 o'clock on the following day; that when she called at his office at the appointed time he said he was glad to see her and asked what the trouble was; that she replied that she had come to see about her husband, because, after what J. B. McCutchen had told her, she thought the district attorney would befriend her husband and help him get out of the 'blackmailing business'; that Mr. McCowan replied that he had 'tried to give J. B. the hint, but that he didn't take it'; that he said he was a friend of the witness' husband and would do all he could for him; that the witness asked him how he would do that, and he replied that there were various ways; that he told her she need not tell him about the 'rotten bunch' that her husband had gotten into; that he knew all about them, and was going to help him get out of it; that he then asked where the husband was, and the witness had told him that she did not know; that along about the 20th of April the accused McCutchen returned to Bakersfield, and the witness called up McCowan on the phone; that he told her to come to the office at 3 o'clock, which she did; that she there told him that Ed, her husband, was at home, and he said, 'I am awfully glad,' and seemed overjoyed with the news; that he then said, 'I am going to fix this all up for him as soon as I can; you people must be patient; this is a serious matter and it is going to take a little time; you go home and tell Ed to lay low until you hear further from me;' that the next day he called up the witness on the 'phone, and had some conversation, and told her she would hear from him again; that he called up the next day and told her to get her husband's brothers in to go on her husband's bond; that a few weeks later, while she was in the country, Mr. McCowan called her on the phone and said, 'Don't you know your good friend Barclay McCowan? I have good news for you; I can settle that suit for $500;' that he told her to tell Ed to trust him and that everything would be fixed up; that she knew at that time the civil suit had been filed on behalf of the Thompson girl against her husband.

"A. A. De Ligne, a witness called on behalf of petitioner, testified that on or about the 19th day of June, 1915, he had a conversation with Barclay McCowan in which reference was made to Judge Farmer; that the conversation took place in a restaurant on the main street of Bakersfield, 'the French Restaurant, I think they call it'; that he was sitting at one of the tables alone, and that Mr. McCowan and Mr. Farraher came over to his table after they had finished their luncheon; that Mr. McCowan introduced Mr. Farraher to him, and that Mr. McCowan stated to Mr. Farraher, 'I have been telling De Ligne what a crook his friend Judge Farmer is;' that he resented the statement made by McCowan and that there was a little altercation about it.

"The accused, Barclay McCowan, testifying in his own behalf, denied that he had ever offered or suggested that money should be paid to him for services in the McCutchen Case or as a condition to his favorable action in that matter as district attorney. He testified that Mrs. McCutchen had come to him and told him that she had taken the child in the matter and wanted to keep it and wanted to get her husband back to help raise it; that he had replied, 'If Ed will come back here and adopt this child and will provide for Effie Thompson and will plead guilty, I will do anything I can legally do to get him probation;' that about two weeks after that time Mrs. McCutchen came to his office again and gave him to understand, not in direct words, that her husband had come home; that he had instructed her to have McCutchen come to his office and arrange to give bond; that the next day that proceeding was carried out; that following that he had a conversation in a downtown office with E. W. McCutchen regarding the charge against the latter; that upon that occasion McCutchen had made a complete disclosure of his relations with the Thompson girl; that McCutchen had said, 'I will do anything you say,' and that he (McCowan) had replied, 'All right; you plead guilty, adopt the child, and provide for the girl;' that very soon after this John W. Thompson, the father of Effie Thompson, commenced a civil action against McCutchen for a large amount of damages on behalf of Effie Thompson; that he (McCowan) was irritated because this suit had been brought, and that he told McCutchen he would go to the firm of attorneys appearing in the action and talk over the matter and see what he could do toward getting the suit dismissed; that he did go to these attorneys and 'told them of the terms on which I had got McCutchen to come back to Kern county; I told them that he was out of the state and they could not find him, that two sheriffs had failed to find him; that he had come back on the understanding that he was to adopt the child, that he was to provide for the girl, and that he would plead guilty;' that the attorneys agreed they would dismiss the suit if security was given for the provision to be made for the girl. The witness testified: 'It was suggested, I believe, that the girl be put in Notre Dame Convent until she was 21 years old, and receive a reasonable sum of money at that time; I said, "Suppose the four brothers will sign an agreement to this effect." Foster said, "All right."' That an understanding was arrived at in accordance with the suggestions he had made, but that McCutchen did not at any time provide or carry out what he had agreed to do respecting the making of provision for the girl; that McCutchen continually said that he had no money, and that McCowan told him that he must get money, saying, 'You have promised to take care of this girl and you must get some money; the court must be a party to the making of whatever agreement we make, and it cannot be made unless the court does approve of it; and if you apply for probation you must show the court you are worthy of it, and if you are not worthy of it the court will not accord it to you;' that McCutchen had said he would see what he could do, and later came back and said he could raise a thousand dollars; that he (McCowan) had replied, 'You better find you can raise another thousand; you seem to be imposing upon my friendship, upon my kindness; if you had been thrown into jail when you came back here, as the ordinary course would be, perhaps you would realize the seriousness of your position;' that he (McCowan) obtained an extension of time within which an answer might be filed in the civil action, but that McCutchen made an appearance in that action and employed certain attorneys with whom the witness stated he was not willing to have negotiations; that one of the McCutchen brothers had offered to give him a $100, which he had refused, and had said, 'Ed McCutchen could not give me a million dollars;' that after McCutchen employed attorneys no further negotiations looking toward securing for him a probationary sentence were had; that the matter was taken before the grand jury for the purpose of having a new indictment returned because of a defect in the proceedings of a previous grand jury which had returned the first indictment. The witness further testified regarding statements affecting the judge of the superior court; that he had said to Mr. De Ligne, on an occasion prior to that referred to as the restaurant talk by the witness De Ligne, 'I don't want to talk to you. If the testimony of H. E. Johnstone is true, that you and Judge Farmer have been traveling around this state in collusion with an ex-convict for the purpose of liberating a child-rapist and of destroying my efficiency as district attorney, and ruining me and my character, I think you are a pair of crooks; I don't want to talk to you.' Further, that he had told De Ligne that Judge Farmer had been the bitterest enemy he had in the world; that his bias and prejudice had blinded him to take unjust and outrageous action. The witness made no denial of the conversation having occurred in the restaurant in terms as stated by De Ligne. He said that in all of his actions in the McCutchen Case he was not prompted by any motive except to cause reparation to be made by McCutchen for the wrong he had done to Effie Thompson. At another point in his testimony he stated that his purpose was to save from wreck four lives, to wit, McCutchen's, Mrs. McCutchen's, Effie Thompson's, and the child of the latter. It appeared from this testimony that McCutchen had afterwards had two trials on the charge, in both of which the jury disagreed, and that he was finally acquitted. He further said: 'At the same time I deemed it my duty as district attorney and in the interest of justice to do exactly what I was doing, in view of the circumstances and conditions in Kern county at that time; and I would believe it to be my duty to do exactly the same thing if the same circumstances and conditions confronted me again.' He added, in another answer, that the character of the Thompsons also influenced him in his action in the McCutchen Case. He also added, in response to a question of his counsel, that he had never practiced law in the state of California, except that he had in some cases rendered gratuitous services.

"In considering the testimony in support of the charge that respondent solicited money with the intent that it should be paid to influence him in his official conduct, it must be remembered that the testimony was given by witnesses whose interest in the matter at the time the affidavits were made and presented to the grand jury was of the greatest. E. W. McCutchen himself testified that his purpose in making the affidavit accusing McCowan of soliciting a bribe, a certified copy of which formed the basis of the inquiry made by the grand jury, was to affect the action of the jury and court in the matter of his own case. In view of the interest of the witnesses whose sworn statements were embodied in the affidavits and whose testimony was reproduced at the hearing herein, it best comports with fairness to conclude, which we do, that the district attorney, in his negotiations with the McCutchens having reference to the payment of money by them, was acting solely with a view to securing that money for the purpose of aiding the Thompson girl. That his action, taken upon his own statement of the matter, was to the highest degree improper, in our opinion, admits of no question. Indeed, the lack of his appreciation of the impropriety of his course in the McCutchen Case seems inexplicable and deserving of the severest censure. Closely analyzed, we find from the evidence that the whole purpose of the district attorney in the inducement which he offered to secure the return of McCutchen to the state of California and as a consideration for the recommendation which he promised to make to the court that McCutchen should be released on probation, was to secure a settlement in favor of the girl in the case wherein he was charged with committing rape. In his testimony he stated that McCutchen, the accused, asked him what he should do, to which he replied that McCutchen should provide for the girl and plead guilty. He seems to have assumed the entire responsibility for the making of the settlement on behalf of the girl, for he says that when the father of the former had an action brought for civil damages after McCutchen returned, that he (McCowan) was irritated thereat and visited the attorneys for Thompson with the idea of getting them to withdraw the action. He said he told them the 'terms' upon which he had secured the return of McCutchen. These terms, it was very clear, were that McCutchen should make monetary provision for the girl and enter a plea of guilty, upon which the district attorney would use his influence with the court to secure a probationary order. McCutchen was to provide for the girl, and was then to escape a prison sentence, if it were within the power of McCowan so to procure such a result for him. We can find no words of approval for the action of any district attorney exercised in the direction of settling felony cases out of court. The duty of every prosecuting officer is, where sufficient evidence is obtainable to warrant a well-founded belief in his mind that the person accused is guilty, to present such evidence to a court or jury, and not use his position and power in negotiating with the defendant for an adjustment of damages to the prosecutrix in consideration of promised favorable action. The latter remedy belongs to the civil side of the tribunal and one altogether outside the cognizance of a district attorney. The prosecuting officer here accused acted with an entire and complete misconception of what his official duty required of him in attempting to 'trade' with the defendant in a criminal case. However, we have stated that we think his action was not that described by the prosecuting witnesses, to wit, designed to secure money for his own use, and so acquit him of such criminal intent. Neither can it be concluded that any action of his taken before the grand jury was of influence in determining a report to be made other than as it was intended by the jury that report should be. We regret, however, that we are compelled to characterize the acts of the accused before the grand jury as highly improper. The common ethics of the profession would, we think, suggest to the average lawyer that the district attorney should have refrained from appearing before the grand jury while the matter of his own alleged misconduct was under investigation. With our understanding of the law, we would deny that he had any right to be present at the sessions of the grand jury, either in person or by deputy, while charges against him of a criminal nature were under investigation. The law, it is true, does permit the district attorney to be present where criminal matters are being investigated; but that provision, we can readily see, is for the purpose of enabling the district attorney to present his evidence against the accused whose indictment is sought or is being considered. It would hardly be supposed that the district attorney would prosecute himself, and that the provision of law which we have referred to is wholly inapplicable must suggest itself most convincingly. The statement made by respondent before the grand jury that one of their number had been indicted for some crime, where the juror referred to had been acquitted, was a thing which savored not of fair practice. In his reference to the judge of the superior court, the accused, without justification so far as appears, used language harsh in the extreme, for which, to say the least, he is deserving of most severe criticism and reprimand. It appears that these statements were made, however, after all action had been taken in the McCutchen and McCowan matters by the grand jury and Judge Farmer. The respondent seems to have been obsessed with the idea that he was being combated on every pretext by the court and practically the entire bar of Kern county, and in this attitude of mind was inclined to characterize the opposition in terms implying a want of any honesty on the part of those against whom he was arrayed. The judge of the superior court would have been remiss in his duty, where such a serious charge as that preferred against the district attorney was brought to his ears, not to have required an investigation of the matter. We would have imagined that such an investigation would not only have been sought on the part of an accused official conscious of his innocence, but untrammeled by his advice to the grand jury in the matter, would have been demanded and insisted upon. The attitude of the respondent herein, however, was not so intentional or expressed. A question asked him by his own counsel and the answer thereto may be mentioned in palliation of his conduct in this regard. We quote from the transcript: 'Q. By the way, right in this connection, did you ever practice law in Bakersfield? A. I never practiced law in the state of California.' We may properly express the hope that as time passes the respondent, with advancing years and more practice, will acquire an appreciation of the demands which the ethics of the profession impose. So learning, he will no doubt avoid like acts of impropriety and vehement characterization of individuals which the evidence here ascribes to him. While condemning in the strongest terms the acts of impropriety with the commission of which we find respondent guilty, we are not prepared, however, to find that the facts require a judgment of disbarment or suspension from practice, and exercising justly, as we believe, the discretionary power confided to this court.

"The judgment prayed for in the accusation is denied."

[2] We are not disposed to question the correctness of the conclusions reached on the facts by the District Court of Appeal. That court heard the testimony as it fell from the lips of the witnesses themselves, and was in a far better position to weigh the evidence than we, after a reading of the bare record, could be. For reasons analogous to those which have always led reviewing courts to treat as conclusive findings of trial courts on conflicting evidence, we accept the opinion of the District Court of Appeal as a correct determination of the issues of fact.

[3] We are, however, not in accord with the legal conclusions drawn by that court from the facts. While the opinion filed declares in terms that the conduct of the respondent was "highly improper" and "deserving of most severe criticism and reprimand," the judgment finally announced was merely one denying the relief prayed for in the accusation. In effect, the respondent was found guilty of professional misconduct, and was then discharged without the infliction of any penalty whatever. Even the mild punishment of a reprimand, which the opinion declares to be merited by the respondent's conduct, is not administered by the terms of the judgment itself.

But, apart from the mere form of the judgment, we are satisfied that a simple censure or reprimand would not be an adequate or appropriate penalty. Accepting the conclusion of the district court that the respondent did not, in any of the transactions complained of, seek any pecuniary advantage for himself, it still remains that he was, in various matters under examination, guilty of most serious improprieties. As district attorney, charged with the high duty of promoting the efficient and impartial administration of the criminal law, he indulged in practices having a direct tendency to hamper and subvert such administration. In addition, his use of abusive and offensive language regarding the judge of the superior court was without a shadow of justification.

It has been held here that there is in this state no authority to disbar (or suspend) an attorney for any ground other than those enumerated in section 287 of the Code of Civil Procedure. In re Collins, 147 Cal. 8, 13, 81 Pac. 220. But one of the grounds specified in that section is "any violation of the oath taken by him, or of his duties as such attorney and counselor." Subdivision 2. The acts committed by the respondent were in violation of his duties, as the same are defined in subdivisions 1 and 2 of section 282 of the Code of Civil Procedure. Such acts were, we think, too grave to justify a court in dismissing the accusation with an announcement of its disapproval of the conduct of the accused. Some substantial punishment should be imposed. We think, however, under all the circumstances of the case, that the extreme penalty of disbarment is not called for. Taking into account the entire history of the proceedings, we are inclined to the belief that the respondent's misconduct arose rather from ignorance of fundamental legal ethics than from any deliberate intention to accomplish evil ends. It seems probable that it was a mistaken and excessive zeal that led him into the use of unjustifiable methods. Of course, ignorance of the law does not excuse misconduct in any one, least of all in a sworn officer of the law. But this is a quasi criminal action, and in fixing the penalty to be imposed the court should properly take into account the motives and purposes which actuated the accused. Applying these considerations, we think the requirements of the situation will be satisfied by a judgment suspending the respondent from practice for a limited time.

It is ordered that the respondent, Barclay McCowan, be suspended from practice in any of the courts in this state for the period of one year from and after the date upon which this judgment shall become final.

We concur: MELVIN, J.; HENSHAW, J.; VICTOR E. SHAW, Judge pro tem.

ANGELLOTTI, C. J. (concurring). I concur in the judgment and in the views expressed by Mr. Justice SLOSS. There is ample support in the record for the conclusion that whatever of misconception of the proper scope of his functions as district attorney in his endeavor to adjust the McCutchen matter there was on the part of the accused, there was no attempt or intent to profit personally thereby, but simply a desire to see some provision made for the injured girl and the child. According to the evidence on which this conclusion was based, the undertaking of the accused was that if McCutchen would return to the state, submit himself to the jurisdiction of the court, make reasonable provision for the girl and the care of the child, and plead guilty to the charge against him, he would recommend probation. Surely it cannot be said that there is anything of moral turpitude in this. The dissenting opinion does not suggest that the conclusion of the District Court of Appeal on this matter is not fully sustained by the evidence.

The investigation by the grand jury was one concerning this matter, based on an accusation made by McCutchen to the effect that the accused as district attorney demanded money for himself in consideration of his proposed action in the matter. The matter was very properly referred by the judge of the superior court to the grand jury for investigation. Of course, the charge was such as to demand the most thorough investigation, and, if well based, not only the removal of the district attorney from his office, but also his punishment for a grave felony. And it goes without saying that in the matter of the investigation the accused had no right to be present, either in person or by deputy, and that it was altogether improper for him to attempt to influence that body to bring in a report favorable to him, either by persuasion or threat, and especially by any assault on the character of any member of the jury. I do not for a moment justify the conduct of accused in this matter. But I do think the language of my learned Associate in his dissenting opinion regarding this matter is too harsh, and hardly presents the case of accused in as fair a light as the record warrants. There is evidence indicating that there was a bitter factional fight in Kern county, political in nature, the district attorney being the special object of hatred of one of the fractions. With the merits of that conflict we have here no concern. The accused probably had every reason to believe that this accusation, which we must take as absolutely false in fact, was a means by which the opposing faction was seeking to obtain his removal from office. It appears that prior to any attempt to influence the jury to bring in a report favorable to him, that body had already voted to ignore the charge. It is quite probable that the accused feared that improper influences were being brought to bear on the jury to prevent the presentation of the favorable report to which, if innocent, he was entitled, and that it was for this reason that he resorted to the methods complained of. Censurable as his conduct was in this regard, I am not prepared to hold that there was anything of moral turpitude in it.

His reflections on the judge of the superior court were entirely without basis in fact, and so far as I can see accused had no good reason whatever for believing otherwise.

On the whole I believe the ends of justice will be fully subserved by the penalty imposed.

I concur: LAWLOR, J.

SHAW, J. I dissent. The statements in the opinion of the District Court of Appeal regarding the first charge against McCowan —that is, that he attempted to intimidate and coerce the grand jury with reference to the action that body would take upon certain charges against McCowan then pending before it—do not state the case fully or adequately, but gloss it over, apparently for the purpose of palliating the conduct of McCowan, which I think the evidence shows to have been a gross offense against morals and decency, and to establish moral turpitude, as well as an attempt to corrupt and coerce the members of the grand jury. The evidence shows that while the investigation of affidavits against McCowan himself, making charges which, if true, would tend to show that he was guilty of soliciting a bribe or of an attempt at official extortion or compounding a felony, was pending before the grand jury, McCowan, then the district attorney of the county, insisted on being present, and was present, at its deliberations upon the matter; that he repeatedly, during said time, threatened members of the grand jury that he would make charges against them of a nature which would expose them to obloquy and disgrace, and that he presented to said body a certified copy of an Arizona indictment charging a member of said grand jury with a felony, he then well knowing that there had been a trial thereof and that said member had been acquitted of the charge, and that with this knowledge he read the indictment to the grand jury, but did not inform the jury of said acquittal; that he frequently during said investigation talked to members of the jury about the charges against himself, both while the jury was in session and during adjournments, endeavoring to induce, persuade, and threaten them in respect to their action upon the charges against himself. His conduct in this matter alone calls for the severest punishment that can be given in this proceeding, his removal as an attorney, his final disbarment.

To say that this conduct was due to his ignorance of fundamental legal ethics is to palter with a gross offense and to shut our eyes and minds to all the reasonable inferences arising from the facts. They fully establish the proposition that he was using these means, this intimidation and coercion, in the endeavor to prevent the grand jury from bringing an accusation to remove him from his office, or from making a report unfavorable to him. The fact, if it be a fact, that the grand jury would have refrained from bringing any such accusation, or from making an unfavorable report, even if he had not made these unseemly and immoral efforts to have it so, and that it did so refrain, does not in the least excuse him. It is obvious that it was not ignorance of right and wrong, but his own personal interests, that moved him thus to violate his official duty as district attorney, his official oath as attorney at law, and the laws of morality and propriety. If he was obtuse and so devoid of moral sense that he believed such conduct to be rightful and lawful, then he is certainly unfit, by reason of his depraved moral character, to hold the honorable and highly confidential office of attorney and counselor at law. It is my opinion that the judgment of the court should be that he be removed from that high office, and that the punishment of suspending him for one year is wholly inadequate to the gravity of the offense and to the protection of the profession of law and of the people who must resort to lawyers for advice, against the evils of having unworthy persons hold such station.

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177 Cal. 477

HOGAN LUMBER CO. v. NICHOLS et al.

(S. F. 8470.)

(Supreme Court of California. Feb. 8, 1918.)

1. Mechanics' Liens ⚷281(5)—Time for Filing—Evidence.

Evidence *held* to show that building was completed on a certain date, so that plaintiff materialman's lien, not filed within 90 days thereafter, was filed too late.

2. Mechanics' Liens ⚷132(7)—Time for Filing—Accrual of Writing.

Where cessation of work began August 20th, and continued for over 30 days, plaintiff materialman's 90 days within which to file his lien commenced to run on September 19th in view of Code Civ. Proc. § 1187, providing that cessation from labor for 30 days upon a building shall be deemed equivalent to completion for the purpose of filing liens.

In Bank. Appeal from Superior Court, Alameda County; Stanley A. Smith, Judge.

Action by the Hogan Lumber Company against Leo L. Nichols, Hugh A. Boyle, and others. Judgment and decree for plaintiff, and defendants Hugh A. Boyle and others appeal. Reversed.

O'Neill & O'Neill, of Oakland, and Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for appellants. B. D. Marx Greene, of Berkeley, for respondent.

VICTOR E. SHAW, Judge pro tem. This is an appeal by defendants other than Leo L. Nichols from a judgment and decree in favor of plaintiff foreclosing a lien upon real property for a sum found due for material furnished by plaintiff to defendant Nichols for use by him in the construction of a dwelling house upon real estate of which he was the owner.

It was conceded at the trial of the case by all parties that the defendant Leo L. Nichols and his wife were at all times up to November 8, 1915, the owners of the lot of land upon which the building was erected; that on the last-mentioned date they sold and conveyed the property to the defendants Hugh A. and Ida M. Boyle, who ever since have been the owners thereof; that between February 18 and July 6, 1915, plaintiff furnished to the defendant Nichols building material of the value sued for which was actually used in the construction of the building; that said sum had not been paid; and that on December 22, 1915, plaintiff filed for record his claim of lien.

[1] Claiming the same to be contrary to the evidence, appellants attack the finding that the building was completed subsequent to September 24, 1915, and that the lien was filed within 90 days after completion of the house. They insist that the evidence shows that the building was completed on August 20th; hence, when the lien was filed on December 22d, the 90 days within which plaintiff was entitled to file the same had expired. This contention must be sustained.

It appears from the evidence that defendant Nichols was a "speculative house builder," having for years been engaged in constructing houses for sale; that it was his custom in building houses for such purpose to omit therefrom the installation of electric fixtures, leaving the same to be selected by the purchaser; that "he never put the fixtures in a building until it was occupied or sold" for the reason that "they deteriorate, go to pieces, and are stolen." While admitting that he had no independent knowledge as to when the building was completed, Nichols testified without contradiction that, other than installing the furnace and putting in the fixtures, nothing was done on the house after the hardwood contractor completed the hardwood floors, which date, as conclusively shown, was on August 20th. On November 8th Nichols sold the property to the defendants Boyle, who selected fixtures, for the cost of which an allowance was made them on the purchase price of the property, and Nichols bought and installed a hot air furnace for use in connection with the pipes and radiators with which the house was equipped. Upon this showing it clearly appears that the house, except as to installing the furnace and electric fixtures, was fully completed on August 20th. It further appears without controversy that while the building was to be heated with a furnace and lighted by electricity, it was not the purpose and design of the owner to put in these fixtures as a part of the completed structure, but that in this case, as was his custom, he intended to and did omit the same until after a sale of the property, allowing the purchaser to select fixtures, which, at his expense, were installed.

No plans and specifications with which to measure the work of completion were offered in evidence, and since, as appears from the evidence, it was not the intention and design of the owner to install these fixtures as part of the completed house, they should not be deemed necessary to the completion thereof. Santa Monica L. & M. Co. v. Hege, 119 Cal. 378, 51 Pac. 555. Had the lien been filed before they were installed, it could not under the circumstances shown be said the filing thereof was premature.

[2] Moreover, even should it be held that the installation of the furnace and fixtures were necessary to constitute a completion of the building, such fact could not aid respondent, for the reason that there was a cessation of work upon the house on August 20th which continued until after November 8th. Section 1187 of the Code of Civil Procedure provides that a cessation from labor for 30 days upon any building shall be deemed equivalent to a completion for the purpose of filing liens. Hence, by reason of such cessation and continuance thereof for 30 days, plaintiff's 90 days within which to file its lien commenced to run on September 19th and expired prior to the filing thereof on December 22d. In Sunset Lumber Co. v. Batchelder, 167 Cal. 512, 140 Pac. 35, Ann. Cas. 1916B, 664, it is held that materialmen do not have an unlimited time in which to file their liens, but must file them at all events within 120 days after actual cessation from labor.

There is no merit in respondent's contention that the evidence of Nichols to the effect that no work was done on the building after the completion of the hardwood floors was stricken out as hearsay. This evidence was not subject to the objection that it was hearsay, nor was the motion directed to the same, but to testimony of the witness that the house was completed about August 1st, as to the truth of which fact he had no independent knowledge.

The case is here by virtue of an order made upon respondent's petition for transfer after decision by the Court of Appeal reversing the judgment. It appears that in the last-named court counsel for respondent in his oral argument, notwithstanding there was evidence adduced as disclosed by the record tending to show that defendants were estopped from claiming that the building was completed prior to September 24th, expressly waived any right of recovery based upon such facts. This concession was made upon the theory that since plaintiff had not affirmatively pleaded the facts constituting the estoppel, it could not avail itself thereof. Since the court made no finding of any facts constituting estoppel, we must assume that the case was tried upon the same theory in the lower court. In this court, however, respondent, seeking to avail itself of these facts in support of the judgment, now for the first time directs our attention to the evidence tending to prove that Nichols, while owner of the property and as late as October, repeatedly represented to plaintiff that the house was not completed and that he was still engaged in work thereon, and upon the authority of Hubbard v. Lee, 6 Cal. App. 602, 92 Pac. 744, and Donnelly v. S. F. Bridge Co., 117 Cal. 421, 49 Pac. 559, it contends that, conceding the building was in fact completed on August 20th, defendants by reason of such representations are estopped from urging such fact in defense of the action. No finding of facts, however, which such evidence tended to prove was made by the court, without which, since as we have held the finding as to date of completion was without support of evidence, there are no findings to support the judgment.

As presented in the Court of Appeal the decision was correct, and the new theory adopted by counsel for respondent in presenting his case in this court is, in the absence of findings of fact, inapplicable to the case.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; RICHARDS, Judge pro tem.; MELVIN, J.; SHAW, J.; SLOSS, J.

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177 Cal. 439

CAMPBELL et al. v. KENNEDY.

(Sac. 2444.)

(Supreme Court of California. Feb. 2, 1918.)

1. VENDOR AND PURCHASER 🔑75 — CONVEYANCE — AGREEMENT FOR RESALE — IMPLIED TERM.

As a term of the agreement, on which plaintiffs conveyed land to defendant for an advance of money with which to clear it of judgment, that when he sold it he would give them half of the proceeds above the amount of the advancement, the law implies that the sale, or reasonable efforts to sell, shall be made in a reasonable time, breached by refusal for years to sell, notwithstanding offers of a fair price.

2. VENDOR AND PURCHASER 🔑15 — RESCISSION OF CONVEYANCE — PART FAILURE OF CONSIDERATION.

The consideration for plaintiff's conveyance consisting of defendant's advance of money for clearing the property of judgment and his agreement to sell and divide the proceeds in excess of advancement, refusal to sell is ground for rescission, under Civ. Code, § 1689, subd. 2, authorizing a party to rescind a contract if the consideration of his obligation fails in whole or in part through the fault of the party as to whom he rescinds.

3. VENDOR AND PURCHASER ⟹98 — CONVEYANCE—RESCISSION—TENDER OF REPAYMENT.

In case of conveyance by plaintiffs in consideration of money advanced and defendant's agreement to sell the property and divide the proceeds in excess of the advancement, the requirement of Civ. Code, § 1691, that plaintiffs as a condition to right to rescind "restore to the other party everything of value * * * received from him under the contract," is satisfied, where, defendant refusing to sell, plaintiffs tender to him repayment of the amounts advanced with interest.

Department 1. Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by J. S. Campbell and another against Guy R. Kennedy. Judgment for plaintiffs, and defendant appeals. Affirmed.

Guy R. Kennedy, of Chico, and W. H. Carlin, of Marysville, for appellant. Frank Freeman, of Willows, and George F. Gardner, for respondents.

SLOSS, J. In August, 1900, the plaintiffs, who were the owners of certain mining property in the county of Butte, gave to one Steifer a working bond or option, entitling him to work the property, and to receive a conveyance upon payment of $19,000. Except for a relatively small amount, the entire purchase price was to be paid out of the net proceeds of the mining operations to be conducted. Steifer's rights under the agreement passed to a corporation which he organized for that purpose. This corporation operated the mine, but nothing was ever paid to the plaintiffs from the net proceeds, if any were realized.

In 1906, the property, which remained in the possession of the holder of the option, was about to be sold under an execution issued upon a judgment against the plaintiffs. Being without means, they approached the defendant, Guy R. Kennedy, and applied to him for assistance, with the result that the parties entered into the transaction which forms the basis of the present litigation. Kennedy advanced $1,200, the amount necessary to pay the judgment, and an additional $72 for taxes. The Campbells conveyed the property to Kennedy, and he gave them in return a writing whereby he agreed that whenever he sold the property he would, after deducting and retaining the amounts advanced by him, give one-half of the balance of the purchase price to the plaintiffs. The complaint alleges that thereafter the defendant had numerous opportunities to sell the property to various persons who had offered to purchase the same for reasonable sums, but that he had refused to accept any of such offers, or to make any sale of the property. It is further alleged that shortly before the commencement of the action the plaintiff J. S. Campbell made a tender to the defendant of the full amount advanced by him, with interest, and demanded a reconveyance of the property, which offer was refused. The complaint asks judgment for the cancellation of the agreement and deed between the plaintiffs and Kennedy, and for a reconveyance, upon payment to Kennedy of his advances, with interest.

The answer put in issue various of the allegations of the complaint, and set up affirmative matter which is not material to the present consideration. The findings of the court were, in the main, in favor of the plaintiffs, and judgment was entered giving them the relief for which they asked. The defendant appeals from the judgment, and thus presents for review the correctness of the order denying his motion for a new trial, as well as that of the judgment itself. Code Civ. Proc. § 956, amended 1915.

While the complaint contains, in addition to what we have set forth, allegations designed to show fraud on the part of the defendant in obtaining the conveyance, the findings do not support this charge, and it need not be further considered. Nor is it necessary to discuss the appellant's claim that the conveyance from the Campbells to him was not a mortgage. The respondents have never contended that it was.

[1] The consideration of the appeal may well proceed upon the theory advanced by the appellant himself, namely, that the conveyance was made to him in trust to sell the property and to divide the proceeds between the grantors and himself, after first deducting the amount of his advances. The writings did not specify any time within which the sale was to be made. But the law implies, as one of the terms of the agreement, that the sale should be made within a reasonable time, or, at least, that the defendant would make reasonable efforts to sell within such time. Elliott, Contr. § 1877. The allegations of the complaint, found by the court to be true, are that the defendant had refused to sell the property, although offers of a fair price had been made to him. Between the date of the deed to defendant and the demand for a reconveyance, seven or eight years had elapsed. There is no specific averment or finding that this was more than a reasonable time for sale, but the circumstances alleged and found make this conclusion inevitable. While the evidence is conflicting, there was ample support for the material findings. The testimony of the plaintiff J. S. Campbell, corroborated to some extent by that of other witnesses, was that, in 1912, six years after the making of the deed, he had transmitted to the defendant an offer of $10,000 for the property, and had pleaded

with him to accept the proposal, but that the defendant had refused.

[2, 3] Under the Civil Code (section 1689), a party may rescind a contract:

> "2. If, through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part."

The plaintiffs made out a case entitling them to rescind under this provision. The consideration for their conveyance consisted, first, of the defendant's advance of the money necessary to clear the property; and, second, of his agreement to sell, and to distribute the proceeds. The refusal to perform the obligation to sell constituted a partial failure of consideration, justifying a rescission. Richter v. Union Land, etc., Co., 129 Cal. 367, 372, 62 Pac. 39; Sterling v. Gregory, 149 Cal. 117, 85 Pac. 305. The plaintiffs were required, as a condition of the right to rescind, to "restore to the other party everything of value * * * received from him under the contract." Civ. Code, § 1691. This requirement they fulfilled when they tendered repayment of the amounts advanced by the defendant, together with interest. The judgment, which makes the cancellation of the agreement and the reconveyance of the property conditional upon payment of the sum so tendered, is entirely equitable, and gives to the defendant all that he is entitled to ask.

The judgment is affirmed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

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177 Cal. 455

CUSTIS v. GEHELE. (Sac. 2463.)

(Supreme Court of California. Feb. 8, 1918. Rehearing Denied March 7, 1918.)

1. APPEAL AND ERROR ⚷934(2) — PRESUMPTIONS—APPEAL ON JUDGMENT ROLL.

In a suit to establish plaintiff's right to the use of waters from certain springs, where the court found and decreed that plaintiff was entitled to the ownership and use of a designated proportion of the waters, and plaintiff appealed on the judgment roll alone, he must be deemed to have received by the terms of the judgment all that the proofs in the case showed him to be entitled to, either as an appropriator of the water, or as a riparian owner.

2. APPEAL AND ERROR ⚷151(5)—RIGHT TO APPEAL—AGGRIEVED PARTIES.

In a suit to establish plaintiff's right to the use of the waters of certain springs, the court found and decreed that plaintiff was entitled to the ownership and use of a designated proportion of the waters and no more, and enjoined defendant from interfering with the flow and free use of such part of the waters. The court further found that defendant had cleaned, enlarged, and developed the springs, as a result of which an additional amount of water not theretofore flowing therefrom had been developed and had used such water for irrigation, and decreed that defendant might take and use any waters from the springs in excess of the amount described as belonging to plaintiff. *Held* that, conceding that this last provision of the decree was outside the pleadings and issues and unwarranted by the evidence, plaintiff, who was satisfied with the court's definition of the extent of his own rights, was not aggrieved thereby, and not entitled to appeal under Code Civ. Proc. § 938, authorizing appeals by any party aggrieved.

Department 1. Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by John W. Custis against W. F. Gehele. From a judgment for plaintiff for insufficient relief, he appeals. Affirmed.

N. J. Barry, of Susanville, and Dodge & Barry, of Reno, Nev., for appellant. R. M. Rankin and Grove C. Julian, both of Susanville, for respondent.

RICHARDS, Judge pro tem. This is an appeal on the part of the plaintiff from a judgment which, in the main, is in his favor, but which he seeks to have modified in one respect only. The action was brought to establish plaintiff's right to the use of the waters of five certain springs, having their source upon lands adjoining those of the plaintiff. The complaint is in two counts, the first alleging an appropriation and adverse use of the waters of said springs for many years by the plaintiff's predecessor in the ownership of his own lands; the second alleging that the waters of said springs flow by defined courses down to and upon the plaintiff's land, and that his rights to said waters are riparian. The defendant's answer consisted of specific denials of practically all the allegations of the plaintiff's complaint except those relating to his attempted use of said waters in opposition to the plaintiff's asserted right therein, but without any affirmative averments of any kind in the defendant to the use of any part of said waters upon land of his own, and without any prayer for affirmative relief. The cause was tried upon the issues thus presented. The court found that the plaintiff was entitled to the ownership and use of a certain designated proportion of the waters of said springs and no more, and that defendant's threatened diversion or obstruction of the flow of said waters to the extent of any interference with the right of the plaintiff to the flow and free use of so much of said waters as the plaintiff was thus held entitled to would be wrongful and should be enjoined. The court further found that a year or two before the commencement of this action the defendant had entered upon said springs and each of them, and cleaned, enlarged, and developed the same, as a result of which an additional amount of water not theretofore flowing from said springs had been developed, and that ever since said time the defendant had used said additional water so developed for necessary irrigation upon lands of which he was in possession. In the judgment following such findings the court decreed that the plaintiff had the right to the use of the amount of said waters to which by its findings he had been found entitled, and that the defendant should be enjoined from any interference therewith. The court then added to its aforesaid judgment the following clause:

> "But that the defendant may take and use upon his own land any waters from said springs in excess of the amount hereinabove described."

It is this addendum to the judgment in his favor that the appellant asks to have stricken from this judgment by an order of said court modifying the same.

[1, 2] The appeal herein is upon the judgment roll alone. The plaintiff must therefore be held to have received by the terms of the judgment appealed from all that the proofs in the case show him to be entitled to, in so far as the amount of the waters of said springs to which he claimed the use is involved, either as an original appropriator thereof or as a riparian owner in the waters naturally and originally derived from said springs. The findings of the court are susceptible of the construction that the waters which the defendant developed through his operations in connection with said springs were waters not naturally or originally derivable therefrom, and in which the plaintiff had no ownership, either as an appropriator or by virtue of any riparian rights therein. The plaintiff is satisfied with the court's definition of the extent of his own rights in the waters of said springs in either capacity, and is only dissatisfied with that portion of the judgment which attempts to deal with the defendant's use of the excess waters of said spring in which the plaintiff has admittedly no interest or concern. Conceding for the sake of argument that the clause in said judgment to which the plaintiff objects is outside of the pleadings and issues, and even of the evidence, in the case, still the plaintiff is in no wise aggrieved thereby, and hence is in no position to prosecute this appeal. Code Civ. Proc. § 938.

Judgment affirmed.

We concur: SLOSS, J.; SHAW, J.

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177 Cal. 450

OVERTON v. NOYES et al. (S. F. 7737.)

(Supreme Court of California. Feb. 5, 1918.)

1. Mines and Minerals 🔑104 — Mining Corporations—Statutory Regulation.

Civ. Code, § 588, provides that it is the duty of the secretary of every corporation formed for the purpose of mining or conducting mining in California, whether formed and organized under the laws of California, or of any other state to keep an office within the state, and a complete set of books, and that each month it shall be the duty of the directors to cause an itemized account or balance sheet to be made and posted in some conspicuous place in the company's office. *Held*, that in view of the history of this law and the purposes for which it was enacted, it applies to corporations organized in this state for the purpose of conducting mining in another state.

2. Appeal and Error 🔑682—Record—Matters Presented for Review.

An order provided that defendants' motion to strike out parts of plaintiff's amended complaint was thereby denied, as to assignments 1 and 2, and granted as to assignment 3 of the motion. The third specification in the motion to strike out designated the matter sought to be stricken out by reference to the lines and pages of the complaint, but the complaint was printed in the transcript, without reference to the original paging and lines. *Held*, that it being obviously impossible to ascertain from the record what portion of the complaint was stricken out, the court was not called upon to review the order.

3. Appeal and Error 🔑518(6)—Record—Matters Included.

While under Code Civ. Proc. § 670, as amended by St. 1907, p. 720, all orders striking out any pleading in whole or in part are a part of the judgment roll, a motion to strike out is not a part of the judgment roll, though printed in the transcript.

4. Pleading 🔑365(3)—Striking Out Matter—Form of Order.

As orders striking out parts of the pleadings are now a part of the judgment roll, it is the better practice to incorporate in the order itself the portions so stricken out, so that the judgment roll will show unmistakeably the matter stricken out.

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by W. S. Overton against Wm. S. Noyes and others. From a judgment for defendants on demurrer, plaintiff appeals. Reversed, with directions.

Wm. F. Rose and Bruce Glidden, both of San Francisco, for appellant. Harding & Monroe, of San Francisco, for respondents.

WILBUR, J. [1] This is an appeal from a judgment rendered on demurrer upon the ground that the complaint "does not state facts sufficient to constitute a cause of action." The plaintiff, a stockholder in a mining corporation, organized under the laws of the state of California, and operating a mine in the state of Texas, but none in this state, sued to recover the penalty provided in section 588 of the Civil Code for failure to post in a conspicuous place in the office of the company the balance sheet therein required to be so posted. The question raised here is whether or not the section applies to the corporation in question. The statute reads as follows:

> "It is the duty of the secretary of every corporation formed for the purpose of mining, or conducting mining in California, whether such corporation be formed and organized under the laws of the state of California or of any other state, territory, or foreign country, to keep at some place within the state of California," etc.

It is claimed by respondent that the words "in California" modify the phrase "corporation formed for the purpose of mining," as well as the phrase "or conducting mining in California." An examination of the history and purpose of this law will assist in its construction. The first statute on this subject was enacted in 1874 (Stats. 1873–74, p. 866), and was entitled, "An act for the better protection of the stockholders in corporations, formed under the laws of the state of California, for the purpose of carrying on and conducting the business of mining." Section 1 thereof provided :

> "It shall be the duty of the secretary of every corporation formed under the laws of the state of California, for the purpose of mining, to keep," etc.

Then follow various requirements, amongst others, "and shall make out a balance sheet showing the correct financial condition of the corporation." This balance sheet is required to be "open to examination and inspection upon demand by any such stockholder." In 1880 this statute was again amended (Stats. 1880, p. 134), and it was there required that:

> "Such account or balance sheet shall be verified under oath by the president and secretary, and posted in some conspicuous place in the office of the company."

In 1897 this statute was again amended (St. 1897, p. 38), and for the first time the phrase "or conducting mining in California" was introduced into the statute. The amendment read:

> "Sec. 1. It shall be the duty of the secretary of every corporation formed for the purpose of mining, or conducting mining in California, to keep," etc.

The phrase "or conducting mining in California" added nothing to the section as it theretofore read, unless it applied to corporations organized outside of the state of California and "conducting mining in California," for as the section previously read it covered the activities of all corporations organized in the state of California for the purpose of mining, whether within or without the state of California ; unless, of course, as contended by the respondent, the phrase "in California" thus added related back to and modified the phrase "formed for the purpose of mining," as well as the newly added phrase "conducting mining." If the latter contention is correct, the purpose of the amendment was to limit the provisions of the statute to corporations "mining in California," thereby excluding from the provisions of the act corporations theretofore controlled thereby, viz. those organized in California for conducting mining outside of California. If that were the purpose it would have been simple to have said: "Sec. 1. It shall be the duty of every corporation mining in California to," etc. The fair inference seems to be that the Legislature intended to broaden the scope of the law by the added words "or conducting mining in California," rather than to limit its effect. This latter view is strengthened by the fact that the phrase "or conducting mining in California" is separated by commas from the phrase "purpose of mining," and is made clear by a proviso showing that the evil sought to be remedied was the sale of mining stock in public exchanges in California, where the stockholders were not furnished the information in that section provided for their benefit. This proviso is as follows, viz.:

> "Provided, that this section shall apply only to mining corporations whose stock is listed and offered for sale at public exchange, and shall not apply to mining corporations whose stock is not listed in the public exchange and is not offered for public sale."

It was obviously in furtherance of this legislative plan to make the same requirements of mining corporations, whether formed outside of or within California, if the stock of such corporation was sold in public exchange in California. Bearing in mind that the words "mining" and "conducting mining" are synonymous, it is evident that, at the time of the codification of this law in 1905 (Stats. 1905, p. 585), the Legislature in examining the first clause of this section, "It shall be the duty of the secretary of every corporation formed for the purpose of mining, or conducting mining in California," etc., observed that the statute was susceptible of the construction that it only fixed the duty of the secretary of mining corporations organized under the laws of California, and to make it perfectly clear that it was intended to assert jurisdiction over those "conducting mining in California," no matter where organized, the codifier added the words "whether such corporation be formed and organized under the laws of the state of California, or of any other state, territory, or foreign country," so that we now have the language of the section as first hereinabove quoted. The history of this section then shows that, for the protection of stockholders and the public in California against fraud and misrepresentation in the sale and manipulation of stocks, the Legislature first passed a law applicable to all mining corporations formed in the state; that they subsequently so modified the language as to include corporations "conducting mining in California" even if organized outside the state, and that to make this more definite and clear finally enacted the section in the form in which we now have it. Taking into consideration the history of the law and the purposes for which it is enacted, it is evident that it applies to corporations organized in this state for the purpose of conducting mining in another state. As the appellate court of the first district well said:

> "We think a consideration both of the object of the act, namely, the better protection of stockholders in mining corporations, and the grammatical construction of the provision, leads to the conclusion that a corporation, conducting its business as the one here, is included within the scope of the section"

—and the history of this legislation makes this conclusion even more certain.

[2-4] Appellant complains of an order striking out a portion of his complaint. This order, under section 670, Code of Civil Procedure, as amended in 1907 (Stats. 1907, p. 720), is a part of the judgment roll. The order is a minute order, sustaining the demurrer and

granting the motion to strike out in part, and reads as follows:

> "It is further ordered that said defendants' motion for order striking out parts of plaintiff's first amended complaint be and the same is hereby denied as to assignments 1 and 2, and granted as to assignment 3 of said defendants' motion."

It is impossible, of course, to determine from this order what portions of the complaint were stricken out. The motion to strike out is not a part of the judgment roll, though it is printed in the transcript in this case. If we refer to that motion, the third specification is as follows:

> "Commencing with the word 'that' in line 7 on page 6, down to and including the word 'damage' in line 29 on page 7 of said complaint."

If, then, we turn to the complaint we find that it is printed in the transcript without any reference to the original paging and lines. It is obviously impossible to ascertain from the record what portion of the complaint was stricken out. In view of the fact that orders striking out parts of the pleadings are now a part of the judgment roll, the better practice would be to incorporate in the order itself all the portions so stricken out, so that the judgment roll as a whole would show unmistakably the matter stricken out. Of course, this would not be necessary where whole paragraphs are stricken out. Under these circumstances we do not feel called upon to review the order striking out portions of the complaint, especially in view of the fact that the complaint may be amended, if necessary, in order to present the various elements entering into the damage alleged to have been suffered by the plaintiff.

The judgment is reversed, with directions to the trial court to overrule the demurrer, with leave to plaintiff to amend his complaint if so advised.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; VICTOR E. SHAW, Judge pro tem.; RICHARDS, Judge pro tem.; SHAW, J.

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177 Cal. 472

FIDELITY & CASUALTY CO. OF NEW YORK et al. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (S. F. 8534.)

(Supreme Court of California. Feb. 8, 1918.)

Master and Servant ⚿398—Workmen's Compensation Acts—Limitation of Claims.

Filling out and filing a blank presenting the employé's request for a permanent disability rating to the department of the Industrial Accident Commission authorized to issue such rating is not a sufficient written application for compensation to bring the employé within Workmen's Compensation Act (St. 1913, p. 287) § 16a, declaring that, unless compensation is paid or the agreement for its payment is made within six months, the right to institute such proceedings shall be wholly barred.

In Bank. Application by Lawrence Knudsen for workmen's compensation opposed by C. A. Kallstrom, employer, and the Fidelity & Casualty Company of New York, insurer. To review an award of two members of the Commission in favor of the applicant, the insurer brings certiorari. Award annulled.

Brittain & Kuhl, of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

MELVIN, J. A writ of certiorari issued from this court to review the action of the Industrial Accident Commission, by judgment of two of the members thereof, awarding compensation to one Lawrence Knudsen against the petitioner here, the insurance carrier for the employers for said Knudsen.

There is no dispute concerning the essential facts, the one question being whether or not the claim of Knudsen was barred by the limiting section of the Industrial Compensation Law. The majority of the commissioners found that the applicant was injured on June 29, 1916; that formal application for compensation was filed with the commission April 21, 1917, more than six months from the date of the injury and more than six months from the payment of any disability indemnity or agreement therefor by the employer or the surety, but that in October, 1916, and before the expiration of six months from the date of the accident, applicant prepared and filed with the commission a document described in the findings as "his application setting forth all the necessary facts as to his said injury and requesting the decision and award of the commission for a permanent partial disability caused by the said injury"; that said application was "a proceeding for the collection of compensation"; and that therefore the claim was not barred by the provisions of section 16 of the Workmen's Compensation Insurance and Safety Act (St. 1913, p. 279).

In the prevailing opinion of the learned commissioners the document first filed by the applicant is thus described:

> "This form has never been considered heretofore as a formal application for adjustment of claim, being intended only as a request for advice to be used in negotiations between the parties leading to informal settlements. This commission maintains a permanent disability rating department, the function of which is to rate permanent disabilities, assist by conciliation in permanent injury cases in a purely informal and advisory capacity, and to gather and compile statistics leading to a more accurate rating of permanent injuries. It was a form used by this department for the gathering of statistical information and the furnishing of an estimate for the use of parties in informal settlement that was used by the applicant in this case."

But, notwithstanding the use to which the request for a rating was usually applied, the majority of the commissioners were of the opinion that it contained all the requisites for a valid application, and that the filing of the paper gave them jurisdiction of the claim, although absolutely no action was taken in regard to it until many months later. The form is addressed to the Industrial Accident Commission, and is headed:

> "Industrial Accident Commission of the State of California, Permanent Disability Rating Department. * * * Employé's Request for Permanent Disability Rating."

The user is warned parenthetically not to attempt to execute the blank without first carefully reading the instructions. The important sentence of said instructions is as follows:

> "This blank, when properly executed and filed with the Industrial Accident Commission of the state of California, presents your request for a permanent disability rating."

The decision was based upon the proposition that the document presented a controversy in that the commission was requested to fix the percentage of permanent partial disability sustained; that it further appeals to the commission for action of one of its departments; that it contains the names of those from whom compensation, if any, would be due the applicant; and that following the expressed policy of the law to encourage informality in proceedings for workmen's compensation it should properly be considered as an application for compensation.

While this court fully agrees with the conclusion that a wise policy of the law encourages simplicity in proceedings before the Industrial Accident Commission, we are unable to agree with the learned commissioners who pronounced this a sufficient written application for compensation bringing the person who filed it within the terms of section 16(a) of the Workmen's Compensation Insurance and Safety Act, which declared that:

> "Unless compensation is paid or an agreement for its payment made within the time limited in this section for the institution of proceedings for its collection (six months), the right to institute such proceedings shall be wholly barred."

At least one of the reasons for limiting the time for making formal application for adjudication of the extent of the injuries and the proper relief is set forth in the opinion in Ehrhart v. Industrial Accident Commission, 172 Cal. 621, 158 Pac. 193, Ann. Cas. 1917E, 465, wherein the following language was used, at pages 625, 626 of 172 Cal., at pages 193, 194 of 158 Pac. (Ann. Cas. 1917E, 465):

> "One of the purposes of the time limit imposed by the various subdivisions of section 16 was to cause an early submission to the commissioners of the injuries to the employé, so that the commissioners by their own observation and with the aid of expert testimony might determine not only the condition of the applicant at that time, but the probable future results of the accident. This policy is manifest from the fact that, where no disability has occurred at the time of the hearing, but is likely to do so in the future, the commission may retain jurisdiction. Section 25(c). In other words, prompt inquiry regarding the injuries in all their details by the commission was evidently intended by the lawmakers."

And further in that opinion this was said:

> "Another object of a prompt investigation of the results of an accident is to put the commission and the indemnitor in a position to discover any attempt either unduly to extend the period of payment or to fix upon the employer the burden of paying for the results of a later casualty."

In the matter now before us the commission was asked to do nothing judicially by the request for a rating. That request sought no action on the part of the commissioners whereby they might bring the adverse parties into court or might acquaint themselves with the facts either from personal examination or by reports of their own trained experts. It did not ask that the employer or the surety be required to present any defense either might have, and, as a matter of fact, neither was called upon to appear and defend until many months later. In an able dissenting opinion, Mr. Commissioner Pillsbury quoted from section 22 of the act, as follows:

> "Upon filing with the commission by any party in interest of an application in writing stating the general nature of any dispute or controversy concerning compensation, or concerning any right or liability arising out of, or incident thereto, jurisdiction over which is vested by this act in the commission, including any controversy relating to or arising out of the provisions of subsection (a) of section fifteen of this act, a time and place shall be fixed for the hearing thereof, which shall be not less than ten days nor more than forty days after the filing of such application."

Further he wrote as follows:

> "In my judgment, the filing with the permanent disability rating department of the application for the rating of the permanent disability of Knudsen did not meet the requirements of either of these provisions of the act. It did not constitute a beginning of proceedings for the collection of compensation and it did not 'state the nature of any dispute or controversy' concerning compensation, as provided in section 22. For these reasons it did not amount to an 'application' within the meaning of the act and did not bar the operation of the statute of limitations.
>
> "I am little disposed to regard any such proceeding with technical or exacting eyes, but I cannot bring myself to believe that every letter of inquiry sent to this commission, or every report of an injury referable to the statistical department, or every request for rating of permanent disability must be treated as an application for adjustment of controversy merely because an injured person has stupidly so regarded it and thereby slept upon his rights until he has lost them.
>
> "In this case Knudsen had every opportunity, if he did not get the information he sought, to write to the commission for instructions or in some other way make it manifest that there was a controversy to be adjusted, whereupon the commission would have sent him the necessary blanks and have given him the necessary information to safeguard his interests.
>
> "Nor do I think that the employer or insurance carrier are without rights in the premises. They have a right to know if any application for adjustment of controversy has been made, and they also have a right to demand that any pretended application, so in essence whether in form or not, be a real application for such adjustment. Such was not the fact in this case. No issue was placed in controversy. Neither the employer nor insurance carrier were advised that there was any controversy."

With this statement of the law on the subject we fully agree.

There is nothing in the opinion in Massachusetts Bonding & Insurance Co. v. Industrial Accident Commission, 168 Pac. 1051, cited by counsel for respondent, which is at all at variance with the views expressed above. It was held in that case that any notice or method of procedure which does not transgress the constitutional mandate regarding due process of law is proper, but it was so held upon objection to a notice which did not specify a time for a hearing, but required a showing of good cause within ten days why a proposed amendment to a judgment should not be made. The statute of limitations was not invoked in that case, and therefore was not discussed in the opinion.

The award under review is annulled.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; VICTOR E. SHAW, Judge pro tem.; SHAW, J.

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177 Cal. 411

PAPADAKOS v. SOARES. (S. F. 8545.)

(Supreme Court of California. Feb. 2, 1918.)

MORTGAGES 🔑407 — AGREEMENT BETWEEN MORTGAGEES—"CONSIDERATION."

Under Civ. Code, § 1605, declaring that any benefit conferred or agreed to be conferred upon the promisor by any other person to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration, and in connection with the well-established rule that forbearance to sue is a sufficient consideration to support a contract, an agreement by the holder of a second mortgage which was due that he would not sue for a period of time, is a sufficient consideration to support an agreement by the holder of the first deed of trust that he would not foreclose before a fixed date, and would make the second mortgagee a party to any proceedings instituted.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Consideration.]

In Bank. Appeal from Superior Court, Alameda County; Stanley Smith, Judge.

Action by Samuel Papadakos against J. M. Soares. From a judgment of dismissal, plaintiff appeals. Reversed.

Henry B. Lister, of San Francisco, for appellant. F. I. Lewis, and Rose & Silverstein, of Oakland, for respondent.

WILBUR, J. Plaintiff seeks to recover $750 damages for breach of contract. This is an appeal from a judgment of dismissal, made upon the ground that the complaint in the case failed to state a cause of action for the reason that the complaint failed to allege a sufficient consideration for the agreement sued upon. The plaintiff and the defendant each owned obligations secured by certain real property. Defendant's obligation was secured by deed of trust made to secure an indebtedness of $3,000. The plaintiff's obligation was a note for $1,500, upon which $750 had been paid, leaving a balance of $750 due March 15, 1915. This was secured by a mortgage subject to said deed of trust. It is alleged:

> That on the 30th day of March, 1915, "plaintiff and defendant entered into a verbal agreement whereby the plaintiff promised and agreed not to commence any action to foreclose said mortgage, until June, 1915, and in consideration of said promise the defendant promised and agreed that he would not take any proceedings under his deed of trust before the 1st day of June, 1915, and the said defendant further promised to foreclose under said deed of trust, after the 31st day of May, 1915, and promised to make plaintiff a party to the action, for the purpose of enabling him to protect his equity in the property."

It is alleged that in violation of the terms of said promise the defendant, without the knowledge or consent of plaintiff, proceeded to advertise said property for sale on May 15, 1915, and on the 29th of May, 1915, caused the property to be sold, and purchased the same for the sum of $3,000, plus the amount due to defendant for interest and costs of sale, thereby causing plaintiff to lose his claim to his damage in the sum of $750. The question presented by the record is this: Did the promise of the plaintiff to forbear bringing a foreclosure proceeding upon his mortgage then due constitute a sufficient consideration for the agreement of the defendant?

> "The rule on this subject is thus stated in Story on Contracts, § 447: 'Mutual promises are concurrent considerations, and will support each other, unless one or the other be void; in which case, there being no consideration on the one side, no contract can arise.'" Siddall v. Clark, 89 Cal. 321, 26 Pac. 829.
>
> "As was stated in Belloc v. Davis, 38 Cal. 256: 'It is well settled that forbearance to sue is a sufficient consideration to support a contract.' What may constitute a valuable consideration 'may be the surrender, suspension, or forbearance of a legal right to process for the enforcement of the collection of the debt'—citing Frey v. Clifford, 44 Cal. 335, 341." Wells Fargo & Co. v. Enright, 127 Cal. 669, 673, 60 Pac. 439, 441 (49 L. R. A. 647).

Our Code provides that:

> "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise." Civ. Code, § 1605.

The agreement to forbear suit on the part of the plaintiff in this case is a "prejudice suffered or agreed to be suffered, by such person, other than such as he is at the time of consent, lawfully bound to suffer." It is immaterial whether the court is able to discover any actual benefit derived by the defendant or any substantial prejudice suffered by the plaintiff by such forbearance. The question of whether or not the plaintiff may be able to establish the allegations of his complaint as to damage is not involved on this appeal.

Judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 414)

GARTLAN v. C. A. HOOPER & CO.

(S. F. 7733.)

(Supreme Court of California. Feb. 2, 1918.)

1. APPEAL AND ERROR 🔑959(3)—REVIEW—DISCRETION OF COURT — AMENDMENT OF PLEADING.

Discretion of Court, under Code Civ. Proc. § 470, in permitting the pleadings of the parties to be amended at any stage of the trial of the cause, will not be interfered with on appeal in the absence of manifest abuse.

2. PLEADING 🔑420(2) — AMENDMENTS — OBJECTIONS.

Where defendant made no request that the submission of the cause be set aside, or that it be permitted to offer further pleadings or proofs, respecting the subject-matter of trial amendments conforming the pleadings to the proof, defendant cannot object to such amendments.

3. PLEADING 🔑8(11)—AVERMENTS—OWNERSHIP.

The averment of ownership of real estate or of any specified interest therein is an averment of an ultimate fact. Therefore an allegation that plaintiff under his deed from defendant's predecessor entered into possession of a certain tract, together with the water then being developed and conveyed as appurtenant to said tract, and ever since then has been the owner in fee of all such water as appurtenant thereto, is an allegation of an ultimate fact.

4. LANDLORD AND TENANT 🔑119(1)—"TENANCY AT SUFFERANCE"—NATURE OF.

A tenancy at sufferance arises when a person goes into possession of land lawfully and occupies it afterward without any title at all. Therefore one who entered into possession of land under a contract with a mortgagor for its purchase upon installments becomes, on remaining in possession after foreclosure of the mortgage, a tenant at sufferance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Tenant at Sufferance.]

5. WATERS AND WATER COURSES 🔑154(1)—CONSTRUCTION—"APPURTENANCE."

Civ. Code, § 662, declares that a thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or a water course. Plaintiff entered into possession of a parcel of land under a contract with the mortgagor for its purchase on installments. Finding no water on the land which he contracted to purchase, he constructed a tunnel on an adjoining parcel of land which was owned by the mortgagor subject to the same mortgage, and by means of a pipe conducted water developed thereon to his own premises. This was consented to by the mortgagor. After foreclosure of the mortgage, plaintiff represented to the mortgagee, defendant's predecessor, that he had paid the major portion of the consideration for the parcel of land of which he had possession and requested relief, also proposing to purchase the land from which he derived water. Defendant's predecessor on plaintiff's payment of the remainder of the consideration executed to him a quitclaim deed, which described the land, together with "all and singular the tenements, hereditaments, and appurtenances thereunto belonging." The agent of defendant's predecessor who executed the deed and knew of plaintiff's desire to obtain the water had been shown the tunnel and pipe leading the water from the adjoining parcel to plaintiff's land. *Held*, that as plaintiff who was in possession at the time of the execution of the quitclaim deed was at least a tenant by sufferance, having entered lawfully, and the pipe and tunnel were used for the benefit of the land of which he had possession, such pipe and tunnel, together with the right to the water conducted, passed as an "appurtenance."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Appurtenance.]

6. PLEADING 🔑388—TRIAL—VARIANCE—MATERIALITY.

In such case, as the pipe, tunnel, and waters passed as an appurtenance to plaintiff, an averment in plaintiff's amended complaint that, at the date of the conveyance to him, he had for a long time openly used the waters under a contract of purchase from the mortgagor, while a variance from the exact facts, was immaterial.

7. WATERS AND WATER COURSES 🔑154(1) — APPURTENANCES — QUITCLAIM DEEDS—CONSTRUCTION.

In such case, as plaintiff notified the agent of defendant's predecessor of the existence of the tunnel and pipe line by means of which he conducted water from the adjoining lands to his own parcel, and suggested that he be allowed to purchase the adjoining parcel, and the agent informed him that having the waters he needed nothing more, the deed though a quitclaim conveyance must be construed to include the waters, tunnel, etc., as an appurtenance.

8. QUIETING TITLE 🔑10(2) — ACTIONS — GROUNDS.

Plaintiff who sought to quiet title to a tunnel, pipe line, and waters conducted by means thereof from adjoining lands to his own premises, may set up not only a claim of title as an appurtenance but an adverse title acquired by open and adverse user.

9. PRINCIPAL AND AGENT 🔑177(3)—KNOWLEDGE OF AGENT—IMPUTATION TO PRINCIPAL.

Knowledge of an agent who had charge of a parcel of land and as attorney in fact executed conveyances for the principal as to the appurtenances of the land conveyed is imputable to the principal.

10. ADVERSE POSSESSION 🔑55—REVERSIONER—RENEWAL OF LEASE.

The rule that limitations do not run against a reversioner has no application where the landlord demised premises for one year and annually renewed the lease during the period of plaintiff's adverse user of a water tunnel he had built on the leased land to carry water to his adjoining land, for the landlord came constructively into possession of his own at the annual expiration of the lease and prior to the annual renewal thereof, and hence might have exercised an owner's right to put an end to the adverse user.

11. TAXATION 🔑430—ASSESSMENT—SPECIFICATION.

Where use of water is appurtenant to a parcel of land and contributes to its value, it must be considered as included in the assessment without a separate specification.

12. EASEMENTS 🔑36(1)—ADVERSE TITLE — PAYMENT OF TAXES.

Title by adverse possession to an easement in water conducted by plaintiff from adjoining land cannot be denied on the theory that, as the water was not separately assessed to plaintiff, he paid no taxes thereon, for it must be assumed that such water was included in the assessment of his land on which it was used.

13. JUDGES 🔑32—RENDITION OF JUDGMENT AFTER RE-ELECTION.

Where, pending the submission of a case to a judge of the superior court, his term of office expired and a new term to which he had been re-elected began, no interregnum between terms intervened; and, the superior court being a continuing judicial tribunal, a judgment rendered after the beginning of the new term is not open to attack.

14. WATERS AND WATER COURSES 🔑158½(1)—APPURTENANCES—SCOPE.

Where plaintiff acquired title to waters from adjoining land either as an easement or appurtenance, he is entitled only to the amount of waters previously used, and the judgment quieting his title to the waters, pipe line, and tunnel should not give him any broader rights than those he was exercising at the time of the commencement of the action.

Department 1. Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by James Gartlan against C. A. Hooper & Co., a corporation. From a judgment for plaintiff, defendant appeals. Modified.

Thos. S. Molloy, of San Francisco, for appellant. A. F. Bray, of Martinez, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment in plaintiff's favor in an action to quiet title to a tract of land designated in the record as tract No. 1, portion of the Moraga Rancho, in the county of Contra Costa, and also to quiet title to certain water having its source upon an adjoining portion of said rancho designated as tract No. 2, which said water is developed and collected in a tunnel on said tract No. 2, and conveyed thence through a pipe to and upon the first-mentioned tract of land. No controversy exists as to the right of the plaintiff to have his title quieted to tract No. 1, for in its answer the defendant disclaims all interest therein. The issues herein arise over the contested right of the plaintiff to the water which has its origin upon the lands of the defendant, designated as tract No. 2, and to have the same developed and conducted to his own land by means of such tunnel and pipe, as an appurtenance thereto. The facts of the case are in the main undisputed. Prior to the year 1889 one Horace W. Carpentier was the owner of 12,600 acres of land comprising the greater portion of the Moraga Rancho. In that year he conveyed his said holdings therein to Angus A. Grant and James A. Williamson, taking back from his said grantees a mortgage thereon as security for a portion of the purchase price. A little later in the same year his said grantees conveyed all of said land to the Moraga Land Association, a corporation, subject to said mortgage. In 1894 a second mortgage thereon was executed to Carpentier by the Moraga Land Association, and this was followed in the year 1895 by a third mortgage between the same parties, all of which mortgages were duly recorded. In June, 1894, while said property was subject to the terms of the first two of said mortgages, the Moraga Land Association entered into an agreement with the plaintiff herein, for the purchase by him of the ten acres in said rancho which is designated as tract No. 1, for an agreed price of $1,350. The agreement was in the nature of a conditional sale contract, by which the would-be purchaser was to be given immediate possession of the premises, paying the purchase price therefor in installments covering a number of years; the contract providing that he was to be considered as a tenant of the property until such installments were fully paid, and that such installments as were from time to time so paid were to be regarded as rental of the premises, and were to be forfeited in the event of his failure to continue the payment of such installments according to the terms of his agreement. This contract was not recorded, but the plaintiff went into possession of tract No. 1, under it, in the year 1894, and proceeded in the course of the following year to improve the same by building fences and by the erection of a house and barn thereon. He also endeavored to find water upon the tract, but failed to do so, whereupon he applied to the Moraga Land Association for permission to go upon the adjoining tract No. 2, and prospect for water to be used upon his own land. He was given such permission, and acting in pursuance thereof, and in the year 1896, he dug a tunnel upon tract No. 2, in which water gathered, forming a pool, which he proceeded to connect by a pipe 2 inches in diameter at the pool, but narrowing to 1½ inches in the course of its extension to and upon tract No. 1, and by means of which he conducted said water thereto.

In the year 1896 Carpentier commenced an action against the Moraga Land Association for the foreclosure of the three mortgages above referred to. The plaintiff herein was not made a party to said action, but it is conceded that it was not necessary that he should have been made a party thereto, his agreement not having been recorded, but that he was bound by the decree of foreclosure therein. Such decree was entered in August, 1899, and in due time thereafter the entire property covered by said mortgages, including both of said tracts Nos. 1 and 2, was sold by the commissioner to said Carpentier, and, the property not having been redeemed, it was, on September 6, 1901, conveyed by said commissioner to Carpentier. In the meantime the plaintiff had continued to pay his regular installments to his vendor, the Moraga Land Association, until he had paid the sum of $1,150 on account of the purchase price of tract No. 1. He had also expended considerable money in the improvement of said tract, and, in addition thereto, he had laid out about $1,000 in the development of the water which he had discovered and collected on tract No. 2, and in the conveyance of the same to his own tract. There is evidence tending to show that the plaintiff was unaware of the pendency of the proceedings in foreclosure until after the judgment therein had been entered, and that it was only after he had gone to the office of the Moraga Land Association in the latter part of the year 1901, to pay another installment upon his contract, that he learned that Carpentier had become the owner of the property. During all of the years of the plaintiff's connection with the property Carpentier had been an absentee owner, residing in an eastern state, and having as his local agent, one Leviston, an attorney with his offices in the city of San Francisco, who held a general power of attorney from Carpentier in relation to his interests in the Moraga Rancho. In the early days of February, 1902, the plaintiff went to see said Leviston for the purpose of explaining to him the hardship he was under by reason of having lost his whole interest and investment in the property through the foreclosure proceedings, and with a view to seeking relief therefrom. Mr. Leviston assured him that Mr. Carpentier wanted to do the right thing by him, but that, before any action was taken, he (Leviston) wished to see the premises. A day or two later the plaintiff and Leviston went together to the premises, looking over tract No. 1, and then going upon tract No. 2, inspecting the tunnel and pipe thereon, and following the course of the latter to its outlet on tract No. 1, and there observing the distribution of the water upon said tract. While there, according to the plaintiff's undisputed testimony, he applied to said Leviston to purchase tract No. 2, for the purpose of protecting his use of the waters which he had been deriving therefrom, from possible interference on the part of some later purchaser of said tract. Mr. Leviston stated that Mr. Carpentier would not sell any more of said land in small tracts, and that if he sold at all he would sell the whole rancho. "But," he said, "you have the water now, what more do you want?" Thereupon it was agreed that, if the plaintiff would pay the sum of $200, the remaining balance of the installments due upon his original agreement, Mr. Carpentier would give him a deed. On February 5, 1902, the plaintiff, having made such payment, Leviston, as the attorney in fact for Carpentier, executed and delivered to the plaintiff a quitclaim deed, conveying to him by proper description tract No. 1. This deed contained the following provision:

> "Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging. * * * To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part and to his heirs and assigns forever."

Upon receipt of this conveyance, the plaintiff continued in the possession of the premises specifically described therein, and also continued in the open and undisputed use and enjoyment of the waters derived from the tunnel and pipe upon tract No. 2. These conditions continued uninterruptedly until shortly before the commencement of this action, on November 28, 1911. In the meantime, and during the years intervening between the inception of Carpentier's reinvestment of ownership of the Moraga Rancho, as the purchaser thereof under the foreclosure sale, until the date of the commencement of this action, one John Devlin had been in possession of tract No. 2 as a tenant under annual leases thereof, which expired in October of each year and were yearly renewed. Devlin was at all times aware of the uses the plaintiff was making of the water which he was deriving by means of said tunnel and pipe upon said tract No. 2, and never made any sort of objection thereto. In the summer of the year 1911 the plaintiff learned that Mr. Carpentier was about to make a sale of his entire holdings in the Moraga Rancho, and desiring to better his title to tract No. 1 by procuring a grant, bargain, and sale deed thereto, and also desiring to further protect himself against any possible interference with what he claimed to be his rights in the water developed upon and issuing from tract No. 2, he applied to the then agent of Mr. Carpentier for the issuance to him of such grant deed. Not being able to procure the same upon satisfactory terms, he instituted the present action. Thereafter and on July 19, 1912, the entire interest of Mr. Carpentier in the Moraga Rancho was conveyed by him to one Charles A. Hooper, who, on August 29, 1912, conveyed the same to one C. A. Hooper & Co., a corporation, the defendant and appellant herein.

The plaintiff appears to have had some difficulty with the law or with the court in setting forth his cause of action herein. Just what the difficulty was does not appear, but it was not until the plaintiff had filed his sixth amended complaint that he succeeded in passing the ordeal of demurrer. The sixth amended complaint counted upon two causes of action; the first an alleged cause of action based upon the plaintiff's claim of right to the use of the water developed upon and derived from tract No. 2 as an appurtenant for tract No. 1, and as having passed to him as such under the terms of his aforesaid quitclaim deed. The second alleged cause of action was predicated upon his claim of right to the use of such water acquired by adverse possession since the date of said deed. The defendant's demurrer to this sixth amended complaint having been overruled, it answered, disclaiming title to tract

No. 1, but denying specifically the averments of both counts of the plaintiff's said complaint as to his right to the water derived from tract No. 2, or to any interest whatever in said tract or the waters thereof. Upon the trial of the cause and at some time after the submission of the same for decision, the plaintiff moved the court for leave to amend his sixth amended complaint so as to make the allegations thereof conform to the proof. The court granted this motion, but declined to accept or permit such amendments in the form in which the plaintiff presented them, and thereupon proceeded to formulate what the court deemed to be the proper phrasing of such amendments so as to make the same conform to the proofs, and, having done so, ordered such amendments to be made. The subdivisions of the plaintiff's said complaint affected by these amendments were the third paragraph of both counts and the sixth paragraph of the first count thereof. These as amended read as follows:

> "Third. That at the date of said conveyance from Carpentier to plaintiff there was being used, and for a long time prior thereto had been used, obviously and permanently by plaintiff under a contract of purchase from the Moraga Land Association, Carpentier's predecessor in title, for the benefit of the lands contained in said tract No. 1, all the waters then and theretofore developed in and issuing out of the tunnel constructed on said tract No. 2, said waters being conveyed across the lands of tract No. 2 a distance northeasterly of 175 feet, more or less, from the mouth of said tunnel to the land of tract No. 1 by means of 2-inch and 1½-inch pipe. That said water is still being developed in said tunnel and is flowing therefrom as aforesaid."
>
> "Sixth. That under said deed of conveyance of February 5, 1902, and on said day, plaintiff took and entered into the actual possession of the whole of the lands contained in said tract No. 1, together with the water then being developed and conveyed as aforesaid as appurtenant to said tract, and ever since said 5th day of February, 1902, plaintiff has been and is now the owner in fee and in the actual possession of all of said tract No. 1 and all of the said water as appurtenant thereto."

The findings of the trial court followed and held to be true the averments of the plaintiff's sixth amended complaint as thus further amended. The judgment follows the findings in its recitals, and then proceeds to adjudge:

> "That plaintiff is the owner of all the water now being developed in and issuing from, or that may hereafter be developed in and issue from, the tunnel constructed on that portion of the Rancho Laguna de Los Palos Colorados, or Moraga Rancho, described in this judgment, and in plaintiff's complaint, under the designation of tract No. 2; with the right to the conveyance of said water across the lands of said tract No. 2 to aforesaid tract No. 1, by means of 2-inch and 1½-inch pipe. That defendant has no right, title, interest, or estate whatever in or to the lands contained in said tract No. 1, or in any part or portion thereof, or in or to the water developed in and issuing from, or that may hereafter be developed in and issue from the tunnel constructed on said tract No. 2."

[1] The appellant urges numerous contentions upon this appeal as grounds for a reversal, but these upon an examination are reducible to the few essential propositions which we shall proceed to consider. The appellant's first contention is that the trial court erred in permitting further amendments to be made to the plaintiff's sixth amended complaint after the submission of the cause for decision; and it particularly complains that the court erred in drafting, or at least directing, the form of such amendment. These contentions are without merit. Under the provisions of section 470 of the Code of Civil Procedure, the trial court is invested with discretionary power to permit and even to order the pleadings of the parties to be amended at any stage of the trial of the cause, and even after its submission, so as to make such pleadings conform to the proofs, and it has been uniformly held that this discretion will not be interfered with upon appeal except in cases of its manifest abuse. Graham v. Stewart, 68 Cal. 374, 9 Pac. 555; Firebaugh v. Burbank, 121 Cal. 186, 53 Pac. 560; Andrus v. Smith, 133 Cal. 78, 65 Pac. 320; Stohlman v. Martin, 28 Cal. App. 338, 152 Pac. 319.

[2] In the instant case, after the court had permitted and directed the form of the amendments in question, the defendant made no request that the submission of the cause be set aside, or that it be permitted to offer further pleadings or proofs respecting the subject-matter of these amendments. It is apparent, therefore, that it was in no wise prejudiced by the action of the trial court in directing the amendments in question to be made. The appellant, however, in this connection, insists that, as to the amendment of the third paragraph of the plaintiff's sixth amended complaint, it did not in fact correspond to the proofs in an important particular and was therefore improperly made. The particular in which the appellant contends that this amendment fails to conform to the proofs is the inclusion therein of the clause which states that the waters developed in and derived from tract No. 2 were being at the date of the plaintiff's conveyance from Carpentier, and for a long time prior thereto had been, used "obviously and permanently by plaintiff under a contract of purchase from the Moraga Land Association." Technically speaking, this contention of the appellant as to the phrase above quoted is correct. The proofs show that the waters in question were prior to and at the date of the Carpentier deed to plaintiff, being used by the latter under the original permission so to do orally given to plaintiff by the Moraga Land Association, at some time after his contract for the purchase of tract No. 1 was entered into, and that the right to the use thereof was therefore not referable to said contract. This variance, however, we hold to be immaterial for reasons which will hereafter appear.

[3] As to the amendment to paragraph 6 of the plaintiff's sixth amended complaint, to the effect that the plaintiff, under his deed

from Carpentier, entered into the possession of tract No. 1, "together with the water then being developed and conveyed as appurtenant to said tract," and that ever since the date of said deed the plaintiff had been the owner in fee "of all of said water as appurtenant thereto," the appellant contends that these quoted clauses do not constitute statements of ultimate facts, but merely conclusions of law, and hence were not the proper subjects of inclusion in said complaint by way of an amendment thereof. But the averments above quoted as having been added to the sixth paragraph of plaintiff's complaint amount to something more than mere conclusions of law. They are averments of the ownership in the plaintiff of the water in question, as appurtenant to tract No. 1, of which he became the admitted owner by virtue of the deed from Carpentier. The averment of ownership of real estate or of any specified interest therein was very early in the history of our jurisprudence held to be the averment of an ultimate fact. Payne v. Treadwell, 16 Cal. 221. And this decision has been adopted in numberless pleadings and approved and followed in numerous subsequent cases, until it has become and long been a settled rule of law. The latest case affirming it is that of McArthur v. Goodwin, 173 Cal. 500, 160 Pac. 679. Whether or not these averments to which appellant objects conform to the proofs will be later considered.

This brings us to the real pivotal points of controversy of the case at bar. They are these: First, was the water as developed and used by the plaintiff under his oral permission so to do given him by the Moraga Land Association and thereafter continuously used by him in connection with and for the benefit of said tract No. 1, up to the time when his rights to the purchase and ownership of said tract ceased under the foreclosure proceedings instituted by Carpentier, and under which he became the absolute owner of said rancho, and thereafter until the date of the execution of Carpentier's deed to said plaintiff, an appurtenance to tract No. 1, so as to have passed as such under the deed of Carpentier to plaintiff of said last-named tract? Second, did such use of said waters in fact pass as an appurtenance to tract No. 1 under the form of the deed from Carpentier to the plaintiff and under the circumstances preceding and attending the making of said deed? Third, if the easement covering the use of said waters did not pass as an appurtenance to said tract No. 1, under the Carpentier deed thereof to plaintiff, has the plaintiff subsequently acquired the right to such easement by adverse possession? Fourth, is the judgment confirming such easement in the plaintiff valid, and, if so, is it not broader than the proofs would justify in defining the plaintiff's present and future right to the use of said waters?

[4, 5] As to the first of these contentions, the appellant insists that the permissive use which the plaintiff was making of the tunnel and conduit upon tract No. 2, and of the waters developed upon said tract and conveyed to tract No. 1, could not have ripened into an easement during the ownership by the Moraga Land Association of the entire tract, so as to be in any way binding upon Carpentier as the prior mortgagee thereof, and that, as to Carpentier, whatever rights or privileges the plaintiff had acquired from his mortgagor in relation to both contracts were absolutely terminated by the commissioner's deed to Carpentier upon the foreclosure of his mortgages thereon. Conceding this much to be true, it does not necessarily follow that the use of such water by the plaintiff during the period prior to the issuing of the commissioner's deed to Carpentier would not have been such an appurtenance to tract No. 1, as to have passed under a grant of said tract from the Moraga Land Association to the plaintiff, had the latter continued to be the owner of said entire tract and had such grant been made. The Code defines an appurtenance as follows:

> "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or water course, or of a passage for light, air, or heat from or across the land of another." Civ. Code, § 662.

The uncontradicted evidence in this case discloses that the plaintiff's rights to the use of the waters in question, while they had their inception in the oral permission of the Moraga Land Association to develop and conduct the same on tract No. 2, and thence to his own tract, were exercised and matured through the expenditure of a considerable sum of money, and were attended with the assertion of certain exclusive acts of apparent ownership in connection with the development and use of said water, such as the diversion of the whole thereof, and the maintenance of a door and lock upon the entrance to the tunnel wherein the waters were collected. Whether these facts would have sufficed to support the plaintiff's claim of an acquired easement against the Moraga Land Association, it is not necessary here to decide. But at least they go to show that the plaintiff's use of said water in connection and for the benefit of tract No. 1 was not unlawful up to the fact and date of the commissioner's deed to Carpentier; and while it is also true, as the appellant contends, that whatever rights the plaintiff had to become the purchaser of tract No. 1, under his contract with the Moraga Land Association, and whatever rights he had acquired to the use of the waters in question as an appurtenance to said tract, ceased upon the making of the commissioner's deed to Carpentier, it does not necessarily follow, as appellant contends, that the plaintiff's holding of tract No. 1, and use of the waters developed on tract No. 2, became unlawful upon the execution of said commissioner's deed, as to its grantee, Carpentier. The plaintiff was a tenant of the Moraga Land Association prior to the making of said deed, under a strict construction of the terms of said contract. How much more than this he had become by reason of the facts that he had almost entirely paid the amount to be paid as the purchase price of tract No. 1, and that he had also expended considerable sums in the improvement of said tract and in the development and conduct of the waters derived from tract No. 2, with the knowledge and consent of his vendor, may not be material to this inquiry. He was at least in the position of a tenant holding over after the termination of his tenancy, and he was thus not a trespasser, as the appellant would have us hold, but a tenant at sufferance of Carpentier, as the successor in interest of the plaintiff's former landlord, by virtue of the purchase by Carpentier of the entire premises at the foreclosure sale thereof. A tenancy at sufferance arises when a person goes into possession of land lawfully and occupies it afterward without any title at all. 2 Blackstone, Commentaries, 150; Uridias v. Morrell, 25 Cal. 31; Moore v. Morrow, 28 Cal. 551; Hauxhurst v. Lobree, 38 Cal. 563.

The rights of Carpentier date from the purchase of the rancho at the foreclosure sale, and not from his former ownership of the rancho, or from the fact that he had been the mortgagee thereof. At the date of such purchase the plaintiff was in possession of tract No. 1, lawfully, and was also lawfully, and hence by right, using the waters in question as an appurtenance or servitude upon tract No. 2 for the benefit of the former tract. Mr. Carpentier unquestionably would have had the right upon coming into the ownership of the entire rancho by virtue of his commissioner's deed to have ejected the plaintiff therefrom; but he did not do so, but, on the contrary, for several months knowingly, through his local agent, permitted the plaintiff to remain in possession of tract No. 1, and in the open use of the waters derived from tract No. 2, for the benefit of the former tract. The plaintiff was therefore in the lawful exercise of such possession and use as a tenant at sufferance of Carpentier in the early days of the month of February, 1902, when he sought and received the conveyance from Carpentier which took the form of the quitclaim deed of the date of February 5, 1902.

The possession of said tract No. 1 by the plaintiff, and the lawful use by him of the waters in question upon and for the benefit of said tract as such tenant at sufferance of Carpentier, during the months intervening between the 6th day of September, 1901, and the 5th day of February, 1902, was the possession and use thereof by his landlord, Carpentier. Had a quitclaim deed, in the form in which the plaintiff's deed was phrased, conveying tract No. 1, and also expressly conveying the appurtenances thereto, been made by Carpentier to a stranger during said period, it cannot be seriously contended that it would not have transferred the waters here in question as appurtenant to tract No. 1. This being so, we can perceive no reason why the deed to the plaintiff should not be given the same effect, and we are cited to no authority holding that it should be given a different effect because executed to a tenant of the grantor occupying the premises and using the waters, as the plaintiff herein was occupying and using the same at the time of receiving his said deed from Carpentier. If such effect is to be given to that deed, it follows that the amendment to paragraph 6 of the plaintiff's sixth amended complaint, and the finding of the trial court which follows the form of such amendment, were an averment and finding of an ultimate fact in the case, conforming to the proofs, and were not therefore subject to appellant's criticism of the court for ordering such amendment or making such finding.

[6] It will also be apparent from what has heretofore been said that the defendants' objection to the amendment of paragraph 3, of said complaint, and to the finding based thereon, is also without substantial merit, since it is quite immaterial under what particular contract or permission the plaintiff originally acquired the right to enter upon said tract No. 2 and to develop and use the waters thereon for the benefit of tract No. 1.

[7] This disposes of all of the appellant's contentions, so far as they relate to the first cause of action, save one, and that is the appellant's contention that the quitclaim deed of February 5, 1902, is not to be construed as intending to convey anything other than the bare land of tract No. 1, without appurtenances, for the reason that all that the plaintiff paid as the consideration for such deed was the sum of $200, the balance remaining due upon his contract with the Moraga Land Association for the purchase of said tract. This contention might have weight, were that the only circumstance casting light upon the intent of the parties in the making of said deed; but the evidence further discloses that, a day or two prior to the execution of said deed, the authorized agent of the grantor, and the person who actually executed the same on his principal's behalf, went with the plaintiff over the premises to be affected by said deed, and practically agreed that it should cover and convey the waters in question. The trial court, in determining the scope of said conveyance, had before it both of these circumstances, and was entitled to give its own weight to each of them in construing said deed, and with its determination of the issue thus raised, in plaintiff's favor, we shall not interfere.

[8-10] With respect to the plaintiff's second cause of action, and to the findings and conclusions of the court based thereon, but little need be said. The plaintiff had a right to

plead and to rely upon both his claim to the ownership of an easement in said waters by virtue of his deed of February 5, 1902, and by virtue of his open and adverse use thereof under claim of right subsequent to the date of said deed, and for the period requisite under the statute to acquire a right thereto by adverse possession. Had he failed in establishing his right to the use of said waters as an appurtenance to tract No. 1, expressly conveyed by said deed, he could still show title by adverse user for the statutory time. We shall not attempt to discuss the evidence which was adduced by the plaintiff in support of the second count of his complaint further than to say that in our opinion it abundantly shows that the use which the plaintiff has made of the waters in question since February 5, 1902, was open, sufficiently continuous, and under a claim of right so to do; and that such use was fully within the knowledge and observation of the tenants and local agents of Carpentier. Such knowledge was therefore his own. The defendant's contention that the statute of limitations does not run against a reversioner has no application to the facts of this case, for the reason that the tenancy of the tenant or tenants, of the rancho, of which tract No. 2 was a part, expired annually, and was annually renewed during the entire period of the plaintiff's adverse user of the waters in question. The landlord as reversioner came constructively into possession of his own at the annual expiration of his tenant's term and prior to the annual renewal thereof, and hence was in a position to exercise, and should have exercised, an owner's right to put an end to an adverse user of any portion of his property before the same ripened into a title through lapse of time. Failing to do this for the statutory period, he would lose that right by an adverse possession on the part of the plaintiff, which would otherwise have satisfied the requirements of the statute.

[11, 12] The appellant urges, however, that the plaintiff's adverse user and claim of these waters did not otherwise satisfy the requirements of the statute because he paid no taxes upon the easement claimed; but in this behalf the evidence shows that no taxes were separately assessed upon such easement, but that the plaintiff paid all of the taxes which were assessed against tract No. 1, since his acquisition of title thereto. This court has held that, where the use of water is appurtenant to a tract of land and contributes to its value, it must be considered as included in the assessment of such land without a separate specification. Coonradt v. Hill, 79 Cal. 593, 21 Pac. 1099; Frederick v. Dickey, 91 Cal. 358, 27 Pac. 742.

[13] With respect to the judgment herein, the appellant makes two contentions: First, that the judgment is void for the reason that Judge Latimer's term of office expired while he held this cause under submission, and that, being re-elected, he decided it after the commencement of his new term. The point has no merit, even if it can be presented upon a record which does not disclose these facts, and even if it can be urged in this court for the first time upon appeal. The cause was pending in the superior court which is a continuing judicial tribunal. It was decided by the same superior judge who tried it. There was no interregnum between his term, and hence the holding by the individual of the office must be held to be a continuous holding in so far as the duties of his office may be involved. The cases cited by appellant have no application to the facts of this case, since they refer to the power of a newly elected judge to decide matters in which he had not heard the evidence in his judicial capacity.

[14] The next and final contention of the appellant is that the terms of the judgment defining the plaintiff's right to the waters in question are too broad. A reference to the portion of the judgment hereinabove set forth will show that this contention has merit. The plaintiff's right to the use of the waters in question should be limited to the extent of his use thereof prior to and at the time of the commencement of this action. He is entitled to maintain a tunnel and pipe upon tract No. 2 for the purpose of developing and transmitting so much of said waters as may be measured by the capacity of the 2-inch and 1½-inch pipe which has heretofore served to conduct said waters to his own premises. But he is entitled to no more than this, and hence those portions of the judgment which declare the plaintiff to be the owner, not only of all the water "now being developed and issuing from" said tunnel, but also of all such waters "as may hereafter be developed in and issuing from the tunnel," etc., and which further decree that the defendant has no right, title, interest, or estate in or to such waters "as may hereafter be developed and issue from the tunnel constructed on said tract No. 2," are susceptible of a construction giving the plaintiff a much greater right and ownership in such waters as may hereafter be developed upon tract No. 2, than he would be entitled to under his previous or present use of such waters, and also to a construction which might give him a larger right to the development of waters upon tract No. 2, through the extension of said tunnel or the enlargement of said pipe, than he has heretofore claimed or exercised.

The judgment of the court should therefore be modified in these respects, and the trial court is hereby directed to modify the same so as to conform to the views expressed in this opinion; each party to pay their own costs on appeal. So ordered.

We concur: SHAW, J.; SLOSS, J.

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BARANOV v. SCUDDER. (L. A. 3941.)

(Supreme Court of California. Feb. 8, 1918.)

1. Landlord and Tenant 🔑78(1) — Subleases—Sufficiency of Instrument.

A sublease read: "This indenture shows that B. has my room No. 936 Fifth St. for two years from this date for $150 per month in advance, with one exception, and that is that in case of fire where I am now located that he gives me possession in thirty days. At the expiration of two years, I have option of two years longer at same proportionate length as the Western Union will have to pay and the same rate will be extended to B." *Held*, that this instrument, though not formal in character, was legally sufficient as a lease for two years, and it was not an objection that the property was not described by reference to a map, or in any other manner usually employed, where it appeared that the parties knew where the room was located and acted upon the theory that the document properly located and described it, nor was it insufficient because of the failure to use the words "let" or "demise," as no particular or set language is necessary to constitute a lease.

2. Evidence 🔑594 — Conclusiveness — Uncontroverted Evidence.

In a sublessee's action for damages sustained from an eviction by the overlandlord, where notices from the overlandlord, terminating the lease, introduced in evidence, stated that the lease contained a covenant against subleasing, and this evidence was uncontradicted, it was conclusive.

3. Landlord and Tenant 🔑80(3)—Rights and Liabilities of Subtenants—Notice.

A sublessee, knowing that his lessor was only a lessee of a third party, was charged with knowledge of the contents of the overlease.

4. Landlord and Tenant 🔑80(3) — Covenant of Quiet Enjoyment—Actions for Breach.

In an action by a sublessee ejected by the overlandlord, against his immediate lessor, to recover for breach of the implied covenant of quiet enjoyment, the complaint failed to state a cause of action, where it was silent as to the basis of the overlandlord's action, whereby plaintiff was ousted from the premises.

5. Landlord and Tenant 🔑80(3) — Covenant of Quiet Enjoyment—Subleases.

Under Civ. Code, § 1927, providing that an agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring, there was an implied covenant of quiet enjoyment in a sublease, entitling the sublessee to sue the sublessor for damages from his eviction by the overlessor, because of the breach of the covenant in the overlease against subletting, though the sublessee knew of the covenant against subletting, as he had a right to assume that the sublessor would procure, if he had not already procured, the overlessor's consent to the sublease.

6. Statutes 🔑222—Construction as Continuation of Common Law.

Civ. Code, § 1927, raising an implied covenant of quiet enjoyment of a thing hired during the term of the hiring, is not subject to the common-law exception that a covenant of quiet enjoyment, not expressed in the lease, but merely implied by law, endures only during the continuance of the estate of the lessor, notwithstanding section 5, providing that the provisions of such Code as far as they are substantially the same as existing statutes, or the common law, must be construed as continuations thereof, and not as new enactments, since section 1927 is not substantially the same as the common-law rule, as it does not provide for such exception, but, on the contrary, provides that the obligation to secure the quiet possession of the thing hired continues during the entire term of the hiring, and moreover section 1927 was apparently borrowed from the civil law, and not intended as a re-enactment of the common law.

7. Constitutional Law 🔑70(3)—Judicial Functions—Inquiry into Justice of Legislation.

While it would probably be more conducive to justice if the common-law exception were incorporated into Civ. Code, § 1927, this was not done, and, the Legislature having spoken on the subject, the courts must follow its mandates without regard to the justice or injustice of the results.

In Bank. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Max Baranov against Hewlett Scudder. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

E. H. Lamme, of San Diego, for appellant. Binnard & Weinberger and W. P. Cary, all of San Diego, for respondent.

SHAW, J. This cause comes before us on rehearing after the decision by the District Court of Appeal. After further consideration of the cause, we approve the opinion of that court prepared by Mr. Justice Works. It is as follows:

"This is an appeal from the judgment and from an order denying appellant's motion for a new trial.

"On September 11, 1912, appellant executed to respondent a sublease of a storeroom held by the former under a lease from the Western Union Telegraph Company. Respondent remained in possession of the property until he was evicted through process of law, in August or September, 1913, in an action brought by the telegraph company for the purpose of ousting him. The present action was commenced to procure a judgment against the appellant for the damages suffered by respondent because of the eviction, on the theory that a covenant for quiet enjoyment was incident to the sublease. The case was tried by jury, and the respondent recovered judgment.

"Appellant claims that the writing which we have termed a sublease is not one. The instrument is as follows: 'This indenture shows that Mr. Max Baranov has my room No. 936 Fifth St., for two years from this date for $150 per month in advance, with one exception, and that is, that in case of fire where I am now located that he gives me possession in thirty days. At the expiration of two years, I have option of two years longer at same proportionate length as the Western Union will have to pay and same rate will be extended to Mr. Baranov.'

[1] "While the paper is not formal in character, it is legally sufficient as a lease for a term of two years. It is no objection that the property was not described by reference to a map, or in any other manner usually employed in legal descriptions of realty. The evidence shows that the parties knew where the room was located and at all times acted upon the theory that the document properly located and described it.

"The point is urged that the paper is lacking in the usual words of hiring of real property, such as 'let' or 'demise.' But it is not necessary to use these words nor any particular or set language to constitute a given writing a lease. The Supreme Court has adopted the following language of a text-book on this subject: 'Whatever words are sufficient to explain the intent of the parties, that one shall divest himself of the possession, and the other come into it, for such a determinate time, such words, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease.' Williams v. Miller, 68 Cal. 290, 292, 9 Pac. 166. See, also, Dodd v. Pasch, 5 Cal. App. 686, 91 Pac. 166; Morris v. Iden, 23 Cal. App. 388, 138 Pac. 120.

"Appellant's next claim is that no covenant for quiet enjoyment went with the sublease, and that the evidence did not justify the finding, necessarily merged in the verdict, that it did. The evidence plainly shows, without dispute, that respondent knew, at the time he took the sublease from appellant, that the latter was but a tenant of the Western Union Telegraph Company, and that the lease between appellant and respondent was but a sublease. The lease from the telegraph company was in writing. The answer alleges, by way of affirmative defense, that in the instrument 'it was provided that said premises described in plaintiff's second amended complaint should not be sublet or the lease assigned except by the written consent of the said Western Union Telegraph Company and the existence of said lease and the contents thereof was as fully known to the said plaintiff as to this defendant.'

"The respondent offered in evidence in the trial court no part of the record or proceedings in the action brought by the telegraph company, probably because of the admissions of the answer; but he did offer two notices served by the company upon appellant before the commencement of the action, each of which, as the testimony of both parties shows, Scudder delivered to Baranov immediately after its service. The first of these contains the assertion: 'We are informed that in violation of our lease to you of the premises No. 955 Fifth St., San Diego, Cal., you have sublet to one Max Baranov. Under the terms of said lease, we are entitled to declare a forfeiture thereto, which we hereby do.'

"The second notice was served a short time later, doubtless because the first designated the property by a street number different from that of the premises actually occupied by Baranov, and was as follows: 'Under the terms of the lease of this company to you dated October 16, 1911, you expressly covenanted not to assign, let, or underlet any portion of the demised premises. Because of your violation of this covenant by subletting to Max Baranov, you are hereby advised that the Western Union Telegraph Company elects to terminate said lease, and you are hereby notified to vacate said premises on or before the 1st day of July, 1913, and in case of your failure so to vacate, the necessary steps will be taken to evict you.'

[2-4] "Neither of the parties offered the lease in evidence, but these notices show that it contained a covenant not to sublet, and that a forfeiture might be declared if a subletting was attempted. The evidence was uncontradicted, and therefore conclusive. As respondent knew that Scudder, his sublessor, was but a lessee of the telegraph company, he also knew the contents of the lease. Peer v. Wadsworth, 67 N. J. Eq. 191, 58 Atl. 379; Missouri, K. & T. Ry. Co. v. Keahy, 37 Tex. Civ. App. 330, 83 S. W. 1102; Gorgeous v. Lewis, 20 Cal. App. 255, 128 Pac. 768. Notwithstanding this knowledge, the respondent elected to take the sublease. Under the circumstances surrounding the execution of the sublease, was it accompanied by a covenant for quiet enjoyment, for the breach of which the appellant may be required to respond in damages? This question is to be solved upon the fact, which we will assume for the appellant, that the action brought by the telegraph company was grounded upon the matter of the subletting to Baranov as a breach of the covenant not to sublet. The pleadings in this case are silent upon the question as to what the basis of that action was. The complaint fails to state a cause of action, because of the omission, but the defect is cured by the manner in which the answer joins issue with the conclusions of law stated in the complaint. Nevertheless the action was tried upon the theory that the subletting was at the bottom of the litigation, and the two notices from the company show that the action was threatened on that account.

[5] "The respondent claims that a covenant for quiet enjoyment was secured to him by the language of section 1927 of the Civil Code, which provides that, 'An agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring, against all persons lawfully claiming the same.'

"The opinion in Gorgeous v. Lewis, supra, contains language, in addition to the point to which it is cited above, to the effect that a subtenant is bound by the terms and conditions of the overlease; that, accordingly, the term of the sublease in question there was measured by the term of the overlease, although the sublease on its face demised the property for a longer period; and that the covenant for quiet enjoyment which accompanied the sublease was ended with the conclusion of the term limited in the overlease. It is to be noted that Gorgeous v. Lewis was exactly like this case in that it was an action by the sublessee against the sublessor for damages for an eviction by the overlandlord. Section 1927 is not cited nor mentioned in the opinion, and respondent asserts that the case, in so far as it bears upon the question now presented to us, is dictum; and such it appears to be, for there the sublease contained the express provision that it was 'to hold only to the conditions of the original lease.' The case is not, therefore, authority upon the point now under review.

"We turn to a consideration of the language of section 1927. Its letter seems plainly to cover the case presented here. If its spirit does not, it can only be for the reason that Baranov knew, as well as did Scudder, of the prohibition in the lease of the right to sublet. But that circumstance does not seem to afford an escape from the effect of the section. It is well settled that one may agree, in future, to convey property to which he has no title, and the other party to the pact, knowing of the lack, may expect that the day fixed for performance will bring to him that title. Is it not as logical to say that Baranov had the right to assume that Scudder would procure, if not, in fact, that he had already procured the telegraph company's consent to the sublease? Again, according to Wilmington Trans. Co. v. O'Neil, 98 Cal. 1, 5, 32 Pac. 705: 'Where a party has expressly undertaken, without any qualification to do anything not naturally or necessarily impossible under all circumstances, and does not do it, he must make compensation in damages, though the performance was rendered impracticable, or even impossible, by some unforeseen cause over which he had no control, but against which he might have provided in his contract.' See, also, Carlson v. Sheehan, 157 Cal. 692, 109 Pac. 29; Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 Pac. 458, L. R. A. 1916F, 1. The reason of this rule applies as well to a foreseen possible cause over which the party might exercise control. Scudder could have readily protected himself against the effects of an eviction such as later resulted to Baranov, by a clause in the sublease, but omitted to do so.

"The doctrine of Gorgeous v. Lewis, followed to its legitimate conclusion, amounts to this: That no sublessee, knowing that he is a sublessee, is protected under section 1927 against a breach of any condition in the overlease, that is, if no act of omission or commission on the part of the sublessor occasions the breach. But such a rule meets with dissent in many cases. Geer v. Boston Little Circle Zinc Co., 126 Mo. App. 173, 103 S. W. 151, and cases cited; Griesheimer v. Bothman, 105 Ill. App. 585. The latter case is a counterpart of the present one, except that there the covenant for quiet enjoyment was expressed in the sublease instead of being secured by statute.

"While, as we have above indicated, a sublessee takes notice of the provisions of the overlease, it does not follow that such notice concludes his rights under his contract with his immediate lessor. He cannot, for instance, hold against the overlandlord for a term longer than that limited in the overlease. There may be other respects in which his knowledge might affect his relations with the overlandlord, or, perhaps, even with his immediate landlord; but that is far from saying that such knowledge deprives him of his right to damages against his lessor for an eviction at the hands of the landlord superior to them both, under some provision of the overlease.

"We are of the opinion that plaintiff is within the provisions of section 1927 of the Civil Code."

[6] The rehearing from that court was granted in order that we might give further consideration to the question of the meaning and effect of section 1927 of the Civil Code. The appellant contends that its construction is governed by section 5 of the Civil Code, which provides that:

"The provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments."

In support of this theory he presents additional authorities to the effect that at common law a covenant for quiet enjoyment, which was not expressed in the lease, but was merely implied by law, did not endure longer than during the continuance of the estate of the lessor, or, as applied to this case, that the covenant for quiet enjoyment implied from the lease by Scudder to Baranov did not bind Scudder to secure the quiet possession to Baranov after the term of Scudder in the premises had terminated. The argument is that section 1927 of the Civil Code must be construed as a continuation of the common law, and therefore that it must be subject to this exception, as was the rule at common law. The trouble with this theory is that section 5, aforesaid, destroys it. The Code provisions are continuations of the common law only "so far as they are substantially the same." Section 1927 on this point is not substantially the same as the common-law rule. Instead of providing for an exception in case the lessor's estate does not endure for the entire period of the sublease, that section provides that the obligation of the letter to secure the quiet possession of the thing hired continues during the entire term of the hiring. The section declares the terms of the implied covenant which it creates from the acts of the parties. The obligation of the sublessor is not thereby limited by the duration of his own term or right of possession. The exception prevailing at common law is excluded. The section is therefore opposed to the common law, and is not governed by the rule of construction of section 5. The notes of the commissioners who prepared the Civil Code indicate that the section was not intended to be a re-enactment of the common law, but that it was borrowed from the civil law. This may explain the reason why nothing is said in the section which would allow an exception in case the sublessor's term ended before the expiration of the sublease.

[7] One of the evils of the Code system is that the law as thus enacted is seldom as elastic as was the common law, which it was in the main intended to declare. It would probably be more conducive to justice, upon the whole, if the exception here involved had been incorporated into the Code provision, but as this was not done, and the Legislature has spoken on the subject, the courts cannot do otherwise than to follow its mandates without regard to the justice or injustice of the results.

The judgment and order are affirmed.

We concur: VICTOR E. SHAW, Judge pro tem.; SLOSS, J.; WILBUR, J.; MELVIN, J.

(177 Cal. 31)

PASSOW & SONS v. UNITED STATES FIDELITY & GUARANTY CO.

(S. F. 8136.)

(Supreme Court of California. Dec. 24, 1917. On Petition for Rehearing, Jan. 22, 1918.)

1. ATTACHMENT 🔑192—RELEASE ON SECURITY—FORM AND REQUISITES OF UNDERTAKING.

Under Code Civ. Proc. § 540, providing that a writ of attachment shall direct the sheriff to attach enough of defendant's property to satisfy plaintiff's demand unless defendant gives an undertaking, and in such case to take such undertaking, an undertaking given, to secure the release of an attachment and providing that, if plaintiff recovered judgment, the surety would on demand pay the amount thereof to plaintiff, was a statutory undertaking, and not a mere obligation to pay the debt in consideration of the release of the attachment.

2. ATTACHMENT 🔑344—ACTIONS ON BONDS—CONDITIONS PRECEDENT.

Under Code Civ. Proc. § 552, providing that, if an execution be returned unsatisfied in whole or in part, plaintiff may prosecute any undertaking given pursuant to section 540, or proceed as in other cases upon the return of an execution, the regular issuance and return of an execution unsatisfied in whole or in part is a condition precedent to the maintenance of an action on an undertaking given under section 540 to procure the release of an attachment.

3. EXECUTION 🔑333—RETURN—TIME FOR RETURN.

Under Code Civ. Proc. § 683, providing that an execution may be made returnable at any time not less than 10 nor more than 60 days after its receipt by the sheriff, an execution made returnable within 60 days cannot be regularly returned before the expiration of 10 days from its receipt by the sheriff.

4. ATTACHMENT 🔑344—ACTIONS ON BONDS—CONDITIONS PRECEDENT.

The return of an execution unsatisfied before it has been held by the sheriff for at least the minimum period prescribed by law cannot be made the basis of an action on a bond given to procure the release of an attachment unless it appears that the judgment debtor had no property subject to levy or means wherewith to satisfy the execution at any time during the period between its issuance and the earliest lawful return day, in which case the return, though premature in point of time, will support the action.

5. ATTACHMENT 🔑349—ACTIONS ON BONDS—PLEADING.

In an action on a bond given to release an attachment, a complaint showing that the execution against the judgment debtor was returned prematurely, but not showing whether at that or any other time the judgment debtor had any property or means, was fatally defective, as, when the execution is returned prematurely, the party suing on the undertaking must allege and prove that the execution could not have been satisfied during the minimum lawful period for its return.

6. ATTACHMENT 🔑337—BONDS—DISCHARGE OF SURETIES—COLLUSION.

Collusion between defendant and plaintiff whereby judgment is given for a larger amount than plaintiff is entitled to will release a surety on a bond given to release an attachment and conditioned for the payment of any judgment recovered.

7. APPEAL AND ERROR 🔑1011(1)—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

In an action on a bond given to release an attachment, the court's finding on conflicting evidence against the surety's claim that plaintiff encouraged and permitted the principal to dispose of his property without applying it to the satisfaction of an execution against him could not be disturbed.

8. ATTACHMENT 🔑337—BONDS—DISCHARGE OF SURETIES.

Plaintiff sold goods to B. by a contract which reserved title in plaintiff, but provided that, if B. failed to pay any installment of the purchase price, the entire balance of the price should become due, and that thereupon plaintiff at its option could either sue for the whole price or cancel the contract and take possession. B. failed to pay, and plaintiff sued for the price, and attached the property on an affidavit stating as required by law that the debt was unsecured by any lien. B., without attacking the judgment, procured its release by giving an undertaking conditioned for the payment of any judgment recovered by plaintiff. Subsequently B. consented to judgment on condition that title to the property should pass to him, and judgment was rendered accordingly, and full delivery made to him. The surety claimed that, when judgment was rendered, plaintiff had a lien on the property, and by failing to enforce it plaintiff released the surety from liability. *Held*, that the surety was in no position to complain of plaintiff's conduct in bringing action on the debt instead of enforcing whatever lien he had as it must be presumed to have been aware of the facts when the undertaking was made and to have made its contract accordingly.

9. ATTACHMENT 🔑350—BONDS—ACTIONS—EVIDENCE.

In an action on such undertaking, evidence of the disposition made by B. of the goods of which complete delivery was made to him at the time of the judgment was admissible, provided its purpose was to show that the property was disposed of after the issuance of the execution against B., but not if the goods were disposed of before execution was issued without collusion between him and plaintiff.

On Petition for Rehearing.

10. ATTACHMENT 🔑192—RELEASE ON SECURITY—DELIVERY OF BOND.

Under Code Civ. Proc. § 540, providing that a writ of attachment shall direct the sheriff to attach the defendant's property unless defendant gives an undertaking and in such case to take such undertaking, the mere fact that an undertaking, whereby the surety promised that if plaintiff recovered judgment it would on demand pay the amount thereof to plaintiff, was delivered to plaintiff instead of to the sheriff, did not change its character and make it a common-law, rather than a statutory, undertaking, where such delivery was for convenience only and the property was thereupon released by the sheriff in the usual way and not by plaintiff.

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Passow & Sons against the United States Fidelity & Guaranty Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

Leon E. Morris, of San Francisco (M. C. Lynch, of San Francisco, of counsel), for appellant. Keogh & Olds and W. H. Morrissey, all of San Francisco, for respondent.

SHAW, J. The defendant has appealed from the judgment, and from an order denying its motion for a new trial.

Plaintiff sued to recover judgment upon an undertaking given by the defendant, as surety for one Charles Bowman, to obtain the release of an attachment issued out of the superior court of Merced county, in an action wherein Passow & Sons was the plaintiff, and Charles Bowman was defendant. The undertaking was given in pursuance of section 540 of the Code of Civil Procedure. By its terms it bound the defendant to the effect that, if the plaintiff in that action recovered judgment, the defendant would on demand pay the amount thereof to said plaintiff. Passow & Sons is a corporation.

[1-5] 1. There was a general demurrer to the complaint, which was overruled. In this ruling we think the court erred.

The complaint alleged the beginning of the action against Bowman for the recovery of money, the execution of the undertaking herein sued on, for the purpose of releasing the attachment issued at the time of the beginning of said action, and the subsequent recovery on January 28, 1913, of judgment in that action against Bowman for $923.27. The undertaking was made a part of the complaint. We cannot agree with the plaintiff's contention that the undertaking is a mere obligation to pay the debt in consideration of the release of the attachment, and was not an undertaking authorized by section 540. It was in the form prescribed by that section, and was in all substantial respects the same in form as the undertakings considered in Preston v. Hood, 64 Cal. 406, 1

Pac. 487, McCutcheon v. Weston, 65 Cal. 37, 2 Pac. 727, and Gardner v. Donnelly, 86 Cal. 372, 24 Pac. 1072, and which were held to be statutory bonds under that section. Section 552 of the Code of Civil Procedure provides that:

"If the execution be returned, unsatisfied, in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section five hundred and forty or section five hundred and fifty-five, or he may proceed, as in other cases, upon the return of an execution."

In alleging compliance with this section the complaint stated that an execution was issued on February 14, 1913, which was returned wholly unsatisfied on February 19, 1913. The effect of section 552 is to make the regular issuance and return of an execution unsatisfied in whole or in part a condition precedent to the maintenance of an action upon the undertaking. Brownlee v. Riffenburg, 95 Cal. 449, 30 Pac. 587. The thing contemplated and required by section 552 is that the plaintiff in the attachment suit shall exhaust his remedy by execution before proceeding against the surety on the undertaking. It is therefore necessary that he shall show in his complaint upon the undertaking that the remedy by execution has been regularly pursued, and that a return of the execution unsatisfied in whole or in part was regularly made before the action was begun. The Code provides that:

"The execution may be made returnable, at any time not less than ten nor more than sixty days after its receipt by the sheriff." Code Civ. Proc. § 683.

The execution in this case was made returnable within 60 days after the sheriff's receipt thereof. Under section 683 it could not be regularly returned before the expiration of 10 days from its receipt by the sheriff. The complaint shows that it was returned within 5 days thereafter. Where a third person, standing in the relation of a surety for the principal debtor, is entitled to have the remedy on execution exhausted before an action lies against him, such execution must be held by the sheriff for at least the minimum period prescribed by the law, before its return unsatisfied can be made the basis of such action, at least unless it is shown that during the minimum period the execution defendant was without means or property wherewith to satisfy it.

"The trustee cannot be held liable to a scire facias before the return day, because the execution may be 'otherwise satisfied,' at any time whilst it remains in force, although he has refused to pay over, to the officer goods, effects or credits sufficient to satisfy it." Adams v. Cummiskey, 4 Cush. (58 Mass.) 422.

In Austin v. Goodale, 58 Me. 109, the same principle was declared, the court stating that until the return day had expired the debtor might voluntarily pay the judgment, and thereby relieve the third party from his contingent liability, saying:

"It is only when the officer has used the powers conferred by the process during the whole time given to him that he can return it unsatisfied within the meaning of the statute," and that the other party cannot be subjected to further process "until it is shown by a return of nulla bona that the execution could not be satisfied otherwise during the time it was in force."

In Dillon v. Rash, 27 Mo. 243, the court said:

"Regularly, an execution cannot be returned before the return day. If search is made and no property is found, it does not follow but that the defendant may have property before the return day of the execution. He may acquire it after the return is made."

The provisions of section 683 as to the period for the return of an execution allow an execution made returnable within 60 days to be returned after the expiration of 10 days from its receipt by the sheriff. 3 Freeman on Executions (3d Ed.) § 353, p. 2016. There is a qualification of this rule in other states to the effect that, where the issuance and return of an execution are necessary as a foundation for further proceedings against the judgment debtor, as, for example, proceedings supplementary to execution, or a creditors' bill, a premature return unsatisfied may be cured by proof that the execution debtor in fact had no leviable property. In our opinion, the reasons in favor of this rule justify its application to a premature return, where the return is necessary as a foundation for an action upon an undertaking to release an attachment. It is obvious that, if in fact the judgment debtor had no property subject to levy, or means wherewith to satisfy the execution, at any time during the period between its issuance and the earliest lawful return day thereof, a premature return could not cause any loss or prejudice to the surety upon the undertaking. It would appear to be just and reasonable that, if these facts be clearly established the return unsatisfied, though premature in point of time, may still be available to support a subsequent suit or proceeding. The effect of this, however, is that the party instituting the suit on the undertaking must allege and prove that the execution could not have been satisfied during the minimum lawful period for its return. In the present case the complaint contains no such allegation. It alleges a premature return, but is silent upon the question whether at that time or at any other time the judgment debtor, Bowman, had any property or means. There was no attempt by the plaintiff at the trial to prove that Bowman had no property during that period. Because of the failure to allege these facts the complaint fails to state facts sufficient to constitute a cause of action.

In Preston v. Hood, 64 Cal. 408, 1 Pac. 487, the court says that "a direction to the sheriff to return an execution without levy" will not discharge the surety. As a general remark concerning the law of suretyship there is no objection to this statement. It was not intended to be applicable to a premature return of the execution required by section 552. That question was not involved in the case. It cannot be deemed to be contrary to the authorities above mentioned.

[6, 7] 2. The defendant in its answer, among other things, alleged that by collision between Bowman and the plaintiff in the trial of the main action judgment was given for a larger amount than the plaintiff was entitled to upon the cause of action sued on. If this were true, the defendant would be released from liability upon the undertaking. But the evidence of collusion was not satisfactory, and there was evidence from which the court may have justly believed that the plaintiff was acting in good faith. It is also alleged in the answer that upon the issuance of the execution the plaintiff encouraged and permitted Bowman to dispose of such property as he had without applying the same to the satisfaction of the execution, by reason whereof the defendant claims to be exonerated from liability. The evidence on this subject is also conflicting, and we cannot disturb the finding concerning it.

[8] 3. Another claim, which is rather obscurely alleged in the answer, is to the effect that at the time the execution against Bowman was begun the plaintiff had a lien upon certain property for the payment of the debt sued for, and that by its conduct in the prosecution of the action and at the trial thereof it released this lien, and thereby discharged the surety on the undertaking. The action was for the recovery of the price of certain goods sold by the plaintiff to Bowman. The price agreed on was $1,000, of which $200 was to be paid before delivery, and $40 per month during each month thereafter. The agreement was in writing, signed by the parties, and it acknowledged the receipt of the goods by Bowman. It further provided that until the price was fully paid the property should belong to the plaintiffs, without right in Bowman to sell or incumber the same. There was a further provision, however, that if Bowman failed to pay any installment when due, or should refuse to accept delivery or return the goods, then the entire balance of the price should at once become due and payable, and that thereupon the plaintiff at its option could either sue for the whole price or cancel the contract and take possession of the goods. Bowman failed to pay the price, and the plaintiff thereupon began the main action. In suing out the attachment the affidavit on behalf of the plaintiff stated, as the law required, that the debt was not secured by any lien. On the trial of that action Bowman appeared and consented to a judgment for the whole price unpaid, on condition that the title to the property should pass to him. Thereupon judgment was rendered accordingly, and full delivery was made to him in accordance with his proposal. It is claimed by the defendant that at that time the plaintiff had a lien upon the property for the security of the price which might have been enforced, and that by releasing the same to Bowman it impaired the surety's rights and exonerated it from liability on the undertaking. No attack was made upon the attachment by Bowman in the main action. Instead of moving that it be dissolved on the ground that the affidavit that the debt was not secured by a lien was false, he procured the exemption of his property from the levy by giving the undertaking here sued on. In this condition of affairs the present defendant executed the undertaking sued on. It must be presumed to have accepted the conditions then existing as the measure of its rights, and to have executed the undertaking with that understanding. The principle is settled in this state that a surety upon an undertaking given under section 540 to release an attachment cannot interpose the objection, in a suit upon such undertaking, that the property attached, if any, was not subject to levy, or that the attachment was irregularly issued because of a false affidavit filed by the plaintiff to procure it. In McMillan v. Dana, 18 Cal. 349, the court said of such an undertaking that:

> The sureties promise, "in consideration of the release of the property from the attachment, that in the event of a recovery of the judgment by the plaintiff, they will pay the amount of the judgment. * * * The object of giving the undertaking was to procure this release, and this release was had in consequence of the undertaking; and the consideration of the undertaking therefore is the release so procured. In consideration of this release, the obligors agree to pay the judgment. Whether the property was redelivered to Vischer or not was wholly immaterial. * * * Nor does it matter whether the property was subject to attachment or not. That matter cannot be tried in this collateral way. It is enough that the plaintiff had this property levied on as subject to his debt, and that these sureties procured its release upon the stipulation that, in consideration of such release, they would pay the amount of the judgment to be recovered by the plaintiff in the attachment suit. Nor was any proof necessary of the preliminary proceedings connected with or preceding the levy; for these defendants admit the levy of the attachment on this property, and this is enough."

On petition for rehearing the court said that "by the contract the parties have bound themselves to pay in an event independent of all considerations of this sort," referring to the fact that they had bound themselves to pay the judgment in consideration of the discharge. This decision was cited and followed in Gardner v. Donnelly, 86 Cal. 367, 24 Pac. 1072, where it was held that, when the undertaking was issued to procure the release of property already attached, and was accepted by the sheriff, it was immaterial whether he thereupon redelivered the property to the judgment debtor or not, so far as the liability of the sureties on the undertaking was concerned. So in Preston v. Hood, 64 Cal. 405, 1 Pac. 487, the court held that sureties upon such an undertaking were not released by the fact that the sheriff, after accepting the undertaking, released the property previously levied on, nor by the fact that the judgment in the attachment suit was entered by consent and execution stayed by agreement for 60 days thereafter. In McCormick v. National Surety Co., 134 Cal. 511, 66 Pac. 741, there were two defendants in the main action; the property of one only being attached. The undertaking was thereupon given for the release of the attachment. Upon the trial of that action judgment was given in favor of the plaintiff against the other defendant, and in favor of the defendant whose property had been attached. It was held that the ownership of the property attached was of no concern to the surety, and that he was liable on the undertaking for the full amount of the judgment recovered against the other defendant, the court saying:

> "Whether it belongs to a third party or for any reason is not lawfully subject to the attachment is a question to be litigated between plaintiff and the adverse claimant, and in no way affects the surety's express covenant to restore."

The undertaking in that case was given for the redelivery of the property, or the payment of the debt, as provided in sections 554 and 555, Code of Civil Procedure, but the principle is the same whether the undertaking is in the alternative, as in that case, or is positive, to pay the judgment when rendered, as in the present case. In McCutcheon v. Weston, 65 Cal. 39, 2 Pac. 727, the court decided that the surety was liable in such undertaking, although there were two defendants to the attachment suit, and the judgment was against one only. To the same effect see Ferguson v. Glidewell, 48 Ark. 195, 2 S. W. 711; Coleman v. Bean, 14 Abb. Prac. (N. Y.) 38; Haggart v. Morgan, 5 N. Y. 428, 55 Am. Dec. 350; Myers v. Smith, 29 Ohio St. 120; McAllister v. Eichengreen, 34 Md. 54; Austin v. Burgett, 10 Iowa, 302; Inman v. Strattan, 4 Bush (67 Ky.) 445. In view of these authorities, we are of the opinion that the defendant here is not in a position to complain of the conduct of the plaintiff in bringing the action upon a debt which was previously secured by some sort of lien upon property, which he might have enforced instead of waiving it and bringing suit for the debt. The surety must be presumed to have been aware of the facts and to have made its contract accordingly. It was an unconditional agreement to pay the amount of the judgment when rendered.

[9] 4. The court should have admitted the evidence offered by the defendant, tending to show the disposition made by Bowman of the goods which he purchased from the plaintiff, and of which complete delivery was made to him at the time the judgment was rendered against him, provided the purpose of the evidence was to show that Bowman had disposed of this property after the issuance of the execution against him. If he had disposed of the goods before the execution was issued, and no collusion were proven between him and the plaintiff relating thereto, the evidence would have been immaterial; but, if the transfer by Bowman did not occur until afterward, the evidence was material and competent. There are no other points that require discussion.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

On Petition for Rehearing.

SHAW, J. In a petition for rehearing, the plaintiff contends that the undertaking sued on is a common-law undertaking, and not an undertaking given pursuant to section 540, Code of Civil Procedure. The petition states two grounds for this claim: First, that the language of the undertaking is precisely similar to the undertaking under consideration in Smith v. Fargo, 57 Cal. 157, which was there held to be good as a common-law undertaking; second, that section 540, Code of Civil Procedure, does not authorize the sheriff to release the property "unless the defendant give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been, or is about to be, attached, in which case, to take such undertaking," and that this means that the undertaking must first be delivered personally to the sheriff, and that no undertaking can be considered as given under its provisions where it is passed directly to the plaintiff.

The first ground is disposed of by the cases cited in the original opinion herein. While the language of the undertaking in Smith v. Fargo is substantially identical with that of the undertaking in the case at bar, the decision there, holding it good as a common-law undertaking, was not based upon that ground, as will presently be seen.

[10] The second ground was not argued in the briefs. It is true the plaintiff's brief stated that the undertaking was delivered directly to the plaintiff, and that this was an admitted fact in the case, but there is no argument to the effect that the delivery direct to plaintiff had the effect of making it a common-law undertaking rather than one given under the statute. The only argument upon the question was a reference to Smith v. Fargo, supra, followed by the statement that "in that case the court was considering a bond containing the same language as the bond in the case at bar, and held such a bond to be a common-law bond," and by a citation to Kanouse v. Brand, 11 Cal. App. 669, 106 Pac. 120, and Bailey v. Ætna I. Co., 5 Cal. App. 740, 91 Pac. 416. The decision in Smith v. Fargo was not put upon the ground that the undertaking was delivered directly to the plaintiff. The fact was that after the attachment was levied, the defendant appeared in the action and applied to the

court for a discharge of the attachment. This he could only do under the provisions of sections 554 and 555, whereby the release could only be obtained by giving an undertaking in a sum to be fixed by the court and for the redelivery of the property or payment of the judgment. Instead of doing this, the defendant gave the undertaking there in question, not for a redelivery, but in the form required for an undertaking under section 540. This court in that case very properly held that the undertaking was not given under section 540, because the defendant was not pursuing the remedy there provided, and that it was not good under section 555 because it did not conform to the proceeding there laid down, but that notwithstanding these facts, a recovery thereon could be sustained on the ground that it was a promise supported by a sufficient consideration to pay the debt due to the plaintiff as ascertained and fixed by the judgment, and that it was therefore good as a common-law undertaking or promise. The decision does not hold, and was not intended to hold, that an undertaking given before the sheriff has returned the writ of attachment, and following the terms required by section 540, is not a good statutory undertaking because of the mere fact that it was delivered directly to the plaintiff instead of being given to the sheriff for the plaintiff. Kanouse v. Brand, supra, was also entirely different from the present case. There writs of attachment had been levied in two counties and the sheriffs had made returns of the writs. In this situation, the defendant executed directly to the plaintiff the undertaking sued on in the case, and thereupon the plaintiff himself released the attachments. For these reasons it was held that the undertaking was not authorized by either section 540 or sections 554 and 555, but that being given upon a sufficient consideration, the release of the attachment, it was a good common-law promise and bound the surety to its performance. The Bailey case has no particular application and need not be noticed.

In the present case all that appears is that the undertaking was "executed and delivered" to the plaintiff and that thereupon the attachment was discharged and the property released. The undertaking is set out in full in the complaint, and in the findings. It is entitled in the action and merely promises that if the plaintiff recover judgment the surety will on demand pay the amount thereof to the plaintiff. It was executed and delivered to the plaintiff only in the sense that it was passed to the plaintiff instead of to the sheriff. It does not appear that the plaintiff himself released the property, but only that upon such delivery the property was released. So far as appears, the delivery to the plaintiff was for convenience only, and the property was released by the sheriff in the usual way as upon the giving of the undertaking provided in section 540. This being the case, it should be regarded as an undertaking given in pursuance of that section, and as governed, with respect to a suit thereon, by the provisions of section 552. If anything further occurred between the parties at the time of its execution which would operate to change its character in this regard, it can be developed upon another trial. It does not appear from the record before us.

The petition for rehearing is denied.

We concur: RICHARDS, Judge pro tem.; MELVIN, J.; VICTOR E. SHAW, Judge pro tem.; WILBUR, J.

(177 Cal. 434)

ANDREWS v. ROBERTSON et al.

(L. A. 3858–3898.)

(Supreme Court of California. Feb. 4, 1918.)

1. APPEAL AND ERROR 🔑715(1) — FILING TRANSCRIPT WITHIN TIME—EVIDENCE.

Evidence *held* to warrant conclusion that notice to clerk of intention to appeal and request for transcript was filed within 10 days after time notice of entry of judgment as required by Code Civ. Proc. § 953a, was actually served upon appellant's counsel, who inadvertently failed to change an incorrect date stated in his acknowledgment of service.

2. MORTGAGES 🔑277—ASSUMPTION—PERSONAL LIABILITY.

Personal liability of the owner was essential to give to any transaction between the owner and defendant purchaser the effect of making defendant personally liable for the mortgage.

3. MORTGAGES 🔑282(1)—SALE OF MORTGAGED PROPERTY—ASSIGNMENT OF MORTGAGE.

Reference in the deed to the mortgage is not essential to the creation of a personal liability of the purchaser for the mortgage debt, where an understanding exists that the purchaser shall assume such liability.

4. MORTGAGES 🔑282(1)—ASSUMPTIONS—PERSONAL LIABILITY.

The conveyance of property subject to a specified mortgage does not in itself render the grantee personally liable.

5. MORTGAGES 🔑282(1)—ASSUMPTION—CONSIDERATION.

A promise at the time the parties met to carry out an existing enforceable agreement by exchange of deeds on the part of one that he would protect the other against a certain mortgage constituted no part of the consideration for the grant, and imposed no personal liability for the mortgage debt; there being no new consideration.

6. APPEAL AND ERROR 🔑16 — DISMISSAL—UNNECESSARY APPEAL.

An appeal by a purchaser of mortgaged property from a deficiency judgment in foreclosure proceedings as docketed by the clerk, though unnecessary in view of his appeal from the foreclosure decree, cannot be dismissed as one not authorized by law, especially where appellant in his brief stipulates that he will waive costs on the deficiency judgment appeal in the event of reversal.

In Bank. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by George H. Andrews, as executor of the will of J. P. Andrews, deceased, substituted as plaintiff, against Catherine F. Robertson, William Mann, and others. From the judgment rendered William Mann appeals. Reversed in part and in part affirmed.

Clinton G. Dodge and Fitzgerald, Abbott & Beardsley, all of San Francisco, for appellant. Wm. Shipsey, of San Luis Obispo, for respondent.

ANGELLOTTI, C. J. This is an action for foreclosure of two mortgages. Plaintiff prevailed, the judgment decreeing a sale of the mortgaged premises, and the docketing of judgment for any deficiency after application of the proceeds of the sale, against several of the defendants, including defendant Mann. Said Mann appealed both from the judgment, and from the subsequent docketing by the clerk of a deficiency judgment against him.

[1] There is no force whatever in the contention of learned counsel for respondent that the transcript, prepared and settled by the trial judge under the provisions of section 953a, Code of Civil Procedure, cannot be considered on these appeals. In so far as the appeal from the judgment is concerned, the sole point is that the notice to the clerk of intention to appeal and request for transcript specified in said section was not filed with the clerk "within ten days after notice of entry of the judgment," as required by the section. Objection to the settlement by the trial judge of such transcript on this ground was made at the time of settlement and overruled. In support of the objection the whole showing was a notice of entry of the judgment on April 7, 1914, bearing acknowledgment of service "this April 9, 1914. Anson Hilton, Attorney for Defendants Percival, Pizmo Beach Resort Co., and Lowell. Clinton G. Dodge, Attorney for Defendants Wm. Mann, Chas. H. Mann, and Agnes G. Mann"—and proof of the fact that the request for transcript was not filed until April 21, 1914. It was solely upon this acknowledgment of service by Mr. Dodge that respondent based his claim that the notice was served on April 9, 1914; no attempt being made to show any other service. In reply Mr. Dodge filed an affidavit to the effect that he never saw any notice of entry of judgment until he found this notice on his desk in his office in Oakland, Alameda county, on April 13, 1914, inclosed in an envelope addressed to the attorney for respondent at San Luis Obispo; that he thereupon signed the acknowledgment, neglecting to observe the date already there (April 9th), and forwarded the same by mail in said envelope to the attorney for the respondent; and that on the same day (April 13th) he made a note in his office register of the fact of such service on April 13th. Manifestly this showing by Mr. Dodge furnished ample support for the conclusion of the trial judge that service of notice of entry was not made prior to April 13th, and that the request for the transcript filed April 21st was therefore in time. If accepted by the trial judge as true, this evidence entirely destroyed the effect of the admission of service as of April 9th. As to the appeal from the deficiency judgment, the stipulation of the respective parties fully authorizes the use of this transcript, provided, as we hold, that the proceeding therefor was initiated in time.

On the appeal from the judgment the principal question on the merits is whether the facts warranted a deficiency judgment against appellant Mann, the judgment not being otherwise assailed. The mortgages were made March 10, 1909, by Catherine F. and John E. Robertson to the Andrews Banking Company (plaintiff's assignor) to secure a loan of $43,400 and interest at the rate of 9 per cent. per annum, evidenced by their promissory note of even date with the mortgages to said company. This note was payable $5,000 on March 10, 1912, and $5,000 on March 10th of each year thereafter until paid. On February 25, 1910, the Robertsons (mortgagors) conveyed the mortgaged property to T. B. Draper and W. W. Percival. It is conceded that these grantees did not assume the mortgage debt. On April 8, 1910, they executed a trust deed of the property to secure performance of an obligation in favor of defendant A. J. Lowell, and in accordance with the terms of this trust deed the property was sold to said Lowell on December 29, 1911, by the trustees, who executed their conveyance therefor to Lowell on April 13, 1912. Concededly there was in his purchase of the premises no assumption of the mortgage debt. But about the time of the trustee's sale Lowell entered into a written agreement with the Andrews Banking Company, whereby, in consideration of the acceptance by the company of $4,500 in full payment of all interest to January 1, 1912, the payment by the company of one-half the state and county taxes on the property for the year 1911–12, and the reduction of interest on the debt from January 12, 1912, to 6 per cent., Lowell was to pay the debt secured by the mortgages. On April 17, 1912, Lowell conveyed the mortgaged property to Charles Mann, a son of appellant. The deed was an ordinary bargain and sale deed, with an expressed consideration of $10, and no mention was made therein of any mortgage or mortgage debt. The deed was made to Charles Mann at the request of appellant, who conducted all the negotiations and who, we may assume, was the real purchaser. Plaintiff's theory, in so far as the question of the personal liability of appellant is concerned, is that by virtue of his agreement with the banking company Lowell became personally liable to the company for the mortgage debt—that the result of the transaction was to create what in effect was a new undertaking from Lowell to the company, and that when appellant purchased the mortgaged property from Lowell, he agreed to assume and pay the debt. The trial court so found, the finding as to appellant being that:

> "At the time of acquiring the same and as a part of the same transaction, said Wm. Mann agreed with said Lowell that he (Mann) would assume and pay said debt and other matters secured by said mortgages."

This finding is assailed as being without sufficient support in the evidence.

[2] To give to any transaction between Lowell and Mann the effect of creating any personal liability on the part of Mann to the mortgagee for the mortgage debt, it was essential, of course, that there should have been such a personal liability on the part of Lowell. See Ward v. De Oca, 120 Cal. 102, 52 Pac. 130. We can see no reason why, by virtue of the new agreement between Lowell and the bank, such a personal liability was not created. The same principle which renders the grantee of the mortgagor personally liable to the mortgagee for the mortgage debt in the event that in purchasing he assumes the same (see Hopkins v. Warner, 109 Cal. 136, 41 Pac. 868; Ward v. De Oca, supra), would therefore render Mann personally liable to the banking company here, if he agreed with Lowell to assume the debt. He could be so liable only in the event of such assumption of the debt. As we have seen, the trial court found that he did so agree. If this finding is not sufficiently sustained by the evidence, the judgment must be reversed in so far as it awards a deficiency judgment against Mann. We are of the opinion that the finding has no substantial support in the evidence.

[3] As we have seen, the deed to Mann contained no reference whatever to any mortgage or mortgage debt. Such mention, however, is not essential to the creation of a personal liability, although, where an understanding or agreement exists that the grantee shall assume such liability, it is ordinarily the custom of careful persons to express it in the deed or in some other writing. The well-settled rule in this regard was stated in Hopkins v. Warner, 109 Cal. 133, 41 Pac. 868, as follows:

> "It is not necessary that there should be a formal promise, on the part of the grantee, to pay the mortgage debt, in order to render him liable therefor, if his intention to assume the debt appears from a consideration of the entire instrument. The obligation may be made orally or in a separate instrument; it may be implied from the transaction of the parties, or it may be shown by the circumstances under which the purchase was made, as well as by the language used in the agreement."

In the case at the bar the conveyance was preceded by a written agreement, which the evidence without substantial conflict shows was carefully prepared, and fully expressed the agreement of the parties. This agreement was entered into April 8, 1912, and was one for the exchange of certain properties of Lowell and Mann, the property of Lowell being the mortgaged property. It recited that the parties were making an exchange of said properties, "each conveying to the other * * * the properties hereinabove described, free and clear of all liens and incumbrances of every kind and nature, save and except only" that Mann's property "may be incumbered as follows: Telegraph Ave. & 43rd St. property is subject to an incumbrance of $10,000, bearing interest at the rate of 6 per cent. per annum, which can remain. Pacific Ave. & 6th St. property, Alameda, is subject to a first mortgage of $7,000, * * * interest 6 per cent. per annum, and a second loan of $3,000 interest six per cent. per annum for a period of two years, and the Watsonville property is subject to an incumbrance of $5,000, bearing interest at the rate of 7 per cent. per annum." Also that Lowell's property (the mortgaged property) "is subject to an incumbrance of $43,400, from the Andrews Bank of San Luis Obispo * * * bearing interest at the rate of 6 per cent., and a loan of $1,600 from H. H. Carpenter of San Luis Obispo county. And no other liens shall be on any of the above-described properties." It was further agreed that "interest, insurance, taxes, water bills, electric bills, and all other accounts against the properties shall be prorated up to date of closing deal by said exchange of deeds."

[4] It is too clear for question that nothing in this agreement imports any assumption by either party of any mortgage debt. It is practically elementary law that a deed which is merely made subject to a specified mortgage does not alone render the grantee personally liable for the mortgage debt. See Jones on Mortgages, § 748; Hibernia Sav. & Loan Society v. Dickinson, 167 Cal. 616, 621, 140 Pac. 265. The language in this agreement was apparently carefully adopted to exclude all idea of the assumption of any debt by either grantee, and for the purpose of showing simply that each party was to take his property subject to the lien of the specified incumbrances. Lowell agreed to convey to Mann his property subject to the lien of the specified incumbrances in return for a conveyance from Mann of his property subject to the lien of the specified incumbrances thereon, interest on all incumbrances to be "prorated" up to date of closing deal by said exchange of deeds. In this connection it is only necessary to refer to the opinion in Hibernia Sav. & Loan Society v. Dickinson, supra, where the court, after considering the effect of somewhat similar language and saying that it did not import an assumption of the debt said:

> "On the contrary it raised a strong inference, if not a conclusive presumption, that Montgomery [the purchaser] did not assume payment of the mortgage as part of the price, but merely bought the land as it was with incumbrances."

Admittedly it was in execution of this agreement by the parties that the conveyances were subsequently exchanged.

[5] A careful analysis of the evidence discloses that no one claims that after the making of this written agreement Mann said a word or did an act importing any assumption of the debt until the parties met on April 17, 1912, to carry the existing agreement into effect by the exchange of deeds. Lowell testified substantially that he delivered the deed to Mann at the same time that he delivered to him his written agreement with the Andrews Banking Company, reducing the rate of interest to 6 per cent., and also paid him $1,619.95, which was the amount then found due him on the "prorating" of interest, etc., provided for in the agreement. It was at this time, Lowell testified, when the fact that a $5,000 installment of the $43,400 had become due and that payment had been demanded was spoken of, that Mann said that "he would protect me against this mortgage." Mann's testimony substantially denies any promise to this effect. It is on this alone that the claim of an agreement between Lowell and Mann that Mann would assume the mortgage debt is founded. We regard it as entirely immaterial whether the fact was as testified to by Lowell or not. If Mann did then make the statement attributed to him by Lowell it was a mere voluntary promise without binding force. The validity of a promise by a grantee of a mortgagor to such mortgagor to assume the mortgage debt, where there is no new and independent consideration, is based on the theory that such assumption in some way constitutes a part of the consideration for the grant. Here clearly it constituted no part of the consideration, and there was no new consideration. The terms of the exchange of properties had been carefully and precisely specified in the written agreement in such a way as to exclude the idea of any such assumption, and the parties had met to carry into effect the written agreement. By the terms thereof Lowell was then legally bound, in consideration of Mann delivering to him a deed of his specified properties subject to the lien of the specified incumbrances thereon, to deliver to Mann a deed conveying the property herein involved, subject only to the lien of the specified incumbrances. He could not require as a condition precedent to such delivery, in view of the terms of the agreement, any undertaking by Mann to assume the debt secured by the incumbrance, and his testimony does not indicate that he claimed otherwise. Under the circumstances there was no consideration whatever for any such promise on the part of Mann as is testified to by Lowell. As already said, it was a mere voluntary promise without binding force, because of absolute want of consideration therefor. Learned counsel for respondent has in no way attempted to reply to this claim of appellant, which was made both in his opening and closing brief.

Some reliance is placed upon acts and statements of Mann subsequent to the conveyance as indicating that he regarded himself as personally obligated for the mortgage debt, and that he dealt with the mortgagee, upon that theory. We have carefully examined all the testimony in this connection, and it will suffice to say that we find no word or act of his which is inconsistent with the theory that he held this property subject to the lien of the mortgages and without any assumption of the mortgage debt. There was never any valid personal undertaking or agreement on the part of Mann to personally pay this debt, and the finding of the trial court in regard thereto is without substantial support in the evidence. Taking the property subject to the lien of the mortgages as he did, such property was liable, for the debt, but there was no personal liability on his part. In so far as the judgment declares any such personal liability and attempts its enforcement, it must be reversed.

In view of our conclusion on this question it is unnecessary to consider any other of the many points made for reversal.

[6] As to the appeal from the deficiency judgment docketed by the clerk, the whole claim is the same as the claim on the appeal from the judgment, viz., that a deficiency judgment against Mann was not warranted for the reason that there had not been on his part any assumption of the mortgage debt. Respondent claims that the appeal from the deficiency judgment docketed by the clerk, even if authorized by law, was entirely unnecessary, that a party may not maintain two separate appeals for the purpose of reviewing the same matter, and that one or the other of the appeals should be dismissed. Of course, the appeal from the judgment of the court, which appellant had the right to take and maintain, cannot be dismissed. Indeed, such appeal is essential to the protection of appellant against the clerk's docketed judgment, for the latter was entered in strict conformity, with the terms of the judgment of the court, and cannot be disturbed if that part of the court's judgment remains in force. We recently held that an appeal lies from a deficiency judgment as docketed by the clerk. See Ewing v. Richvale Land Co., 167 Pac. 876. So such appeal cannot be dismissed as one not authorized by law. It was perhaps an unnecessary appeal, for without a reversal of that portion of the judgment requiring the docketing, such docketing could not be disturbed, and the reversal of that part of the judgment of the court would necessarily deprive the docketed judgment for the deficiency of all force. We do not, however, feel warranted in dismissing the appeal for this reason. The only practical question involved is one of costs of appeal, and appellant stipulates in his brief that in

the event of reversal he waives all costs on the appeal from the docketed deficiency.

In so far as the judgment holds appellant personally liable for any deficiency existing after the sale of the mortgaged property and application of the proceeds of such sale, and directs the docketing of a judgment against him for such deficiency, it is reversed, and in all other respects it is affirmed. Appellant shall recover his costs on the appeal from such judgment. The deficiency judgment subsequently docketed against appellant is reversed. Appellant shall recover no costs on his appeal therefrom.

We concur: SHAW, J.; SLOSS, J.; VICTOR E. SHAW, Judge pro tem.; MELVIN, J.; WILBUR, J.

(177 Cal. 465)

DULUZ v. ALASKA PACKERS' ASS'N.

(S. F. 8248.)

(Supreme Court of California. Feb. 8, 1918. Rehearing Denied March 7, 1918.)

1. Appeal and Error 🔑930(1) — Review — Construction of Evidence.

On appeal from a judgment on a verdict for plaintiff, where it is claimed that there is no evidence to support the verdict and judgment, respondent is entitled to the most favorable view of the evidence, and all reasonable inferences therefrom.

2. Master and Servant 🔑219(2)—Assumption of Risk—Obvious Dangers.

Plaintiff was engaged in moving crates of salmon over a vat of lye, the top of which was about at the waist line, and sousing them up and down therein. He was injured by slipping on the wet floor, so that his arm went into the vat and was severely burned. The injury was governed by the law of Alaska, under which an employé assumes all the risks and dangers incident to his employment that were at the time of the employment open, obvious, and apparent, and respecting which he had the same knowledge and opportunity to observe as his employer. *Held*, that where plaintiff knew the possibility of slipping, and knew the dangerous condition of the vat, he assumed the risk of injury from the absence of guard rails around the vat, from the slippery condition of the floor from water and grease, from the absence of cleats to prevent slipping, and from the floor being springy and somewhat sunken, so that it sloped towards the vat, as these were obvious conditions which plaintiff had as good an opportunity to observe as the employer.

3. Master and Servant 🔑97(2)—Liability for Injuries—Place to Work.

If, as claimed, a person of ordinary prudence would not have believed that the servant could, in the regular discharge of his duties, be injured by the defective conditions, then the employer was not negligent in failing to exercise ordinary care to furnish a safe place to work; since, where the employer exercises his judgment in the selection and maintenance of a safe place to work, and the employé exercises his judgment in working there, if the situation is equally obvious to all of ordinary comprehension, either the employer is negligent and the employé assumes the risk, or the employer is not negligent.

4. Appeal and Error 🔑1052(5)—Harmless Error—Effect of Correct Conclusion.

In an action governed by the laws of Alaska, if such law was correctly stated to the jury by the trial court, appellant could not complain that the court adopted a wrong method of reaching a conclusion as to what such law was.

5. Appeal and Error 🔑1057(1)—Harmless Error—Exclusion of Evidence.

Though Code Civ. Proc. §§ 1900–1902, provides, among other things, that the oral testimony of witnesses skilled therein is admissible as evidence of the unwritten law of a sister state, the published reports of decisions are more satisfactory, and where by consent of both parties such reports are offered in evidence, it is not prejudicial error to refuse the testimony of a witness.

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Manuel Duluz against the Alaska Packers' Association. From a judgment for plaintiff, defendant appeals. Reversed.

Chickering & Gregory, George H. Whipple, and Evan Williams, all of San Francisco, for appellant. James W. Cochran and S. L. Mash, of San Francisco, and Manuel Duluz (Walter J. Thompson, of San Francisco, of counsel), for respondent.

WILBUR, J. This is an appeal from a judgment after verdict in favor of plaintiff for personal injuries received by him while employed by the defendant at its fish cannery in Alaska. Plaintiff relies upon defendant's negligence in failing to supply him a safe place to work, and defendant denies such negligence, and also relies upon the defense of assumption of risk.

It is conceded that the law of Alaska, the place of the injury, controls. This proposition was thus stated by the trial court in its instructions:

> "You are instructed that as far as the liability of the defendant Alaska Packers' Association is concerned the law of Alaska will govern in this case; and you are further instructed that under that law Manuel Duluz, the employé in this case, assumed all the risks and dangers incident to his employment that were at the time of his employment open, obvious, and apparent, and respecting which he had the same knowledge and opportunity to observe as his employer."

[1-3] Appellant claims that under this law there is no evidence to support the verdict and judgment. Respondent is entitled on this appeal to the most favorable view of the evidence and all reasonable inferences therefrom. There is, however, no substantial disagreement in the evidence. The plaintiff, at the time of his injury, was engaged with others in dipping steel crates containing 144 one-pound cans of salmon into a 4′ x 4′ vat of boiling lye, filled to within three inches of the top, resting on the floor on which he stood and three feet in height. The crates were moved over the vat and soused up and down therein by means of a trolley and lifting device operated by other employés. Plaintiff's duty was to hook two lifting chains hanging from the trolley into the crate, and his associate on the other side hooked a third chain thereto They then guided the crate over

the lye vat, and, after sousing therein, guided it to another vat filled with water, afterward unhooking the chains and returning therewith for the next crate. In so doing plaintiff slipped on the wet floor so that his arm went into the lye vat and was severely burned. The top of the vat, it will be observed, was about at the waist line. Plaintiff testifies:

> "There was a good deal of water on the floor, and I slipped, and that is how I came to fall. The board on which I stood was about a foot wide. I was working three days at the vat prior to the accident."

He testified that it was wet and slippery when he first started to work at the wash lye tank, and so continued all the time he worked there, and that, although he knew it was wet and slippery, he made no complaint. It is shown that the nature of the work caused the lye and water to splash over the sides of the tank; that the lye had softened the smooth surface of the board on which plaintiff worked so that if struck a hard blow its smooth surface would be dented. It will be observed that the duties of the employer and of the employé, under the law of Alaska, and under the common law, are correlative. Taking the instruction of the court as given in this case as a correct statement of employer's duty, he "is not required to furnish appliances which are absolutely safe, nor is he bound to furnish the best that can possibly be had. He is, however, under an obligation to exercise reasonable and ordinary diligence in their selection, and to furnish to his servant such as are reasonably safe and adapted to perform the work for which they are designed, and which with ordinary care and prudence on the part of the servant render it reasonably probable that they can be used by him in the ordinary exercise of his employment without danger to himself," etc. The respondent points out several alleged defects in the place and appliances furnished him: First. That there were no guards around the lye vat. If we assume that a man of ordinary prudence would in the exercise of ordinary prudence furnish such guard rail, the danger from its absence "was open, obvious, and apparent" and the plaintiff "had the same knowledge and opportunity to observe as his employer." Second. That the floor was slippery from water and grease. But this must have been as apparent to a man who had walked over it for three days as to his employer. Third. That no cleats were nailed on the boards. This, too, must have been as obvious to plaintiff as to his employer. Indeed, if he had stumbled over a cleat instead of slipping on a board without a cleat, it might with equal force be claimed to be an act of negligence to provide cleats. But in either case the answer is that plaintiff knew the conditions, and assumed the risk. Fourth. It is claimed that the floor had sunk somewhat so that it sloped sufficiently toward the vat, so that water ran toward it, and that it was "springy." There is no evidence that either the slope of the floor or the softness of the floor caused plaintiff's fall, but in any event the condition was so obvious that plaintiff could not fail to observe it. Certainly he had as good an opportunity as his employer. Respondent claims, however, that the rule of assumption of risk does not apply, and cites the rule in Shearman and Redfield on Negligence, § 95, viz.:

> "This rule has, however, been very properly held to be applicable only to such defects as the servant ought reasonably to have foreseen might endanger his safety. If a person of ordinary prudence would not have believed that the servant could in the regular discharge of his duties be injured by the defect, the servant may properly disregard it without losing his right to complain if while pursuing his ordinary course he suffers from such defect."

But here, where the entire situation is open to the observation and understanding of the employé as well as the employer, it is fatal to plaintiff's case to hold that a "person of ordinary prudence would not have believed that the servant could, in the regular discharge of his duties, be injured by the defect," for under the rule hereinbefore given it would establish that the employer was not guilty of negligence in failing to exercise ordinary care to furnish the plaintiff a safe place to work; in short, where the employer exercises his judgment in the selection and maintenance of a safe place to work, and the employé exercises his judgment in working there, if the situation is equally obvious to all of ordinary comprehension, either the employer is negligent and the employé assumes the risk, or the employer is not negligent. In a somewhat similar case (Carrigan v. Washburn & Moen Mfg. Co., 170 Mass. 79, 48 N. E. 1079), plaintiff fell into a vat containing vitriol. This vat was in the floor of the room in which plaintiff worked, as was another vat containing water. Hot wire was dipped into the vitriol vat and then into the water. It was in the evening, and some of the arc lamps had gone out, and the steam rising from the vats with the hot wire dipped into them obscured the light. The court there said:

> "It is evident that he understood the danger which there was of falling into the vats, and he also knew that he might fall into the one containing vitriol. He appreciated the risk, and must be held, we think, to have assumed it. If the want of a railing was a defect, it was an obvious one which he knew and understood, and so with the obscurity, whether it arose from a want of light or from the steam, or both. It is not contended that the vats themselves were defects, or that they could have been used without removing the covers. * * * He knew that they were there, and that there was no railing, and that when the covers were off there was danger of falling into them; and he continued in the defendant's employment, without any objection on account of the additional risk to which he was subjected by them."

In Labatt on Master and Servant (2d Ed.) vol. 3, p. 3130, note, it is said:

> "A servant assumes the risk of danger from the floor being slippery where the condition is obvious. Omaha Packing Co. v. Sanduski, 155 Fed. 897, 84 C. C. A. 89, 19 L. R. A. (N. S.)

355 (ice formed as necessary result of work done); Swift & Co. v. Campbell, 97 Ill. App. 360 (brine on floor in packing plant); Steffen v. Illinois Steel Co., 140 Ill. App. 551 (floor in rolling mill greasy); Wilson v. Chess & W. Co., 117 Ky. 567, 78 S. W. 453 (slippery floor around vat of water); Goudie v. Foster, 202 Mass. 226, 88 N. E. 663 (floor in laundry). A servant assumes the risk of the danger of slipping on the wet and slimy floor of a meat-packing establishment. Saversnick v. Schwarzschild & S. Co., 141 Mo. App. 509, 125 S. W. 1192. A baggageman assumes the risk of the floor being slippery due to the spilling of a can of oil kept in the car. Schultz v. Chicago, R. I. & P. R. Co., 145 Mo. App. 262, 129 S. W. 1051. An employer is not liable for an injury to a servant resulting from the floor being wet and slippery, if such is its normal condition. Murphy v. American Rubber Co., 159 Mass. 266, 34 N. E. 268. An employé in a mill assumes the obvious risk of slipping on a wet floor while turning a lever and being thus brought into contact with an uncovered gearing. Scharenbroich v. St. Cloud Fiber-Ware Co., 59 Minn. 116, 60 N. W. 1093."

In the case at bar plaintiff knew the possibility of slipping upon the wet floor, and knew the dangerous contents of the vat of boiling lye. It is evident, we think, under the law of assumption of risk, as is found by the lower court to obtain in Alaska, that under the admitted facts plaintiff must be held to have assumed the risk, and is thereby precluded from recovery.

[4, 5] With reference to the method of proving the law of Alaska, it seems to be conceded by the parties that the instruction given by the court was a correct statement of the law. The law of Alaska was to be proved by competent and proper evidence to the satisfaction of the trial court, and by him stated to the jury in its application to the facts of the particular case. If the law was so correctly stated, the appellant cannot complain that the court adopted a wrong method of reaching a right conclusion. The respondent does not complain. Two decisions of the United States District Court of Alaska were read in evidence on the trial, viz., Seittn v. Alaska Treadwell Gold Mining Co., 2 Alaska, 8, 30, and Allen v. Knight's Island Consolidated Copper Co., 3 Alaska, 651. A statute of Alaska was also read in evidence (Session Laws of Alaska 1913, pp. 84, 85). Testimony was also introduced by the defendant, showing that there is no statutory law in Alaska with reference to the assumption of risk and fellow-servant rule. The method of proving a law in a foreign state is regulated by sections 1900, 1901, and 1902 of the Code of Civil Procedure. It is there provided, among other things, that "the oral testimony of witnesses skilled therein is admissible as evidence of the unwritten law of a sister state," but the method of using the published reports of decisions is more satisfactory, and where, by the consent of both parties, such reports are offered in evidence, it is not prejudicial error to refuse the testimony of a witness. It being conceded that the conclusion of the court was correct upon the subject of what constituted the law of Alaska and that the jury were correctly instructed thereon, we are not called upon to pass on the correctness of that decision and do not do so, leaving that question, in the event of a new trial, to be determined by the trial court upon the evidence that may at that time be produced. It is conceded that evidence as to the customary method of maintaining lye vats in other establishments was admissible. It is therefore unnecessary to consider the question whether or not the objections to questions asked on that subject were properly overruled.

Judgment reversed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 442)

HENRICI v. SOUTH FEATHER LAND & WATER CO. (Sac. 2461.)

(Supreme Court of California. Feb. 5, 1918. Rehearing Denied March 9, 1918.)

1. WATERS AND WATER COURSES 🔑232—RECORDS—ACKNOWLEDGMENT.

An unacknowledged contract to furnish water for irrigation, although filed, is not record notice of such fact to a successor of the water company, under Civ. Code, § 1213.

2. WATERS AND WATER COURSES 🔑232 — CONSTRUCTIVE NOTICE — EASEMENTS AND SERVITUDES.

A purchaser of the properties of a water company has constructive notice of rights of a landowner to water, where lateral ditches to such landowner could be seen from an inspection of the system.

3. WATERS AND WATER COURSES 🔑232—PURCHASER OF WATER COMPANY—PRIOR CONTRACTS.

A purchaser of a water company with notice, actual or constructive, of prior contracts to furnish water is bound by such contracts.

4. SPECIFIC PERFORMANCE 🔑29(1) — CONTRACTS—CERTAINTY.

An agreement "to furnish water for irrigation on the lands described in the within agreement" is not too uncertain to be capable of enforcement, the fair meaning being to furnish that reasonably necessary.

5. WATERS AND WATER COURSES 🔑257(1)—CONTRACTS—LIMIT AS TO TIME.

A contract for water, without stating any time, is binding as to rate until superseded by order of a public body vested with the power of regulating the service.

6. WATERS AND WATER COURSES 🔑254 — DEMAND FOR WATER—SUFFICIENCY.

Where a water company declares that it will not furnish water except at a particular rate, a landowner entitled to water at a lower rate need not demand any specific amount or tender payment, especially where his contract does not require payment in advance.

7. DAMAGES 🔑62(4)—MITIGATION—REFUSAL TO FURNISH WATER.

Although a landowner is entitled to water at a certain rate, he cannot stand by and recover more than nominal damages for loss of crops and trees from lack of water because the defendant refuses to furnish water at such rate, but he should pay the excess rate without conceding its correctness and sue for the difference.

Department 1. Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by John Alfred Henrici against the South Feather Land & Water Company, a corporation. Judgment for plaintiff, and defendant appeals. Reversed.

C. E. McLaughlin, of Sacramento, and C. P. McLaughlin, of San Francisco, for appellant. W. H. Carlin, of Marysville, for respondent.

SLOSS, J. The plaintiff, owner of a tract of land in Butte county, containing about 20 acres, brought this action to recover damages for the failure and refusal of the defendant, a water company, to furnish water for the irrigation of his land. The trial was had before the court sitting without a jury, and the court rendered judgment in favor of the plaintiff for $1,176. The defendant appeals from the judgment, bringing up the evidence by means of a typewritten transcript.

The defendant is the successor in interest of South Feather Water & Union Mining Company (hereinafter termed the "old corporation"), which was engaged, among other things, in the business of furnishing and supplying water to the public for hire. On the 9th day of October, 1884, the old corporation, then the owner of the 20-acre tract above mentioned, made an agreement with the plaintiff for the sale of said land to him, conveyance to be made upon the completion of the deferred payments provided for. Upon the paper containing the contract of sale, and following the signatures of the vendor and vendee, there was appended an additional agreement, executed at the same time by the same parties, and reading, except for the signatures, as follows:

"ADDENDA. The South Feather Water & Union Mining Company hereby agrees to furnish water for irrigation on the lands described in the within agreement at the rate of ten cents per inch per day of twenty-four hours each, whenever water is flowing in its ditch adjacent to said lands, and said John Alfred Henrici or his assigns hereby agree to pay for all water so furnished by said company for said purposes, said sum of ten cents per inch per day of twenty-four hours monthly on demand.

"Witness the hands and seals of said parties this ninth day of October A. D. 1884."

The plaintiff went into possession under his contract of sale. The main ditch of the old corporation then ran within about 1,000 feet of the land so contracted to be sold. A lateral ditch and pipes were constructed to connect the main ditch with the land. The old corporation thereupon commenced to supply water to the plaintiff upon the terms stated in the agreement above quoted. The plaintiff completed his payments on the land, and in October, 1888, received from the old corporation a deed conveying to him the land described, with its appurtenances. The deed made no specific reference to any agreement for the furnishing of water. After the making of the deed, as before, the old corporation furnished water to plaintiff's land upon the terms stated in the agreement. The plaintiff had planted his land to fruit trees and vines, and applied for water as he needed it for irrigation, paying 10 cents for each inch served for the number of days during which the use continued. In 1909 the old corporation conveyed all of its water system and other property to the defendant, which has ever since been carrying on the business of a public service corporation supplying water to the public for hire. When the defendant came into possession of the system, it undertook to establish a new system of rates, under which it made a flat charge of $36.50 per annum for one inch of water, allowing the user to cumulate the use during any month, e. g., to use five inches for six days in the month, or three inches for ten days, or ten inches for three days, and so on. The effect of the new rule, however, was to require a consumer to pay a minimum of 10 cents for every day in the year, whether he used water or not. The plaintiff demanded the right to have water served to him upon the terms on which he had received it during the 25 years from 1884 to 1909. The defendant refused to furnish water except upon payment of the new rate. In consequence, no water was furnished to the land, and plaintiff brought this action in 1914 to recover damages for the refusal to furnish him water during the four preceding seasons.

[1] The main question is whether the defendant was bound to furnish water at the rates agreed upon between its predecessor and the plaintiff. Underlying this is the preliminary inquiry whether the defendant, in purchasing the water system of the old corporation, took with constructive notice of plaintiff's rights under his contract. It did not have such notice from the records, since the contract, though copied in a book of the records of Butte county, had not been acknowledged. There was therefore no such legal recordation as would impart constructive notice. Civ. Code, § 1213; McMinn v. O'Connor, 27 Cal. 239, 245; Lee v. Murphy, 119 Cal. 364, 370, 51 Pac. 549, 955.

[2] But the purchaser of real property is bound to take notice of all easements or servitudes which are "apparent," upon an inspection of the property. Rubio Cañon L. & W. Ass'n v. Everett, 154 Cal. 29, 96 Pac. 811. As between the plaintiff and the old corporation, the right to the flow and use of the water constituted an easement in favor of plaintiff's land. Civ. Code, § 552; Farmer v. Ukiah W. Co., 56 Cal. 11; Franscioni v. Soledad L. & W. Co., 170 Cal. 221, 224, 149 Pac. 161; S. P. Co. v. S. V. W. Co., 173 Cal. 291, 159 Pac. 865, L. R. A. 1917E, 680. At the time of the defendant's purchase, the water system was connected by lateral ditches and pipes with the plaintiff's land. The trial court was warranted in drawing the inference that the physical conditions were such as to indicate to any one inspecting the system that water

had been, and could be, furnished therefrom to such land. Undoubtedly the defendant knew that its grantor had been engaged in the sale or rental of water as a public service, and that those who were receiving water from it had a right to demand continued service on proper terms. The law charged it with notice of all further facts which it might have ascertained by proper inquiry. Civ. Code, § 19; Tynan v. Kerns, 119 Cal. 447, 451, 51 Pac. 693. Knowing then, that plaintiff's land had some kind of a right to receive water from the system which it was buying, the defendant was put on inquiry as to the nature, extent, and conditions of such right. Under the law, the water might have been furnished under rates fixed by public authority. In the absence of any such regulation (and there had been none during the period here involved), the service might have been rendered either on rates fixed by the corporation or on terms agreed upon by it with the customer. S. P. Co. v. S. V. W. Co., supra. The purchaser of the system had no right to assume either that water had been furnished under an agreed rate, or that it had not. The fact could as well be one way as the other. The court was authorized (to conclude, therefore, that the dictates of prudence required the defendant, on purchasing the system, to make inquiry to ascertain the terms upon which any prior consumer was receiving the service. Such inquiry would have disclosed that the water had been furnished to the plaintiff under a rate fixed by contract.

[3] If the defendant had notice of the contract of the old corporation, it was bound by the terms of that contract. The case is governed by the principles laid down in Stanislaus Water Company v. Bachman, 152 Cal. 716, 93 Pac. 858, 15 L. R. A. (N. S.) 359. There the court, in speaking of a similar situation, said:

> "The agreement is, in legal effect, an agreement to sell a right or interest in real property. * * * Hence the agreement to furnish the necessary water from the canal from year to year, during the times specified, and to deliver it upon the * * * lands for the irrigation thereof, for an agreed price, was, in substance and effect, an agreement for the sale of real property of the canal company. Such an agreement, with all its terms, is binding, not only upon the maker, but upon all persons who subsequently acquire the maker's title to the property agreed to be sold, with notice of the agreement. The plaintiff [water company], as we have seen, bought with notice, and it is therefore as much bound to comply with this part of the agreement according to its terms as if it had executed the same."

This reasoning is equally applicable to the present case. It is true that the contract before us does not provide, as did that considered in the Stanislaus Case, that it should have "the force and effect of a covenant running to and with" the land of the consumer and the canal of the water company. But, as was held in the case cited, the language quoted was not effective to make the covenant one running with the land, nor did it create a lien on the canal. See Fresno Canal, etc., Co. v. Rowell, 80 Cal. 114, 22 Pac. 53, 113 Am. St. Rep. 112. The real ground of decision was that the agreement to furnish water conferred upon the landowner a specific right or interest in real property, affecting the system of the water company, and that any one purchasing such system with notice, actual or constructive, of the landowner's interest, took subject to it. This, as we have seen, is the precise situation here.

[4] It is argued that the agreement is too uncertain to be capable of enforcement. But we think there is no merit in this contention. No specific amount of water was mentioned, but the company agreed "to furnish water for irrigation on the lands described in the within agreement." The fair meaning of this language is that the amount to be supplied was that reasonably necessary for irrigating the lands. This, apparently, was the interpretation put upon the contract by the parties to it, and they had no difficulty in acting on such interpretation for 25 years. In Stanislaus Water Company v. Bachman, supra, the contract merely bound the company to furnish "a flow of water sufficient to fully irrigate said land as often as necessary during each year." It was held to be sufficiently certain.

[5] The obligation to furnish water at the agreed rate was unlimited in time, and continued until the rate was superseded by order of a public body vested with the power of regulating the service.

[6] There is no force in the claim that the defendant was excused from the obligation to furnish water because plaintiff had not made a demand for a specific amount, and had not tendered payment in advance at the contract rate. The position of the defendant, plainly and unequivocally declared, was that it would not furnish water except upon the rates prescribed by it. It is perfectly apparent that a demand, however specific as to amount, would have been unavailing so long as plaintiff was not willing to pay the rates demanded. On familiar and well-settled principles the defendant cannot therefore avail himself of any indefiniteness in the demand, or of a failure to offer the contract price. Furthermore, so far as tender is concerned, the contract did not require the plaintiff to pay or offer to pay in advance. The provision was that payment should be made "monthly on demand." If defendant was, as we have seen it was, bound to furnish water under the terms of the contract, it could not refuse plaintiff's demand for want of an offer to make payment before he was required to make it.

[7] The defendant makes the further contention that the evidence does not support the finding with respect to damage. We think this position is well taken. The land had been without water for 4 years. The plaintiff introduced testimony to the effect that

the lack of water had greatly diminished both the quantity and the value of his crops of fruit and grapes, and had caused many of his trees and vines to die. The damage claimed consisted of the loss on these items, and the finding represented the conclusion of the court with respect thereto. It is manifest, from the record, that the defendant did not at any time refuse absolutely to furnish water. It was always ready to supply plaintiff's land upon payment of the rates demanded by it. This was perfectly understood by the plaintiff, who was well aware that he could get the water by complying with the defendant's demands. His right to water was not disputed. The one point of controversy was whether he should pay the rates which he had been paying theretofore, or the rates fixed by the defendant. If the plaintiff had continued to use a quantity of water approximating that received by him in prior years, paying the defendant what it asked, the cost to him would have amounted, in each year, to only a few dollars more than the sum payable under the contract. By paying the excessive price without conceding its correctness, he could have saved his trees, vines, and crops, and reduced his damage to a comparatively trifling sum. This it was plainly his duty to do. "The law imposes upon a party injured by another's breach of contract or tort the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible. If by his negligence or willfulness he allows the damages to be unnecessarily enhanced, the increased loss, that which was avoidable by the performance of his duty, falls upon him." 1 Sutherland on Damages (4th Ed.) § 88; Ash v. Soo Sing Lung, 170 Pac. 843, decided January 29, 1918; Cullerton v. Miller, 26 Ont. 36, 45; Dillon v. Anderson, 43 N. Y. 231, 237. The principle has been applied by this court in a case similar to the one at bar. Mabb v. Stewart, 147 Cal. 413, 418, 81 Pac. 1073. There, as here, the action was to recover damages for the withholding of water from plaintiff's land. It appeared that the plaintiff, Mrs. Mabb, could have obtained the water by paying a small sum which was not in reality due from her. The decision was that she could not, in this state of facts, hold the defendant for the loss of crops due to lack of water. The court referred to the passage from Sutherland on Damages, quoted above, and went on to say that:

> "Under this rule the measure of damages in this case was the amount that it would have been necessary for her to pay to obtain sufficient water to replace that of which she was deprived."

So, in this case, the plaintiff could not hold the defendant responsible for the ruin caused by his own act in allowing his trees and vines to go without water for four years, when, as he well knew, he might, at slight cost, have secured the water and reduced his damage to almost nominal proportions. The rule under discussion is not rendered inapplicable by the circumstance that the defendant itself demanded the excessive payment. This was the situation in Cullerton v. Miller, supra, a case cited with approval in Mabb v. Stewart.

We find no other point requiring discussion.

The judgment is reversed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

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176 Cal. 771

In re SEILER'S ESTATE. (S. F. 8189.)

(Supreme Court of California. Dec. 18, 1917. Rehearing Denied Jan. 17, 1918.)

1. WILLS 🔑199—REVOCATION BY MARRIAGE—REPUBLISHING—CODICIL.

While marriage revokes a prior will under Civ. Code, § 1299, the making of a codicil after marriage, stating that the provisions of the former will "now in full force and effect" should continue, was a sufficient republishing to reinstate the old will.

2. WILLS 🔑302(7)—CODICIL—EXECUTION—INSTRUCTION—EVIDENCE.

Evidence *held* to show that a codicil referring to a former will referred to testator's first will and not his subsequent writing, executed but destroyed.

3. WILLS 🔑55(1)—CAPACITY—EVIDENCE—SUFFICIENCY.

Evidence *held* to sustain finding that testator had sufficient capacity to execute a will.

4. WILLS 🔑166(1)—UNDUE INFLUENCE—QUANTUM OF PROOF.

To set aside a will for undue influence clear proof is required.

5. WILLS 🔑91—TRUSTS—CONSTRUCTION.

A memorandum accompanying a deposit of money in a bank, providing that "in the event of my death, the amount of my deposit shall be divided among my children equally," is not a will, but merely the creation of a trust in the moneys deposited.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Will.]

6. WILLS 🔑353—PROBATE—TESTIMONY OF A SUBSCRIBING WITNESS—NECESSITY OF FILING.

Code Civ. Proc. § 1314, requiring that the testimony of the subscribing witness to a will be filed with the order admitting the will to probate, is directory, and it is sufficient if the testimony is subsequently reduced to writing and filed.

7. WILLS 🔑384—PROBATE—INTERLINEATION—HARMLESS ERROR.

Exclusion from probate of interlineation in a will of names descriptive of banks wherein trust funds were deposited, showing that the banks' names had been changed, was not harmful.

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Proceedings in the matter of the probate of the will of Paul Seiler, deceased, wherein his widow appeals from a judgment admitting two instruments to probate. Affirmed.

See, also, 164 Pac. 401.

A. G. Kazebeer and J. E. Pemberton, both of San Francisco, for appellant. Cullinan & Hickey, Wilson & Haines, and Hugh K. McKevitt, all of San Francisco, for respondents.

MELVIN, J. The widow of Paul Seiler, deceased, appeals from a judgment admitting to probate two certain instruments as the last will and testament of said Paul Seiler. One of the documents admitted to probate was dated July 6, 1909. The latter which is dated October 8, 1914, is in form a codicil to the testator's "last will." By it he announces the republication "in every particular" of the said will theretofore made by him and then "in full force and effect," subject to certain exceptions which we quote below:

> "Because of the death of my son Adolph, I give one-third (⅓) of the business known as the Paul Seiler Electrical Works to his mother Hulda Seiler, and also give one-third (⅓) of said business to Frank Herrguth, and, also, because of my recent marriage I give one-third (⅓) of the said business to my present wife, Alice C. Seiler."

[1] Appellant seeks a reversal upon numerous grounds, the first being that the will of July 6, 1909, was revoked. It appears that Mr. Seiler married contestant after the execution of the will of 1909, and it is argued that since thereby that writing was revoked (section 1299, Civ. Code), the reference in the codicil to a will "now in full force and effect" could not have been intended as applicable to said instrument. If the will of 1909 was otherwise sufficiently identified as the one to which the testator referred in the codicil, although his marriage left the former instrument, if standing alone, without effect because of the provisions of section 1299 of the Civil Code, it does not follow that it had no testamentary force in making the postnuptial will. Indeed, a codicil may operate entirely to republish such an instrument in every particular. Estate of Cutting, 172 Cal. 191, 155 Pac. 1002, Ann. Cas. 1917D, 1171. Upon the execution of the codicil the testator might say with truth, therefore, that a former will was "now in full force and effect."

[2] But it is argued that a few days before the execution of this codicil, Paul Seiler had executed another testamentary instrument which better fitted the description of the will sought to be republished than the writing of July 6, 1909. The testimony regarding this instrument is conflicting. Mrs. Alice C. Seiler, the contestant, said that it was brought to Mr. Seiler by his trusted employé, Mr. Herrguth. She looked over the latter's shoulder while he was reading it. Regarding the document she testified as follows:

> "The substance of it, as nearly as my memory will serve me, was, 'On account of the death of my son, Adolph Seiler, I give the Paul Seiler Electrical Works to Frank Herrguth, and on account of my recent marriage to Alice C. Seiler, I give her one-fourth,' and below that there was a space, and below that it said, 'I appoint Frank Herrguth executor without bonds.' There was no reference made therein to any other older will. Mr. Seiler signed that paper. I was present when he signed it. Mr. Guthrie, Mr. Herrguth and Mr. Seiler signed it as witnesses. They were all in the room when it was signed. Mrs. Malone was standing in the door. Mr. Seiler did not refer to it as his will at that time."

That some sort of a document was signed by Mr. Seiler appears in the testimony, but there was no showing that it was executed with due formality. Whatever it was, it was destroyed. According to the testimony of Mrs. Malone, one of the daughters of Paul Seiler, this instrument was prepared by an attorney at her request. After its execution Mr. Seiler told her that he had changed his mind and another writing was finally drafted, submitted to Mr. Seiler, and signed. There was no sufficient proof that the so-called "Herrguth will" had been properly executed, and there was testimony to the effect that when the codicil of October 8, 1914, was drawn at Mrs. Malone's request, while she, according to her testimony, was acting under her father's direction, the attorney who prepared it had before him the will of July 6, 1909, which, according to her father's orders, she had procured from a safe. We are satisfied that, notwithstanding the fact that the earlier document was not physically affixed to the codicil, there was sufficient proof to justify the finding that the codicil referred to the will of July 6, 1909.

[3] Upon the questions of alleged unsoundness of mind and undue influence there was a conflict of testimony which prevents us from disturbing the court's conclusions. It is undeniably true that Mr. Seiler was a very sick man when he executed the codicil, and that he was under treatment which involved the use of sedatives. But the attending physician testified that between the 1st and the 15th of October, 1914, the patient was of sound mind when awake and not greatly under the influence of morphine. Speaking of Mr. Seiler, the physician said:

> "When he was awake he was sound, and he would listen attentively to what you were telling him, and he would answer clearly and intelligently any questions that were addressed to him."

Mr. Borden, one of the witnesses to the codicil, testified that Mr. Seiler was of sound mind when it was signed, and that prior to the signing of the document the testator read it aloud in the presence of the two witnesses and Mrs. Seiler (the contestant here). Mr. Schulze testified to the same general effect. There were other witnesses who were of the opinion that the testator was of disposing mind, and while there was some testimony the other way, there was ample support for the finding that he was competent.

[4] As the contestant was present with her husband on the 8th of October, 1914, there can be little doubt that he was not acting

under undue influence, unless it previously had been exerted and had persisted up to the moment of the testamentary act. There was no proof of any such sinister pressure upon the mind and volition of Mr. Seiler. Clear proof of such influence is required in order that a solemnly executed testament may be set aside for undue influence. Estate of Clark, 170 Cal. 418, 149 Pac. 828; Estate of Gleason, 164 Cal. 756, 130 Pac. 872; Estate of Carithers, 156 Cal. 428, 105 Pac. 127; Estate of Lavinburg, 161 Cal. 543, 119 Pac. 915; Estate of Kilborn, 162 Cal. 11, 120 Pac. 762.

[5] The motion for a new trial was based principally upon the discovery after trial of the contest of a document asserted by appellant to be testamentary in its nature. It was a memorandum accompanying a deposit of money in the Bank of Italy by testator. It was as follows:

> "'Oct. 1, 1911.
>
> "'In the event of my death, the amount of my deposit shall be divided between my children equally in four parts, to wit: Louise Malone, Clara Pape, Adolph Seiler, Hazel Vallejo.
> "'Paul Seiler, Trustee.'"

This was not a will, but merely the creation of a trust in the moneys deposited. Cahlan v. Bank of Lassen Co., 11 Cal. App. 533, 105 Pac. 765; Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370; McCloskey v. Tierney, 141 Cal. 101, 74 Pac. 699, 99 Am. St. Rep. 33; Bell v. Moloney, 165 Pac. 917.

In the will of July 6, 1909, the testator bequeathed to his lawful children (naming them) "all the money deposited in their names in the various savings banks; I myself being trustee (self-appointed) and said amounts being deposited by me with the understanding that the money shall be divided in equal parts."

[6] There is no force in the contention that the judgment should be reversed because of failure of proponents to comply with section 1314, Code of Civil Procedure, by filing the testimony of the subscribing witnesses to the will with the order admitting the will to probate. The section is directory, and it is admitted that the testimony was subsequently reduced to writing and filed.

[7] In the will of 1909 there were two interlineations which the court expressly excluded from probate. After the name of one of the banks specified as containing deposits of trust funds were the words "now Bank of Italy," and the words "First Savings Bank of Oakland" also appeared. Both titles were written after the execution of the will. We cannot see how appellant could be harmed either by the inclusion or omission of these interlineations.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(176 Cal. 671)

BOYLE et al. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (WESTERN MAGNESITE DEVELOPMENT CO. et al., Interveners). (S. F. 8411.)

(Supreme Court of California. Dec. 12, 1917. On Petition for Rehearing, Jan. 10, 1918.)

CORPORATIONS ⟹553(5) — RECEIVERS — APPOINTMENT—PROPRIETY.

Under Code Civ. Proc. § 564, subd. 6, providing for appointment of receivers, a receiver may be appointed for a corporation with four directors at a deadlock, from which it was impossible to do business, with resultant damage to the corporation and stockholders.

In Bank. Mandamus by L. E. Boyle, receiver, and others, against the Superior Court of the City and County of San Francisco and others, wherein the Western Magnesite Development Company and others intervened. Writ awarded. On rehearing execution of writ stayed pending determination of proceeding for prohibition.

Joseph E. O'Donnell, Keyes & Erskine, Thomas R. White, George A. Connolly, and R. W. Cantrell, all of San Francisco (Herbert W. Erskine, of San Francisco, of counsel), for petitioners. Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for interveners.

HENSHAW, J. Certain stockholders of the Western Magnesite Development Company, a corporation, appealed to equity, charging fraud, dereliction of duty, and violation of trust against two of the directors of the corporation, and prayed for a removal of these directors and for an appointment of a receiver to take possession and charge of the assets and property of the corporation. It was alleged that the Western Magnesite Development Company was a mining corporation owning magnesite claims of large value; that dissension had arisen in the board of directors, which board consisted of but four persons, of whom the defendants Cummings and Wolfe were two; that, because of these dissensions and the mutual hostility underlying them, no business of the corporation was performed. The corporation had entirely ceased operations and no longer prosecuted its mining operations. On account of the disputed ownership of over two-thirds of the capital stock, it was alleged that it was impossible to hold a stockholders meeting for the purpose of electing a new board of directors; that litigation was pending to determine the true ownership of this disputed capital stock. Other allegations going to the trouble and confusion in the affairs of the corporation, the enforced suspension of all its business activities, and improper conduct on the part of the directors Cummings and Wolfe, were set forth. Trial upon the issues joined was had. Application was made for the appointment of a receiver to preserve the assets and property of the corporation pendente lite and until the directorate was able to act. At the conclusion of the taking of the evidence at the trial and before decision upon the merits of the case, the trial court appointed a receiver pendente lite to take charge of the assets and continue the business of the corporation. The receiver was directed, first, to execute to the state of California an adequate undertaking in the sum of fifty thousand dollars. The order declared that it was made "without determining the merits of this cause as between plaintiffs and defendants and upon the sole ground that there is now and ever since the commencement of this action has been a deadlock in the board of directors of said corporation, as a consequence of which the business of said corporation is not carried on and the mine of said corporation is not operated." The parties litigant, dissatisfied with this order, sought and obtained an alternative writ of prohibition issued out of the District Court of Appeal of the First Appellate District, by which alternative writ action of the judge of the court and of the receiver so named was stayed until further order of the District Court of Appeal. On the 27th day of June, 1917, the District Court of Appeal made its order dismissing the proceeding and quashing the alternative writ.

Following this came an application to this court for mandate directed to the trial judge of the superior court for his refusal to approve the bond and undertaking of the receiver whom he had appointed, and to allow this receiver to qualify. In the petition and in the alternative writ of mandate which issued from this court, it is declared that the sole ground of the trial court's refusal is "that the decision of the District Court of Appeal of the State of California in the action of Western Magnesite Development Company, a Corporation, et al. v. The Superior Court of the City and County of San Francisco et al., will not become final for 30 days."

Were this the sole ground, no consideration here would be necessary, since the 30 days have elapsed and the trial judge doubtless would not longer withhold action for the reason indicated. In passing it may be said that Noel v. Smith, 2 Cal. App. 158, 83 Pac. 167, affords justification for the court's refusal to act until the expiration of the 30 days, only after which the decision of the District Court of Appeal became final.

The serious contention is over the jurisdiction of the trial court to appoint a receiver under the indicated circumstances, and it is declared that under the decisions of this court such an appointment, based upon the stated ground, is in excess of the jurisdiction of the court and therefore void. With this contention, however, we cannot agree. Section 564, subd. 6, of the Code of Civil Procedure, declares that a receiver may be appointed by the court in which an action is pending, or by the judge thereof "in all other cases where receivers have heretofore been appointed by the usages of courts of equity." That courts of equity, English and American, have appointed receivers under precisely the situation here presented, is beyond all controversy. These receivers are not appointed to close up the affairs of a corporation, to work its dissolution, but to preserve its properties, and, where possible, continue its corporate functions. Says Pomeroy (5 Pom. Eq. Jur. § 124):

> "The power of a court of equity to appoint a receiver of a corporation either because it has no properly constituted governing body, or because there are such dissensions in its governing body as to make it impossible for the corporation to carry on its business with advantage to its stockholders, appears to be settled; but it is equally well settled that this power is subject to certain limitations, namely, it must always be exercised with great caution, and only for such time and to such an extent as may be necessary to preserve the property of the corporation and protect the rights and interests of its stockholders. As soon as a lawfully constituted and competent governing body comes into existence, whether it is brought into existence by an adjustment of the dissensions or by the election of a new body, and such body is ready to take possession of the property of the corporation, and proceed in the proper discharge of its duties, the court must lift its hand and retire."

It is to be noted from this and from the citations which will follow that fraud is not a necessary basis for the procurement of such an appointment. Dissensions, honest differences of opinion, which result in making it impossible for the corporation to carry on its business to advantage, or, as here, to carry it on at all, are sufficient to invoke the action of a court of equity. In California Fruit Growers' Ass'n v. Superior Court, 8 Cal. App. 711, 97 Pac. 769, where a receiver was asked for upon the ground of fraudulent mismanagement, the court declared that the trial court had jurisdiction to appoint a receiver under the allegations of the complaint, and pointed out that the proceeding was not directed toward the closing of the affairs of the corporation or toward an attempt to dissolve it, but was designed merely to place the assets of the corporation in safe hands. In Sternberg v. Wolff, 56 N. J. Eq. 389, 39 Atl. 397, 39 L. R. A. 762, 67 Am. St. Rep. 494, difficulties had arisen, as here, in a board of directors consisting of four members. The lower court refused to appoint a receiver. On appeal its order so doing was reversed and a receiver appointed upon the ground that injunction was inadequate, and the court based its decision solely upon the fact that dissensions existed between the two factions which had brought the affairs of the company to a deadlock "so far as any corporate action by the board of directors is concerned"; and proceeded to say that, while the court of chancery had no jurisdiction to dissolve a solvent corporation under such circumstances, its jurisdiction "to control the business of a company, especially a trading company, pending a litigation over the management and conduct of its business, must necessarily exist." Without multiplying quotations upon this point, further reference may be made to Featherstone v. Cooke, L. R. 16 Eq. 298; Auxiliary Co. v. Vickers, L. R. 16 Eq. 303; Archer v. Waterworks, 50 N. J. Eq. 33, 24 Atl. 508; Jasper Land Co. v. Wallis, 123 Ala. 652, 26 South. 659; Sheridan Brick Works v. Marion Trust Co., 157 Ind. 292, 61 N. E. 666, 87 Am. St. Rep. 207; Powers v. Blue Grass Building & Loan Ass'n (C. C.) 86 Fed. 705; Boothe v. Summit Coal Co., 55 Wash. 167, 104 Pac. 207, 19 Ann. Cas. 1255; Gibbs v. Morgan, 9 Idaho, 100, 72 Pac. 733; Alabama Coal & Coke Co. v. Shackelford, 137 Ala. 224, 34 South. 833, 97 Am. St. Rep. 23; State v. District Court, 15 Mont. 324, 39 Pac. 316, 27 L. R. A. 392, 48 Am. St. Rep. 682; Ritchie v. People's Telephone Co., 22 S. D. 598, 119 N. W. 990; In re Lewis, 52 Kan. 660, 35 Pac. 287.

An examination of our own cases has been made under the adverse contention that this equitable doctrine has been refused recognition in this state. It would unduly and unnecessarily prolong this discussion to review those cases at length. One and all, however, they were cases susceptible of broad differentiation. They were cases where the receiver was appointed to wind up the affairs of the corporation—in effect to dissolve it and to distribute its assets, a power which under our laws equity does not possess, and a power which equity in the case at bar did not attempt to exercise. The distinction is well recognized, as a consideration of any of the foregoing citations will amply demonstrate.

Let mandate issue accordingly.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.

On Petition for Rehearing.

PER CURIAM. On petition for rehearing, it is called to our attention that on August 23, 1917, we made an order, transferring the proceeding for prohibition, referred to in the opinion of Mr. Justice HENSHAW, to this court for hearing and determination. The order revived the alternative writ of prohibition issued by the District Court of Appeal, and the restraining effect of such writ will remain in force until this court shall dispose of the proceeding thus transferred, and now pending here. On the merits, the two proceedings—that in prohibition and the present one in mandate—turn on the same legal questions. We are entirely satisfied with the manner in which these questions are disposed of by our opinion herein. But, since the alternative writ of prohibition is still in force, the respondent judge is confronted by two orders; one commanding, and the other prohibiting, certain action. To avoid technical difficulties which may arise, it is ordered that execution of our writ of mandate be stayed until the disposition of the pending proceeding for prohibition.

The petition for rehearing is denied.

MEMORANDUM DECISIONS

176 Cal. 648

In re JEPSON'S ESTATE. (L. A. 5055, 5056.) (Supreme Court of California. Dec. 12, 1917.) Department 1. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge. In the matter of the estate of Frederick Emile Jepson, deceased. From orders setting apart a homestead to the widow and dismissing contests, deceased's nephews and nieces appeal. Reversed. Fred N. Arnoldy, of Los Angeles, for appellants Jepson and Miller. Stewart & Stewart, of Los Angeles, for appellants Nielsen. Frank Stewart and J. W. Howell, both of Los Angeles, for petitioner and administratrix.

SHAW, J. In this case the widow of the decedent applied to the court in probate to have set apart to her a homestead. The nephews and nieces of the decedent filed a contest to the application. The court below dismissed the contest, on the ground that the nephews and nieces had no interest in the estate as heirs or otherwise, and thereupon made an order setting apart to the widow a homestead out of the property of the decedent. From this order two appeals have been taken; one being an appeal from the part of the order setting apart the homestead, the other an appeal from the part of the order declaring that the nephews and nieces are not heirs at law of the decedent. The decedent died intestate. A motion to dismiss these appeals was heretofore made in this court, based upon the ground that the nephews and nieces were not heirs, and consequently had no interest in the property of the decedent. Upon the decision of this motion the court held that the nephews and nieces, who were also the next of kin, were heirs, and were therefore entitled to present a contest to the application of the widow for a homestead. Estate of Jepson, 164 Pac. 1. The discussion of the subject in that case renders it unnecessary to state either the facts or the law in the disposition of the case on the merits. As the decision of the court below dismissing the contest, on the ground that the nephews and nieces were not heirs, was erroneous, it follows that the order must be set aside, and the cause remanded for a new trial. The order is reversed.

We concur: SLOSS, J.; LAWLOR, J.

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35 Cal. App. 513

JOHNSON SERVICE CO. v. LATOURRETTE-FICAL CO. (Civ. 2258.) (District Court of Appeal, First District, California. Dec. 10, 1917. Rehearing Denied by Supreme Court. Feb. 7, 1918.) Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge. Action by the Johnson Service Company against the Latourrette-Fical Company and another. From the judgment rendered, and from an order denying motion for a new trial, plaintiff appeals. Affirmed. Houghton & Houghton, of San Francisco, for appellant. John C. March and De Ligne & Jones, all of Sacramento, for respondents.

LENNON, P. J. This is an appeal by plaintiff from the judgment and the order denying its motion for a new trial. The plaintiff, Johnson Service Company, furnished and installed what is known as the Johnson system of temperature regulation in the county courthouse at Sacramento. The original defendant, Latourrette-Fical Company, held a contract to furnish and install the heating system of the courthouse, including the temperature regulation apparatus, and became obligated to pay the sum of $6,600 for the labor and work so furnished. It was admitted by all persons concerned in the litigation that $3,700 of the $6,600 had been paid, and that there was a balance of $2,900 due at the time plaintiff brought this action against the Latourrette-Fical Company to recover the latter amount. The defendant answered, admitting its obligation, but averred that the Scott, Lyman & Stack Company claimed to be entitled to the money. Therefore it deposited the disputed moneys in court and interpleaded the Scott Company. Upon trial of the action the plaintiff claimed to have furnished the work for Latourrette-Fical Company under and in pursuance of an alleged contract with it, while the Scott Company claimed to have furnished the work under and in pursuance of a contract entered into between the Latourrette-Fical Company and R. B. Lindsay, the Pacific Coast manager of plaintiff's business at the time, which contract was transferred and assigned to the Scott Company by Lindsay. The Scott Company further claimed that, while the work was actually done by plaintiff, it was done by it as the subcontractor and agent of the Scott Company. The court below found that plaintiff furnished the labor and material under and in pursuance of a contract entered into between plaintiff, Johnson Service Company, and the defendant Scott, Lyman & Stack Company, and that the latter furnished the same labor and material, through plaintiff as its subcontractor, to the Latourrette-Fical Company under and in pursuance of the contract originally entered into between the Latourrette-Fical Company and R. B. Lindsay, which was thereafter transferred and assigned to the Scott Company, and that the Scott Company was entitled to the moneys in dispute less $500, of which it was admitted $50 was due and $450 would become due from the Scott Company to plaintiff when the former should receive its money for the work. Plaintiff's main attack upon the judgment appealed from is based on the alleged insufficiency of the evidence to sustain the findings, and some 16 assignments of insufficiency are designated in support of this contention. In response to these various objections it will suffice for us to say that we have read the record and find ample evidence to support the findings, which in turn support the judgment. Upon the oral argument of the case in this court it was conceded by counsel for plaintiff that the attack made in the opening briefs upon the findings of the court, because of an alleged irregularity in their preparation and entry, was not well taken, and therefore we will not now discuss that point. The judgment and order are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

CALIFORNIA REPORTER

171 PACIFIC REPORTER

177 Cal. 493

ASATO v. EMIRZIAN. (S. F. 7464.)

(Supreme Court of California. Feb. 13, 1918.)

1. APPEAL AND ERROR 🔑1208(1) — TROVER AND CONVERSION 🔑5 — REVERSAL — RESTITUTION—WHAT CONSTITUTES TAKING.

Where plaintiff in action for specific performance of contract to sell orange trees got judgment, and defendant appealed without filing a stay bond, and receiver was appointed for defendant, and delivered the trees to plaintiff, plaintiff's taking the trees was not an unlawful taking, though when the judgment was reversed he was bound to account to the defendant for the property.

2. APPEAL AND ERROR 🔑1208(8)—REVERSAL—RESTITUTION.

In such case, if he was unable to make restitution, plaintiff was bound to show that loss of the trees was not due to want of good faith or lack of common skill, prudence, and diligence.

3. TROVER AND CONVERSION 🔑5 — WHAT CONSTITUTES.

In such case, where plaintiff took the trees and planted them in his orchard, there was a conversion which rendered him liable for the value of the trees.

4. APPEAL AND ERROR 🔑1064(1)—REVIEW—HARMLESS ERROR—INSTRUCTION.

Where defendant gave no stay bond, and plaintiff under order of court which appointed receiver for defendant went on defendant's land and removed trees, and planted them on his own land, and the judgment was reversed, instruction to consider value of trees at the time of conversion, without confining time of conversion to the time when the trees were planted, was not prejudicial, the trees having been transplanted in June, and presumptively, therefore, the conversion occurred at about the same time as the removal from defendant's land.

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Sosei Asato against Karl Emirzian. From an order denying motion for new trial after judgment for plaintiff, defendant appeals. Affirmed.

C. K. Bonestell, of Fresno, for appellant. Geo. Cosgrave, of Fresno, for respondent.

VICTOR E. SHAW, Judge pro tem. This action for conversion grew out of the following facts: On June 8, 1909, the parties entered into a contract whereby for a specified consideration plaintiff, Asato, agreed to grow and deliver to defendant, Emirzian, 4,000 orange trees, delivery thereof to be made in June, 1911. For some reason not material to the issues in this case, the trees were not delivered and Emirzian instituted suit for the specific performance of the contract, the result of which was a decree entered in his favor on March 28, 1912. After an appeal from this judgment by Asato without giving an undertaking to stay execution thereon, the court upon application of Emirzian appointed a receiver, who, in accordance with the terms of the decree and under order of the court, made delivery of the trees to Emirzian, who planted the same on his land as a part of his orange orchard, where prior to the commencement of this action, they died.

The appeal so taken by Asato from the judgment in the former action resulted in a reversal of the judgment. Emirzian v. Asato, 23 Cal. App. 251, 137 Pac. 1072. Thereupon, plaintiff brought this action alleging that on May 13, 1912, he was the owner, entitled to, and in the exclusive possession of 2,600 orange trees then and there of the value of $2,600, which trees defendant unlawfully took and carried away and converted to his own use, all of which allegations were denied by defendant's answer. The case was tried by a jury which rendered a verdict as prayed for by plaintiff in accordance with which judgment was entered. Defendant appeals from an order of the court denying his motion for a new trial.

[1] In effect, the several provisions of the Code of Civil Procedure declare that where no undertaking on appeal is given by defendant in cases of this character to stay execution of the judgment, the same may be enforced as though no appeal were had. Hence the taking of the trees by defendant in this action under the terms of the decree as to the execution of which there was no stay could not be deemed an unlawful or wrongful taking. "A judgment, although it may be erroneous, nevertheless is the act of the court, and, until reversed, unless superseded, which was not done in the instant case, constitutes a sufficient justification for all acts done in its enforcement, and afforded complete protection for the defendant who acted in reliance upon the adjudication." State Nat. Bank v. Ladd, 162 Pac. 684, L. R. A. 1917C, 1176, and cases there cited. Nevertheless, where a plaintiff by virtue of a judgment rendered in an action obtains possession of money or specific property of the defendant therein, the latter upon a reversal of the judgment on appeal therefrom is entitled to restitution of the property or proceeds of the sale thereof under execution. Section 957, Code Civ. Proc.;

Dowdell v. Carpy, 137 Cal. 333, 70 Pac. 167; Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624. As to such defendant "the courts will, where justice requires it, place him as nearly as may be in the condition in which he stood previously." Ward v. Sherman, 155 Cal. 287, 100 Pac. 864.

Since, under the decree, the possession of the trees taken by Emirzian was lawful, and Asato's right thereto did not attach until after the reversal, it follows that until the judgment was reversed defendant herein was lawfully in possession of the property so acquired. When, however, the judgment was reversed, he was in duty bound to account to Asato for the property which he had theretofore received, and, as said in Ward v. Sherman, supra, the rule governing the extent of defendant's liability is that applicable to a trustee which in 28 Am. & Eng. Ency. of Law (2d Ed.) p. 1059, is stated as follows:

> "The general doctrine being that trustees ought to conduct the business of the trust in the same manner as an ordinarily prudent man of business would conduct his own, they will not be chargeable with more than they have received nor held responsible for losses that may arise, when they have acted in good faith and with common skill, prudence and diligence."

[2, 3] While pending the appeal Emirzian, under the principle stated, was entitled to the possession of the property, his title thereto was contingent upon the determination of the case, and if, as such trustee, he was unable to make restitution of the trees, it devolved upon him in order to escape liability to show that such fact was not due to the want of good faith, or the lack of common skill, prudence, and diligence in the care thereof. The only evidence touching the subject is that of defendant who stated that upon receiving the trees he planted them in his orchard as part thereof, thus changing their character from nursery stock, which constituted personal property, to a part of his real property, thereby placing it beyond his power to make restitution. By such act, in the absence of any evidence showing necessity therefor, or that in so doing he exercised common prudence, he, in violation of his duty as trustee, appropriated the property and converted it to his own use as fully and to the same extent as though the subject of controversy had been a lot of hay, upon the taking of which defendant had thereupon fed it to is cattle. "In such cases the true rule would seem to be that the trustee is liable to the extent of the actual value of the property at the time of the conversion, * * * with interest." Am. & Eng. Ency. of Law, p. 1062. If he had retained the trees as personal property, in which character they were received by him, he could at any time thereafter have made restitution to Asato, in which case, under the rule applied in Ward v. Sherman, supra, his liability for loss would have been that due to want of common prudence and care. Had the trees been sold under execution, the proceeds thereof coming into the hands of Emirzian would, in the absence of fraud, have fixed the amount of his liability (section 957, Code Civ. Proc.), and since he converted them to his own use his liability should be measured by the value of the trees at the time of the conversion. The fact that the trees thereafter died is immaterial, unless such loss could be attributed to some cause for which defendant was not responsible existing prior to the conversion, evidence bearing upon which question was in fact introduced by both parties as affecting the value of the trees, which the jury found to be $1 per tree at the time they were delivered to defendant.

[4] At the trial plaintiff's theory of the case was that the receiver's delivery of the trees to defendant constituted the conversion, while that of defendant was that, since the taking by defendant was lawful, and the capacity in which he held the property that of a trustee, there could be no conversion thereof by him. The trial court instructed the jury that in ascertaining the value of the trees they were governed by the evidence as to value as of the time of the taking and refused defendant's requested instruction fixing the value as of the time of the conversion. In this the court erred, but in view of the evidence disclosed by the record we are unable to perceive how defendant was prejudiced by the ruling. It was not the taking, which appears to have been about June 1st, but the appropriation made by defendant in planting the trees as part of his orange grove that constituted the conversion, and barring any lack of proper care of the trees on his part prior to such conversion, their value at such time was the measure of defendant's liability. Nevertheless, in the absence of any evidence as to the time when the trees were so planted other than that of defendant, who said upon receiving the trees he planted them in his orchard, we may indulge the presumption, based upon common knowledge, that the trees, upon being taken from the nursery in June, were permanently set in the ground about the same time, hence the error could not have been prejudicial.

The gist of appellant's whole claim and argument is that there was no conversion since defendant held the trees as trustee; that the permanent setting of the trees on his land in orchard form, thus appropriating them for all time to his own use, was, in itself, in the absence of other evidence of such fact, proof that he, as trustee, exercised proper skill and diligence in the care and management of the trust property, and hence, though shown to be in good merchantable condition when he got them, nevertheless, since they died, he is not responsible for the loss to plaintiff. We cannot assent to this contention.

The order appealed from is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; MELVIN, J.; SHAW, J.; RICHARDS, Judge pro tem.

177 Cal. 481

GRIFFIN v. SMITH. (S. F. 7915.)

(Supreme Court of California. Feb. 11, 1918.)

1. Bankruptcy 🔑188(1) — Effect as to Liens.

Under Bankruptcy Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 (U. S. Comp. St. 1916, § 9651), providing that liens given or accepted in good faith, and not in contemplation of, or in fraud upon, that act, and for a present consideration, which have been recorded, if necessary, shall, to the extent of such present consideration only, not be affected thereby, a pledge of stock, created more than four months before the filing of a petition in bankruptcy against the pledgor, was not affected by the bankruptcy proceeding.

2. Bankruptcy 🔑151—Title Acquired by Trustee.

Where a bankrupt had pledged stock more than four months before the filing of the petition, the trustee would take only such interest in the stock as the debtor had; that is, a title subject to the interest of the pledgee.

3. Bankruptcy 🔑214 — Liens — Enforcement.

Under a pledge of stock created more than four months before bankruptcy, the pledgee's right to sell the stock and apply the proceeds to the payment of his debt was not affected by the bankruptcy proceeding.

4. Bankruptcy 🔑214 — Liens — Enforcement.

The filing of a petition in bankruptcy did not oust a state court of jurisdiction to entertain an action by the pledgee to foreclose his lien, but at most authorized the bankruptcy court to enjoin the prosecution, or the state court to stay it.

5. Bankruptcy 🔑214 — Corporations 🔑123(24)—Pledge of Stock—Enforcement.

A pledgor of stock, or his creditors on his bankruptcy, were not entitled to ask that the pledgee, who had a matured and present right to realize upon his security should be required to defer the exercise of such right indefinitely, to await a purely problematical increase in the price which might be realized at a sale.

Department 1. Appeal from Superior Court, Alameda County; William H. Donahue, Judge.

Action by Henry T. Griffin against F. M. Smith. From a decree in favor of plaintiff, defendant appeals. Affirmed.

Pillsbury, Madison & Sutro, of San Francisco, for appellant. St. Sure & Rose, of Oakland, for respondent.

SLOSS, J. On June 12, 1912, the defendant executed and delivered to plaintiff a demand note for $3,000, secured by a pledge of certain shares of stock. A collateral agreement, made at the same time, authorized the holder of the note, in case of default, to sell the pledged property at public or private sale, with or without notice to the pledgor. This action was brought in January, 1914, to foreclose the lien of the pledge. The court found that $750 of the principal and $150.05 of the interest due on the note was unpaid, and that the plaintiff had waived any right to a deficiency or personal judgment against the defendant. A decree was accordingly entered for the sale of the pledged property by a commissioner and for the foreclosure of defendant's right of redemption. The defendant appeals from the judgment.

His sole contention is that the court below should have stayed its hand because of the pendency of bankruptcy proceedings. It was alleged in the answer, and found by the court, that on July 24, 1913, there was filed in the United States District Court, in and for the Northern District of California, a petition praying that the defendant herein be declared an involuntary bankrupt; that said defendant had appeared in said proceeding, but no adjudication with respect to his bankruptcy had been made.

[1-3] The plaintiff's pledge was valid under the laws of this state, it was created more than four months before the filing of the petition against the defendant, and its validity was in no way affected by the bankruptcy proceeding. Bankruptcy Act, § 67, subd. "d" (U. S. Comp. St. 1916, § 9651). The trustee appointed upon an adjudication of bankruptcy, if there had been such adjudication, would have taken only such interest in the stock as the debtor had—that is, a title subject to the interest of the plaintiff under his pledge. 7 C. J. 185. Since the judgment under review did not decree any personal liability, it gave to plaintiff no more than he had by the terms of the collateral agreement viz., the right to sell and apply the proceeds to the payment of his debt. This right, which might have been exercised without resort to any court, was not affected by the bankruptcy proceedings. Hiscock v. Varick, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945.

[4, 5] The filing of the petition in bankruptcy did not oust the state court of jurisdiction to entertain the present action. 7 C. J. 204, 205. The most that could possibly be claimed is that bankruptcy court might have enjoined the prosecution, in a state court, of an action which might interfere with its own administration of the estate, and that, on like grounds, the state court itself should have granted a stay. But no case was made calling for the intervention of the bankruptcy court. The answer avers that the pledged shares of stock had no "market value," and that, if they were sold under the most favorable circumstances, they would not bring enough to satisfy plaintiff's demand. If this were so, there would be no surplus available to the appellant's other creditors, and the estate in bankruptcy would have no interest in seeking to control

the foreclosure sale. In re Holloway (D. C.) 93 Fed. 638. The answer alleges further, on information and belief, that "the actual value of the stock is in excess of the amount due to the plaintiff." There is no attempt to state what value the stock has above the amount of the debt. But if, overlooking the defective form of the pleading, we take it as intended to aver that a substantial surplus above plaintiff's claim might be realized if the sale were postponed, the allegation is still insufficient. The plaintiff, as pledgee, has a matured and present right to realize upon his security. The pledgor is not justified in asking that the exercise of this right be deferred indefinitely to await a purely problematical increase in the price which might be realized at a sale. Nor are the general creditors of the alleged bankrupt entitled to this indulgence.

The answer showed no ground, therefore, for staying the proceedings, or otherwise interfering with the plaintiff in the pursuit of his remedy. In this view, the further points made by the appellant become immaterial.

The judgment is affirmed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

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177 Cal. 498

HUDSON v. UKIAH WATER & IMPROVEMENT CO. (S. F. 7680.)

(Supreme Court of California. Feb. 15, 1918. Rehearing Denied March 14, 1918.)

1. WATERS AND WATER COURSES 🔑152(11)—APPROPRIATION—LIMITING BY DECREE.

An old decree limiting a water right to what could be conveyed from defendant's pipes through a half-inch pipe means the quantity that could then be conveyed, and a later decree, attempting such limitation, but not providing for increased pressure and lessened friction, enlarges such right to include water hereafter acquired by defendant, which is error.

2. WATERS AND WATER COURSES 🔑152(11)—DECREE—ENLARGING RIGHT APPURTENANT TO LAND.

A decree erroneously enlarging a water right limited by contract and former decree from its being appurtenant to four acres of land to include an additional tract, and ignoring a limitation to what may be used in sprinkling with a hose, requires reversal.

3. WATERS AND WATER COURSES 🔑143—APPROPRIATION—QUANTITY OF WATER.

Plaintiff's right to establish her private water right as against the public served by defendant corporation would be measured not by the amount claimed by her predecessors, but by the amount which had been actually taken for beneficial use on the land to which appurtenant.

4. WATERS AND WATER COURSES 🔑152(11)—RIGHTS—SUCCESSOR IN INTEREST BOUND BY DECREE.

In so far as a company is bound by a judgment against its predecessors confirming the rights of plaintiff's predecessors to preferential right in water appropriated to public use, it is estopped from claiming such rights unlawful.

5. WATERS AND WATER COURSES 🔑130—APPROPRIATION—PUBLIC USE.

While plaintiff might enlarge her right to use a certain quantity of water from defendant's pipes by prescription or implied grant, yet no such right can be acquired against waters appropriated or acquired by defendant for public use.

Department 2. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Grace Hudson against the Ukiah Water & Improvement Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Robert Duncan, of Ukiah, for appellant.
Preston & Preston, of Ukiah, for respondent.

WILBUR, J. Defendant appeals from the judgment establishing plaintiff's water right.

[1, 2] The water right in question was before this court in Farmer v. Ukiah Water Co., 56 Cal. 11. Plaintiff claims as the successor to the plaintiff in that case by mesne conveyances of the land owned by Farmer, and seeks to bind the defendant as the successor of the defendant corporation, the Ukiah Water Company. Assuming, without deciding, that the parties hereto are bound by the decree in the case of Farmer v. Ukiah Water Co., the judgment must, nevertheless, be reversed for the reason that the water right described therein is entirely different from the water right confirmed in the decree in Farmer v. Ukiah Water Co. To make this apparent, it will be necessary to state some of the facts and to compare the provisions of the decree in the former case and in this case. At the time of the rendition of the decision in Farmer v. Ukiah Water Co., supra, the defendant corporation therein was appropriating a portion of the water of Gibson creek by means of a dam, diverting the water into its reservoir, and conducting the same therefrom in a two-inch pipe, to which plaintiff's predecessors attached a half-inch pipe, and it was to this water of Gibson creek so diverted that the decree declared plaintiff's right. That decree was entered on retrial after reversal, and described the water right of plaintiff therein with reference to the amount of water that would flow through a half-inch pipe, as does the decree in this case. That amount varies with supply, pressure, and friction. Since the decree in Farmer v. Ukiah Water Co., the defendant has increased the supply by diverting all the water of Gibson creek, by diverting water from Orr creek, and by pumping water from wells on Russian river. It has increased the pressure by diverting the water a mile higher up Gibson creek and constructing reservoirs at a higher elevation, and it has decreased the friction in the pipes by increasing to six inches the diameter of the pipe to which plaintiff's one-half inch pipe is attached. It is evident that the plaintiff will

receive a vastly greater quantity of water through a half-inch pipe under the circumstances stated than under the system as established at the time her right was granted to her predecessor. But the decree also confirms in plaintiff a right for all future time to use the pipes and water of the defendant corporation. If it erects new reservoirs at greater elevation and establishes larger pipe lines, the plaintiff under this decree would be entitled to the increased flow in her one-half inch pipe due to such increased supply, for the decree herein provides that:

> "Plaintiff is the owner of so much of the water of the defendant corporation as may now or hereafter at any time flow in or through their aqueducts, reservoirs, or pipes, as may or can be conveyed in, through or by a pipe or aqueduct one-half inch in diameter. Also the right to draw such supply of water from the main pipes, aqueducts, or reservoirs, of the said defendant corporation."

Thus, it will be observed, the decree secures to plaintiff and her successors an undivided interest not only in all waters now owned by the defendant, or passing through its pipes, but all water that may from any source subsequently be diverted into said pipes, and this without regard to the question as to whether or not the waters of Gibson creek have become exhausted for any reason. In the former decree there were also limitations upon the amount of water plaintiff's predecessors were entitled to receive through their half-inch pipe, which are entirely ignored in the decree in this case. The right to irrigate was restricted "to water that may be used in sprinkling by means of a hose," etc., and it was therein provided "that nothing herein contained shall authorize the plaintiff to use said right and privilege for purposes of speculation," probably meaning that plaintiff was not allowed to sell water for use by others. But, for an even more obvious enlargement of the plaintiff's water right, it is necessary that the judgment be reversed. The water right which plaintiff claims by mesne conveyances of land as aforesaid is appurtenant to a piece of land about four acres in extent, known as the Fox property. Since the acquisition of that land she has also acquired an adjoining piece of property, known as the Bennett property. By the terms of this decree, perhaps by an inadvertence, the water is made appurtenant to both properties. This enlargement of the right is particularly important because of the above-mentioned limitations imposed in the decree in Farmer v. Ukiah Water Co. upon the right to irrigate, etc., even upon the Fox property.

[3] Plaintiff claims her right under La Mar, one of three partners who originally formed the copartnership known as the Ukiah Water Company, succeeded by the Ukiah Water Company, a public service corporation, defendant in Farmer v. Ukiah Water Co. The defendant in the case at bar is a public service corporation in charge of a public utility, organized since the Constitution of 1879, and supplying the inhabitants of the city of Ukiah with water purchased or appropriated by it since its organization. Where the plaintiff seeks to establish her private right to water as against the right of the public served by the defendant, her right would be measured not by the amount of water which La Mar claimed, nor by the amount which would flow through a half-inch pipe, but by the amount which had been actually taken and applied to a beneficial use upon that land. The "right to priority in the use of water would also be measured according to these facts and limited to this quantity." Leavitt v. Lassen Irr. Co., 157 Cal. 82, 86, 106 Pac. 404, 29 L. R. A. (N. S.) 213. It is because the water was used with the land for its benefit that it was held to be appurtenant to the land in question. Farmer v. Ukiah Water Co., supra. There should be no difficulty upon a new trial in fixing the quantity of water to which plaintiff is entitled, if any, in terms of gallons per month, based upon the amount that was used upon the Fox property during the time that the Ukiah Water Company, a corporation, defendant in said Farmer Case, was furnishing such water (1872–1895).

[4] Appellant claims that the conveyance, if any, to the plaintiff or her predecessors gives her such a preferential right in waters devoted to public use as is void under the law, citing such cases as Leavitt v. Lassen Irr. Co., supra, People v. Kerber, 152 Cal. 732, 93 Pac. 878, 125 Am. St. Rep. 93, City of South Pasadena v. Pasadena Water Co., 152 Cal. 579, 93 Pac. 490, Byington v. Sacramento Valley, etc., Co., 170 Cal. 124, 148 Pac. 791, arising under article 11, § 19, of the Constitution, and Price v. Riverside Land & Irr. Co., 56 Cal. 432, under the law and the Constitution previous to the Constitution of 1879. But this principle does not apply in this case except with reference to the statute of limitations, which will be hereafter discussed, for, as was held in City & County of San Francisco v. Itsell, 80 Cal. 57, 22 Pac. 74, even though there is no power in the first instance to make such conveyance, a judgment establishing a private right, although erroneous in law, is nevertheless binding upon the company and its successors, so that in so far as the defendant here is bound by the decree in Farmer v. Ukiah Water Co., it is, to that extent, barred from claiming that the right therein confirmed is violative of the law against creating preferential rights in water appropriated to public use.

[5] The findings and decree herein are based in part upon a prescriptive right in the plaintiff. Whether during the 42 years that plaintiff and her predecessors have used water from the pipes of the Ukiah Water Company (1872–1895) and of the defendant (1895–1914) the use has been enlarged does not appear from the findings or decree, but the evi-

dence would seem to indicate that the use had been about the same. If this question arises upon a new trial, it is sufficient to say that in so far as any right to water is claimed by the plaintiff by reason of prescription or implied grant, no such right can thus be created against the waters appropriated or acquired for public use by the defendant. Leavitt v. Lassen Irr. Co., supra; People v. Kerber, supra; Holladay v. San Francisco, 124 Cal. 352, 57 Pac. 146; County of Yolo v. Barney, 79 Cal. 375, 21 Pac. 833, 12 Am. St. Rep. 152.

Appellant makes the point that the Ukiah Water Company could not and did not transfer all its properties to the defendant company. On a new trial other and different evidence as to the relation of the defendant to the Ukiah Water Company, a corporation, and the properties, may be presented, so that we deem it unnecessary to discuss this question, as the general question has been discussed in recent cases by this court, as well as those cited by counsel. Byington v. Sacramento Valley, etc., Co., supra; Southern Pacific Co. et al. v. Spring Valley Water Works et al., 173 Cal. 291, 150 Pac. 865, L. R. A. 1917E, 680; Limoneira Co., Farmers' Ditch Irr. Co. et al. v. Railroad Comm. of California, 174 Cal. 232, 162 Pac. 1033.

The complaint states a cause of action.

Judgment reversed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 484)

AVERY v. WILTSEE. (S. F. 7564.)

(Supreme Court of California. Feb. 13, 1918.)

1. TRIAL 🔑48—RECEPTION OF EVIDENCE—ADMISSIBILITY FOR PARTICULAR PURPOSES.

In an attorney's action for services in various matters, a verified complaint filed against defendant in an action brought by third parties, charging him with fraud, was properly admitted to show the nature and character of the services performed by plaintiff in warding off the filing of the complaint, in negotiating with the attorneys for the plaintiff in such suit, and in securing its dismissal, though it might be suspected that the jury was improperly influenced by the charge of fraud, and though it might have been more just to have excluded the evidence, especially where the court and counsel made every possible effort to prevent the jury from giving it any other effect than that for which it was offered.

2. APPEAL AND ERROR 🔑1170(7)—REVERSAL—STATUTE—HARMLESS ERROR.

Code Civ. Proc. § 1854, provides that when part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other, and that when a detached act, etc., is given in evidence, any other act, etc., which is necessary to make it understood may also be given in evidence. *Held* that, where in an attorney's action for services he introduced letters written by defendant to third parties, the exclusion of the letters written by the third parties in reply which had not been communicated to plaintiff, and which contained hearsay statements that plaintiff had neglected his duty, was not prejudicial under Const. art. 6, § 4½, prohibiting the setting aside of judgments for errors not resulting in a miscarriage of justice.

3. EVIDENCE 🔑155(1) — ADMISSIBILITY BY REASON OF ADMISSION OF SIMILAR EVIDENCE.

Under Code Civ. Proc. § 1854, where evidence otherwise incompetent is relevant, if at all, only because connected with other evidence in the case, and would have little, if any, weight, but would be prejudicial if erroneous, any doubt as to its connection with the evidence already admitted should be resolved against its admission.

4. PRINCIPAL AND AGENT 🔑116(1)—AUTHORITY—UNDISCLOSED LIMITATION.

Defendant's instructions to his agent with reference to the scope of his employment were inadmissible against an attorney to whom they were never communicated, and who had been notified by defendant that the agent represented him, and was thereby fully justified in conferring with the agent concerning the various matters on which he was employed.

5. EVIDENCE 🔑368(7) — DOCUMENTARY EVIDENCE—COMPELLING PRODUCTION.

Code Civ. Proc. § 1855, subd. 2, provides that there can be no evidence of the contents of a writing other than the writing itself, except in the case, among others, when the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice. Section 1938 provides that, if a writing be in the custody of the adverse party, he must first have reasonable notice to produce it, and that, if he then fail to do so, its contents may be proved as in case of its loss. Section 454 provides that the items of an account need not be pleaded, but that the pleader must deliver to the adverse party within five days after demand a copy of the account or be precluded from giving evidence thereof. Section 1000 authorizes any court or judge to order either party to give to the other an inspection and copy, or permission to take a copy of entries of accounts in any book, etc. *Held* that, where the trial of an action by an attorney for services began April 28th, and the jury were instructed June 4th, and the action had been pending for more than a year when defendant on the 16th day of the trial demanded the production of plaintiff's books, which were then in New York, the court did not err in refusing to order the production of the books, as plaintiff was entitled to reasonable notice to produce them.

Department 2. Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Brainard Avery against Ernest A. Wiltsee. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles S. Wheeler and John F. Bowie, both of San Francisco (Charles S. Wheeler, Jr., of San Francisco, of counsel), for appellant. Wise & O'Connor, of San Francisco, for respondent.

WILBUR, J. Defendant appeals from a judgment, after verdict, for the sum of $7,500, in an action for attorney's fees. The main proposition urged is that the evidence is insufficient to justify the verdict. The typewritten transcript, containing the testimony of only two witnesses, plaintiff and defendant, with exhibits, covers 3,000 pages; the printed briefs 380 pages. Plaintiff claims that for more than two years he was actively engaged as attorney for the defendant in an endeavor to combine certain mining properties in Mexico, to adjust the claims against said properties, to settle a lawsuit growing out of the transactions involved therein, and in so doing participated in the organization of a corporation in Canada to take over said properties and issued its stock and debentures, the same to be sold for the purpose of paying off certain judgments and claims against the Mexican mining properties. The amount involved in these various transactions was $4,000,000. Plaintiff sued for $25,000 attorney's fees. The contentions of the respective parties were submitted to the jury under instructions which are conceded to be correct. Defendant contends that certain services performed by the plaintiff were not authorized by him and were without any value, etc. All the evidence for and against these claims was submitted to the jury. It is sufficient to say that there was substantial evidence to justify the verdict.

[1] Certain rulings of the trial court on the admissibility of documentary evidence are complained of by defendant. In each instance the contents of the documents were confessedly incompetent as hearsay declarations of third parties. Each was offered because of its more or less remote connection with the issues in the case. The plaintiff offered in evidence a verified complaint filed against defendant in an action brought by certain stockholders in one of the mining companies involved in the proposed organization, charging the defendant with fraud. It was conceded that the defendant was not guilty of the fraud therein charged, but the ground upon which the complaint was offered was to show the nature and character of the services performed by the plaintiff in warding off the filing of the complaint, and in negotiating with the attorneys for the plaintiff in that fraud suit, and finally in securing its dismissal. Court and counsel made every possible effort to prevent the jury from giving the evidence any other effect than that for which it was offered. Notwithstanding this, appellant claims that the ruling is prejudicially erroneous because "accusations of misrepresentations and fraud attached to any person's name are calculated to create prejudice against such person." But where, as here, the evidence is clearly admissible for one purpose, its reception in evidence is not error, even though we may suspect that the jury was improperly influenced thereby, and even though it would have been more just to have excluded the evidence.

[2, 3] The defendant offered in evidence certain letters written by third parties to him. None of these letters nor any information contained therein had been communicated to the plaintiff. They contained statements, confessedly hearsay, that the plaintiff had neglected his duty. The defendant offered these letters as a part of the correspondence between defendant and the said third parties, to explain certain letters of the defendant in reply thereto already introduced in evidence by the plaintiff. The rule upon that subject is that:

> "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; * * * and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." Section 1854, Code Civ. Proc.

It is by no means easy to apply this rule to all the ramifications of the evidence in a trial. In passing upon the admissibility of such evidence, where the connection is doubtful, it is a safe rule to exclude evidence otherwise incompetent, where its admission would be prejudicial if erroneous. A court should be reluctant to admit evidence which in itself is incompetent, because of a more or less remote or inferential connection with evidence that is properly admitted. The purpose of a trial is to do justice between the parties, and even though such evidence, by reason of some slender thread of connection, is technically admissible under the above rule, it is not prejudicial error to reject it, unless its rejection results in a "miscarriage of justice." Const. Cal. art. 6, § 4½. Where a party seeks to introduce incompetent evidence, relevant, if at all, only because connected with other evidence already in the case, and admissible solely because of such connection, and where, if erroneously admitted, it would be prejudicial to one of the parties, and would have little, if any, proper weight with the jury, the trial court, if in doubt as to the sufficiency of the connection shown, should resolve the doubt in favor of the exclusion of the evidence, for the error in its exclusion, if any, would not be prejudicial to either party, while the error in its reception, if any, would be prejudicial to the party against whom it is offered. Suffice it to say that no prejudicial error was committed in the exclusion of these letters. It is therefore unnecessary to enter into an elaborate discussion of the situation which defendant claims sufficiently connects these letters with the evidence to make them competent.

[4] Appellant offered evidence of his instructions given to an agent named Mayer with reference to the scope of his employment. These instructions were never communicated to the plaintiff, who had been notified by the defendant that Mayer represented him and was thereby fully justified in conferring with Mayer concerning the various matters on which he was employed. Plaintiff did not base his claim of employment upon the authority of Mayer at all, but upon direct employment by the defendant.

No error was committed in excluding this testimony.

[5] Appellant complains that the court refused to make an order during the trial directing the plaintiff to produce his account books showing the expenditures made by plaintiff on behalf of the defendant. The demand for the production of these books was made on the 16th day of the trial. The case had been pending for more than a year. The trial began April 28, 1915, and the jury were instructed June 4, 1915. At the time the demand was made the books were in New York. Plaintiff was entitled to reasonable notice to produce said books. Section 1855, subd. 2, and section 1938, Code Civ. Proc. Defendant could have demanded a bill of particulars (section 454, Code Civ. Proc.), or an inspection of these books (section 1000, Code Civ. Proc.). Not having done so, there was no error in refusing the demand made at the trial under the circumstances indicated.

The judgment is affirmed.

We concur: VICTOR E. SHAW, Judge pro tem.; MELVIN, J.

(177 Cal. 504)

YOUNGBERG v. SOUTH END WAREHOUSE CO. (S. F. 7904.)

(Supreme Court of California. Feb. 15, 1918. Rehearing Denied March 14, 1918.)

1. CONTRACTS 🔑245(1)—EXTINGUISHMENT—SUBSEQUENT CONTRACT.

A contract by a warehouse company to deliver to plaintiff one-fourth of its net income in payment for his services as specified in the contract was extinguished by subsequent written contract, made when the company was insolvent, providing that plaintiff and another should assume the company's indebtedness, and that plaintiff should draw no money except his salary as fixed by such contract.

2. APPEAL AND ERROR 🔑1052(8)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In such case, the admission of evidence as to the oral understanding of the parties as to the later contract, if improper, was an immaterial error, where the court was bound to decide that the later contract prevented plaintiff's recovery.

Department 1. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Charles J. Youngberg against the South End Warehouse Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Wm. M. Sims, of San Francisco (F. A. Plank, of San Francisco, of counsel), for appellant. W. C. Sharpstein, of San Francisco, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment in favor of the defendant in an action brought by the plaintiff to recover the sum of $12,301.33, claimed to have become due to him under a certain written agreement made and entered into between the parties hereto on February 1, 1909, and which provided for the delivery by defendant to plaintiff of one-fourth of its net income and profits, in payment for the rendition by the plaintiff of certain services to the defendant, as set forth in said agreement. The defendant in its answer admits the making of said original agreement, and the performance for a time of certain services by the plaintiff thereunder, but denies that there was ever any greater sum than $2,400 due or owing to said plaintiff under such agreement; and by way of further answer and defense avers that by a subsequent agreement in writing, entered into between the parties on April 15, 1911, the said plaintiff waived and released his claims against the defendant for whatever share of its profits was due under the terms of the former agreement, for the consideration of the transfer to him of one-half of the capital stock of the defendant corporation, and of the payment to him thereafter of a stated salary of $100 a month for all future services to be performed by him. Upon the trial of the cause upon the issues thus tendered, both of these agreements were presented in evidence. There were also certain other facts admitted by the pleadings or referred to in the writings, which were the subject of proper consideration by the trial court in determining its rulings as to the effect of the later writing in respect to the obligations of the former one. One of these facts, as admitted by the express terms of the plaintiff's complaint, was the fact that shortly after the date of the first agreement between the parties, one G. W. Thomas was employed by the defendant, pursuant to an oral understanding with the plaintiff, to perform certain of the services which the plaintiff had engaged to perform by the terms of said writing. Another fact, shown in evidence at the trial and found by the court, was the fact that the defendant was in an insolvent condition on April 15, 1911, the date of the second written agreement. This later agreement contained a clause providing that the plaintiff, as one of the parties thereto, together with one George W. Lamb, also a party thereto, "hereby agree to assume, and hereby assume, all of the indebtedness due and owing from the South End Warehouse Company. * * *" Said agreement also contained a clause providing that:

> "None of the parties of the third part [which included plaintiff] shall draw any money except their respective salaries, which are hereby fixed at $250.00 a month for said George W. Lamb, and $100.00 a month for said Charles J. Youngberg."

Upon the trial of the cause the defendant offered certain oral evidence for the purpose, as it was claimed, of explaining these two clauses of the later agreement by showing that at the time of its execution it was orally understood and agreed between the parties to it that it should have the effect of extinguishing whatever liability the defendant might be under to pay any share of its previous profits to the plaintiff. To the introduction of this oral evidence the plaintiff objected, upon the ground that it operated to change the terms of the written agreement and was inadmissible under the provisions of sections 1625 and 1639 of the Civil Code. The court overruled the objection and admitted the evidence, and upon the strength of this admission, in effect, construed the later agreement of the parties, in its findings, to amount to an extinction of the obligation and liability created by the earlier agreement for a division of the defendant's profits with the plaintiff. It is this alleged erroneous ruling of the trial court which underlies the several assignments of error which are urged upon this appeal.

[1, 2] We are entirely satisfied from an examination of the terms of the written contract between the parties, dated April 15, 1911, and particularly of the above-quoted clause of it, that said writing required no explanation or aid from oral evidence to make clear its meaning. The agreement of the plaintiff, that he, together with another of the parties to it, would assume all of the indebtedness of the South End Warehouse Company, and his further agreement not to draw any money except his salary, then for the first time fixed at the definite sum of $100 a month, can be given no other meaning than that his former contract with the corporation, and all obligations which had accrued thereunder, was to be at an end. The fact, shown in evidence without objection and found by the court, that the defendant corporation was at the date of this second agreement with the plaintiff in an insolvent condition would add further certainty to this interpretation if that were necessary, but it did not require the aid of the oral evidence which the court heard over the objection of the plaintiff, to explain uncertainties or ambiguities which did not exist. The ruling of the court, however, in the admission of such evidence, if improper, was nevertheless an immaterial error, since it was bound to decide in any event that the plaintiff was foreclosed by the express terms of his written agreement from a recovery in this action.

Judgment affirmed.

We concur: SLOSS, J.; SHAW, J.

(177 Cal. 520)

HARDING et al. v. LIBERTY HOSPITAL CORP. (S. F. 7488.)

(Supreme Court of California. Feb. 16, 1918.)

1. ACTION 🔑27(1)—COMPLAINT—CONSTRUCTION.

An amended complaint, alleging that plaintiff entered into a contract with defendant, a corporation operating a hospital and carrying on therein the general business of furnishing medicine and medical and surgical treatment, ambulance, and hospital care to the sick and injured, by which defendant agreed to furnish plaintiff medical and surgical treatment when the same should be necessary; that plaintiff suffered a fracture of certain bones of her leg, rendering surgical treatment necessary; that defendant undertook through it chief surgeon to render and furnish such treatment; that the surgeon was incompetent, and failed and neglected to use proper care, diligence, and skill in reducing the fracture; and that by reason thereof plaintiff's leg was shortened and its use impaired—shows that the gist of plaintiff's action, notwithstanding statements as to the contracts, was the negligence of defendant's chief surgeon and not breach of contract.

2. LIMITATION OF ACTIONS 🔑31—RUNNING OF STATUTE—NEGLIGENCE.

Code Civ. Proc. § 340, subd. 3, requiring actions for libel, slander, etc., or for injury to or death of one caused by the wrongful act or neglect of another, to be begun within a year, applies to an action against a hospital corporation for injuries resulting from the negligence of its chief surgeon, who failed to properly set plaintiff's broken leg, this being true notwithstanding the parties stood in contractual relations, and the hospital corporation had agreed to furnish plaintiff with medical and surgical attention; and hence an action against such corporation must be commenced within one year after the negligent act.

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Margaret A. Harding and George K. Harding, her husband, against the Liberty Hospital Corporation, a corporation. From a judgment for defendant, after demurrer had been sustained to plaintiffs' amended complaint, plaintiffs appeal. Affirmed.

Edwin T. McMurray and H. Clyde Harms, both of San Francisco, for appellants. John A. Percy, of San Francisco, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment in favor of the defendant after its demurrer had been sustained to the plaintiffs' first amended complaint, the latter declining to further amend. The first amended complaint alleged, in substance, that at some date prior to October 11, 1913, the plaintiff Margaret A. Harding had entered into a contract with the defendant, a corporation operating a hospital and carrying on therein "the general business of furnishing medicines and medical and surgical treatment, ambulance and hospital care to the sick and injured," by the terms of which contract said corporation agreed to furnish to the said plaintiff medical and surgical treatment "when the same may be rendered necessary by any accidental injury or in sickness or disease"; that on the 11th day of October, 1913, the said plaintiff suffered a fracture of certain bones of her left leg at the knee joint, which rendered it necessary for her to have medical and surgical treatment under the terms of said contract, and that on or about said last-named day the defendant undertook the treatment of said plaintiff for said injury and did through its chief surgeon render and furnish all surgical and medical treatment received by said plaintiff therefor; that the said chief surgeon of defendant was incompetent by reason of a lack of skill and experience to give plaintiff and to her said injury the medical and surgical treatment necessary and proper therefor, and that in treating said plaintiff for said injury the said chief surgeon of defendant wholly failed and neglected to use and exercise reasonable and ordinary care, diligence, and skill in reducing the fracture of said limb and in treating the same, and carelessly, negligently, improperly, and unskillfully set the bones thereof, and negligently, carelessly and unskillfully failed and omitted to use and employ the necessary, ordinary, proper, and approved methods in the reduction and treatment of said fracture, and negligently, carelessly, and unskillfully failed and omitted to remedy and correct the defects resulting from said negligent, careless, and unskillful reduction and treatment, at a time when said defects could reasonably have been corrected and remedied by the exercise of ordinary care, skill, and diligence, although he well knew that said defects existed. By reason whereof, and solely on account of defendant's failure to furnish a competent and skilled surgeon to treat plaintiff for said injury as aforesaid, and the aforesaid negligent, careless, and unskillful treatment of said injury by the aforesaid chief surgeon of said defendant, said plaintiff's left leg has become and is short, weak, crooked, and deformed, and the usual and proper use thereof permanently impaired, and said plaintiff rendered permanently lame, crippled, and deformed, to her damage in the sum of $25,000, for which sum the plaintiffs prayed judgment in their favor and for their costs.

This action was commenced on April 12, 1915. The defendant demurred to the plaintiffs' first amended complaint upon the usual grounds, and also upon the ground that the plaintiffs' cause of action as set forth therein was barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure. The court sustained the defendant's demurrer upon this latter ground, and thereafter entered judgment in defendant's favor, upon the plaintiffs' refusal to further amend. The sole question presented upon this appeal is as to whether or not the plaintiffs' cause of action, as above set forth, is barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure. The chapter of the Code of Civil Procedure relating to the periods prescribed for the commencement of actions other than for the recovery of real property contains the above section and subdivision, which reads in part as follows:

> "Sec. 340. Within one year. * * *
>
> "3. An action for libel, slander, assault, battery, false imprisonment, seduction or for injury to or for the death of one caused by the wrongful act or neglect of another."

[1, 2] The appellants herein contend that the cause of action set forth in their complaint is one arising out of the breach of the plaintiff Margaret A. Harding's contract with the defendant, such breach consisting in its failure to furnish adequate and competent surgical treatment for her injured limb, and hence that her cause of action, being one for the breach of a written contract, does not come within the scope or effect of subdivision 3 of section 340 of the Code of Civil Procedure. Notwithstanding the elaboration with which the plaintiffs have undertaken to set forth the terms and provisions of their said contract, we are of the opinion that the gravamen of this action consists in the alleged negligent acts of the chief surgeon of the defendant, consisting in his unskillful setting of the said plaintiff's injured limb, by reason solely of which the plaintiff's alleged injury and damage arose.

No distinction in principle can be discovered between this case and the case of Basler v. Sacramento, etc., Ry. Co., 166 Cal. 33, 134 Pac. 993. That was an action brought to recover damages for injuries suffered by one of the plaintiffs while a passenger on a street car operated by the defendant in the city of Sacramento. There, as here, the plaintiffs pleaded the terms of the contract out of which the relation between the parties arose. In that case the relation was the contractual one of carrier and passenger. In this the relation was the contractual one of hospital and patient. In that case this court held that the pleading of the contract by the plaintiffs was merely matter of inducement, out of the existence of which the definite legal duty of the defendant arose; and in that case, as in the instant one, the breach of that definite legal duty consisted in the alleged negligent acts and omissions of the agent of the defendant and consequent injury directly and solely caused thereby. The court there held that this was the gravamen of the action, citing numerous authorities in support of its view.

In the later case of Krebenios v. Lindauer, 166 Pac. 17, the same question arose, and was similarly decided. There the injury complained of was the alleged negligence of the defendant in failing to provide the plaintiff with a safe place to work, in violation of its contract of employment, and the court there held the action to be one arising ex delicto and to be barred by the provision of the section and subdivision of the Code above quoted. In this latter case the court refers to and disposes of the case of Gillette v. Tucker, 67 Ohio St. 106, 65 N. E. 865, 93 Am. St. Rep. 639, upon which the appellant herein particularly relies. That was a case of malpractice on the part of a physician, which consisted in the careless leaving of a sponge in the patient's wound after an operation.

The court called attention to the fact, adverted to by the Ohio tribunal in its decision of said case, that the neglect of the physician was that of leaving the sponge in the wound until a period within the statute, during which his treatment of the case continued, but that in that case the Ohio tribunal held the action to be one ex delicto. In the case at bar, while it is true that the complaint alleges that the relation of hospital and patient continued for some time after the date of the alleged negligent acts of the physician and up to a time within one year prior to the commencement of the action, this cannot be held to negative the direct and positive averments of the complaint that the negligent acts of the physician which caused the immediate injury complained of occurred on October 11, 1913, and that said plaintiff's damage was solely referable thereto.

In the earlier case of Denning v. State, 123 Cal. 316, 55 Pac. 1000, cited with approval in Krebenios v. Lindauer, supra, the court, in discussing the question involved in all of these cases, says:

> "The contract of employment has nothing whatever to do with the liability except to create a duty on the part of the employer, a duty not expressed in the contract and for the violation of which the contract of employment furnishes no rule or standard for the estimation of damages; nor is the action grounded upon the contract, but upon the duties springing from the relation created by it, namely, that of employer and employé, and under the old system of pleading was always classed as an action ex delicto."

In the recent case of Marty v. Somers, 169 Pac. 411, in which a rehearing has been denied by this court, the precise question presented in the instant case upon almost an identical state of facts arose. There the contract of employment was directly with the physician, who was alleged to have negligently performed the operation which caused the plaintiff's injury; and upon the authority of Basler v. Sacramento, etc., Ry. Co., supra, the court there held that subdivision 3 of section 340 operated as a bar to the action. The authorities cited herein from other jurisdictions, dealing with cases of alleged malpractice on the part of physicians, are not uniform in their rulings as to whether the action is one arising upon contract or tort. But the case of Lotten v. O'Brien, 146 Wis. 213, 131 N. W. 362, bears instructively upon the case at bar. Its facts are similar. It appears that the employment of the physician continued for some time after the date of the negligent setting of the plaintiff's broken arm. The court held that the action sounded in tort, and that the cause of action accrued when the negligent acts were committed, without reference to the time of the physician's discharge. Notwithstanding the conflict of authority from other jurisdictions, we are satisfied that it has become the settled rule in California that actions for injuries caused by the negligent acts of another or his agent must be commenced within the period of one year from the date of the alleged injury, and that the fact that the parties stand in contractual relation to each other does not operate to change the rule or extend the time for the commencement of such actions.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; SHAW, J.; VICTOR E. SHAW, Judge pro tem.; WILBUR, J.; MELVIN, J.

177 Cal. 513

J. M. HOWELL CO. et al. v. CORNING IRR. CO. et al. (Sac. 2459.)

(Supreme Court of California. Feb. 16, 1918.)

1. WATERS AND WATER COURSES ⟹49—RIPARIAN RIGHTS—PROTECTION—FORM OF ACTION.

An action will lie to quiet title to riparian rights in a stream, and a new action is the appropriate remedy to clear up and remove the uncertainty on the face of a former judgment involving such rights.

2. WATERS AND WATER COURSES ⟹79—IRRIGATION COMPANY—PUBLIC SERVICE.

A mutual water company which diverts water from a stream and devotes it exclusively to the use of its own stockholders and not to the general public is not engaged in public service, and is not a public utility.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Utility.]

3. WATERS AND WATER COURSES ⟹49—RIPARIAN RIGHTS—EXTENT.

A judgment depriving a riparian owner of the right to a certain surface flow, and permitting an irrigation company to take the surplus not necessary for such owner's use, was an invasion of the owner's technical right to the full flow of the stream.

4. WATERS AND WATER COURSES ⟹49—RIPARIAN RIGHTS — JUDGMENT — CONCLUSIVENESS.

A judgment adjudicating the water rights as between a riparian owner and an irrigation company is conclusive on the parties and their successors in interest.

Department 1. Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by the J. M. Howell Company and others against the Corning Irrigation Company and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Frank Freeman, of Willows, for appellants. McCoy & Gans, of Red Bluff (P. H. Coffman, of Red Bluff, of counsel), for respondents.

SHAW, J. The defendants appeal from the judgment. The plaintiffs, respectively, own tracts of land which are riparian to a stream known as Thomas creek, in Tehama county. The defendant Corning Irrigation Company is, and for many years has been, diverting water from said creek, and carrying the same to nonriparian lands belonging to its stockholders, and there distributing the same to such stockholders for their use on such nonriparian lands. The object of the present action is to ascertain and determine the respective rights of the plaintiffs and the defendants in the waters of said stream, and to quiet the plaintiffs' title to such part thereof as they are entitled to have flow down to their lands. The principal defendant is the Corning Irrigation Company, the other defendants being directors of said company and not otherwise interested in the action.

The complaint alleges that on May 14, 1894, in an action by the predecessors in interest of the plaintiffs, against the said corporation defendant, judgment was duly given, determining the respective rights of the parties in the creek; that the defendants have no right therein or thereto except as set forth and adjudged in said action, but that they have nevertheless diverted therefrom quantities of water greatly in excess of their rights under said judgment, and that they have violated the conditions of said judgment as to the manner of diverting water therefrom, greatly to the injury of the plaintiffs, and that unless they are restrained they will continue to do so, and that said defendants claim the right to take said waters in excess of the rights given to them by said judgment.

The judgment mentioned is made a part of the complaint. It declares that the defendant Corning Irrigation Company shall be perpetually enjoined from taking any of the waters of said creek to the lands of its stockholders, or at all, except to the extent and in the manner therein set forth. It fixes the point of diversion at which the defendant is allowed to take water, and the kind of ditch and diverting works by which it may do so, forbids the alteration of such diverting works, and further provides:

> "That when there is an abundance and surplus of water in the said creek for all the uses and purposes of the riparian owners below the said point of diversion, including the use for the purposes of irrigation by ditches now constructed, then and at such time the defendant the Corning Irrigation Company may divert by and through the said ditch any amount of surplus water and convey and discharge the same into the water course known as Squaw Hollow."

It further provides that when the water is low and insufficient for the uses of the said riparian owners, the defendant company shall not take or divert from the creek more than 100 inches of water measured under a 4-inch pressure, which quantity of water the judgment further provides, in effect, may be taken by said defendant at any time, provided the same is taken from the surface water flowing in the stream and not otherwise.

For answer, the defendants alleged that since the rendition of the said judgment of 1894, the defendant company has acquired by prescription the right to divert from said stream a quantity of water amounting to 4,000 miner's inches, measured under a 4-inch pressure. The answer also alleges by way of estoppel that during the interval between said judgment of 1894 and the beginning of this action, the plaintiffs have stood by, with full knowledge of the diversion by said defendant, and of the fact that said water has been distributed and used on nonriparian land, and of the fact that said defendant has expended large sums of money in the erection of works for conveying same, and have made no protest against such diversion or expenditure.

The findings of the court were that the defendant company has acquired no prescriptive right, and has no rights in the waters of the stream, except such as are given to it by the judgment of 1894; that the said defendant has at divers times diverted quantities of water from the creek greatly in excess of the amount permitted to it by said judgment, and has claimed the right to do so. It will be observed that the judgment of 1894 does not state the quantity of water necessary for the plaintiffs' use upon their riparian land, nor the amount, the excess of which may be deemed a surplus subject to diversion by said defendant. In its findings in the present action the court determined that the quantity necessary for plaintiffs' use was 2,500 inches, measured under a 4-inch pressure, and that the facts alleged in the answer as an estoppel against the plaintiffs, are not true, but that said defendant has been accustomed to take from the surplus waters of the stream not necessary for the use of the plaintiffs, the quantity of 3,100 miner's inches, measured under a 4-inch pressure.

The judgment appealed from declares that the defendant company shall be at all times entitled to take 100 miner's inches of water at the place of diversion described, provided that amount is flowing on the surface; that after that amount shall have been taken by said defendant, 2,500 miner's inches shall be allowed to flow down the stream for the use of the plaintiffs; and that the defendant Corning Irrigation Company may take through its diversion works and ditches, all the surplus not exceeding 3,100 miner's inches, measured under a 4-inch pressure.

The defendants claim that the finding against the prescriptive right to the water the company has been taking, over and above that allowed by the judgment of 1894, is not sustained by the evidence. It is sufficient to say that at most there is a conflict in the evidence, with sufficient substantial evidence in favor of the finding of the court to support it. The excessive diversions of the defendant were interrupted by the plaintiffs from time to time, and so often that no adverse use thereof for a period of five years has occurred. Hence no prescriptive right to such water could accrue.

Even if it were true, as appellants claim, that this action is nothing more than an action upon the former judgment, we are not prepared to say that such a judgment could not be enforced by a new action as well as by proceedings in contempt. Rowe v. Blake, 99 Cal. 167, 33 Pac. 864, 37 Am. St. Rep. 45; Ames v. Hoy, 12 Cal. 11; Stuart v. Lander, 16 Cal. 373, 76 Am. Dec. 538. The present action, however, is more than a mere action to enforce the former judgment. That judgment contained elements of uncertainty. It allowed the defendant to take the surplus water not required for the use of the lands of the plaintiffs riparian to the stream. Whether this should be construed to mean the surplus over and above that required at the time of its rendition for use upon said lands, or the surplus in excess of what might from time to time thereafter be necessary therefor, is somewhat doubtful. The court below in the present action construed it to mean the surplus in excess of the quantity necessary in 1894 for plaintiffs' use, and the plaintiffs do not complain of this construction. It is clearly more favorable to the defendants than the opposite construction. But with that construction, the amount necessary for plaintiffs' use at that time is not stated with precision, and no facts are stated in that judgment from which it could be ascertained. Subsequent changes in physical conditions had increased the difficulty. The defendants had asserted the right to take from the stream a quantity of water that would deprive the plaintiffs of water necessary for their use, and their claims had been successfully resisted from time to time by the plaintiffs. This was the assertion of rights to water in excess of those given it by the judgment. The complaint asks not only for the enforcement of the former judgment, but for the quieting of their title against the new and additional claims of the defendants, and for an injunction against the taking of water by the defendants in violation of the former judgment, or in excess of the amount allowed thereby.

[1] It is obvious that an action will lie to quiet title to riparian rights in a stream, and it seems equally clear that a new action is the appropriate remedy to clear up and remove the uncertainty existing on the face of the former judgment, and by reason of subsequent events, as to the quantity to be allowed to run down to plaintiffs' land, so that the surplus available to defendants can be more readily determined than it could be by an inquiry as to plaintiffs' needs in 1894, or at any other time when the surplus was in question, in case the former judgment should have been construed so as to make that the test.

[2] The defendant company claims that it is a public service corporation; that it has been taking the excess water over and above that allowed by the judgment of 1894, and applying the same to public use; that it has done this for many years with the knowledge of the plaintiffs, who have allowed a large community to be built up by the use of said water, and that consequently an estoppel arises under the doctrine established by numerous cases in this court. This doctrine is reviewed and stated at length in Miller v. Enterprise, etc., Co., 169 Cal. 415, 147 Pac. 567. The defendant has not brought itself within the doctrine. It has nowhere alleged that it is using its water in public service. On the contrary, the answer alleges, and it is not disputed, that it is a mutual water company, devoting the water which it diverts exclusively to the use of its own stockholders, and not to the general public. Such a corporation is not engaged in public service, and is not a public utility. McFadden v. Board, 74 Cal. 571, 16 Pac. 397; Hildreth v. Montecito, 139 Cal. 29, 72 Pac. 395; Barton v. Riverside Water Co., 155 Cal. 518, 101 Pac. 790, 23 L. R. A. (N. S.) 331. It appears that the case was fairly and thoroughly tried by the learned judge of the superior court, and that the conclusions at which he arrived are eminently reasonable and fair to the defendants. We find no cause for interfering therewith.

[3, 4] The former judgment, it may be well to add, constituted a limitation upon the riparian rights which were parcel of plaintiffs' lands bordering upon the stream. It deprived them absolutely of the right to 100 miner's inches of the surface flow, and so far as it permitted the defendant company to take the surplus not necessary for plaintiffs' use, it was an invasion of the technical right of a riparian owner to the full flow of the stream. It is conclusive on the parties and their successors in interest. The defendants in this action do not complain of the limitation of the amount to be taken of the surplus water to 3,100 miner's inches.

The judgment is affirmed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

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177 Cal. 529

PEOPLE v. KINGS COUNTY DEVELOPMENT CO. (Sac. 2372.)

(Supreme Court of California. Feb. 18, 1918.)

1. PUBLIC LANDS 🔑144(1)—SALE—AGRICULTURAL LANDS.

Under Const. art. 17, § 3, as to sale of state lands suitable for cultivation, and Act March 24, 1893 (St. 1893, p. 341), providing for sale of land uncovered by the recession of inland lakes, the surveyor general before selling such land must ascertain whether it is suitable for cultivation, and can make sales only to actual settlers, in tracts not exceeding 320 acres, if the land is suitable for cultivation.

2. PUBLIC LANDS 🔑144(1)—SALE—SURVEYOR GENERAL—AGENCY FOR STATE.

The surveyor general in selling lands uncovered by recession of inland lakes under Const. art. 17, § 3, and Act March 24, 1893, acts as the agent of the state, and, in the absence of fraud or mistake, the state is bound by his determination.

3. PUBLIC LANDS 🔑144(4)—PATENTS—CANCELLATION—PLEADING—SUFFICIENCY.

Count of petition for cancellation of patent to lands uncovered by recession of inland lakes, failing to allege mistake of the surveyor general in selling the land, and based solely on the theory that no state officer may grant such land to one not an actual settler, nor in excess of the prescribed area, is insufficient; the state being entitled to such remedy only for mistake or fraud.

4. Public Lands 🔑144(4)—Patents—Cancellation—Pleading—Sufficiency.

A count alleging that the patentee was not an actual settler, and procured the patent at the instance of the defendant development company, which knew of the fraud, was sufficient as alleging actual fraud.

5. Limitation of Actions 🔑11(1) — Statutes Applicable — Actions by State — "Right or Title."

An action by the state to declare illegal a patent and certificate of purchase, and to declare the state the owner of the lands, is barred only after ten years under Code Civ. Proc. § 315, limiting actions by the state in respect to real property to ten years after the accrual of the state's "right or title," such words meaning "cause of action," and not under section 338, subd. 4, limiting actions for relief on the ground of fraud or mistake to three years, although the basis of the action was fraud in procuring the patent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Right; Title.]

In Bank. Appeal from Superior Court, Kings County; M. L. Short, Judge.

Suit by the People against the Kings County Development Company. Judgment for defendant after demurrer to the complaint was sustained, and plaintiff appeals. Reversed.

U. S. Webb, Atty. Gen., and Jones & Weller, of Los Angeles, for appellant. Gibson, Dunn & Crutcher, of Los Angeles, and T. T. C. Gregory and D. Hadsell, both of San Francisco, for respondent.

SHAW, J. A demurrer to the complaint was sustained by the court below, and thereupon judgment was given for the defendant. From this judgment the plaintiff appeals.

The prayer of the complaint is that a certificate of purchase and patent issued by the state to Amelia C. Johnson for the lands described be declared illegal and void, and canceled, that the conveyance of the lands afterwards made by Johnson to the defendant be declared void, and that the plaintiff be adjudged to be the owner of the lands, free of any right or claim of defendant thereto, and for such further relief as may seem proper.

The complaint consists of two counts, each relating to the same subject-matter. The facts stated in the first count are as follows: The land described consisted of 507.45 acres and belonged to the state. It was a part of the land uncovered by the recession of the inland lake known as Tulare Lake, and was subject to sale under the provisions of the act of March 24, 1893, providing for the sale of land uncovered by the recession of inland lakes. On December 3, 1904, a certificate of purchase of said land was issued to Amelia C. Johnson in pursuance of said act. Said land was then suitable for cultivation, that is, it was ready for and susceptible of immediate occupation, and was by ordinary farming processes fit for agricultural purposes. Amelia C. Johnson was not then and never had been an actual settler on said land or any part thereof. When she made her application and received the certificate therefor, she knew that said land was suitable for cultivation. On June 13, 1906, a patent was issued to her for said land in pursuance of said certificate, and on July 23, 1907, without any valuable consideration, she conveyed said lands to the defendant herein. Defendant and its directors and officers at the time of receiving said deed well knew that then, and at the time said land was so applied for by Johnson and patented to her, it was suitable for cultivation, as aforesaid.

The second count of the complaint relates to the same purchase, and alleges the same facts. It adds thereto the further statement that with her said application Amelia C. Johnson made an affidavit stating that she desired to purchase said land for her own use and benefit and for no other person or persons whatsoever, and that she had made no contract to sell the same to any person, but that in truth and in fact she made said application and affidavit at the instance and for the use of a syndicate of several persons, then organized for the purpose of acquiring in that manner from the state of California, without any settlement thereon, the said lands and other lands, which were then, and at all times referred to, suitable for cultivation; that said syndicate, with full knowledge of all of said facts, aided the applicant in procuring her certificate of purchase, and thereafter, in pursuance of said purpose, procured the making of said conveyance by said Johnson to the defendant; and that the defendant claims said land by virtue of said conveyance and not otherwise.

The complaint was filed on May 22, 1914. This was less than ten years after the issuance of the patent. The demurrer was based on the grounds that neither count of the complaint stated facts sufficient to constitute a cause of action, and that each of the causes of action set forth therein are barred by sections 315, 318, 319, and subdivision 4 of section 338 of the Code of Civil Procedure.

Section 3 of article 17 of the Constitution is as follows:

> "Lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers, and in quantities not exceeding three hundred and twenty acres to each settler, under such conditions as shall be prescribed by law."

The act of 1893 required that the applicant for such land should accompany his application with an affidavit stating that he desires to purchase the same for his own use and benefit, and for the use and benefit of no other person, and that he has made no contract to sell the same; that upon the filing of said application the surveyor general should cause the county surveyor of the county in which the land lies to make an actual survey thereof, and establish the corners connecting the same with the United States survey, and should file with the surveyor general a copy of his field notes and plats, and a statement under oath showing whether or not the land is occupied by any actual settler, and that, if the lands are suitable for cultivation without reclamation, such lands shall be sold only to actual settlers, in tracts not exceeding 320 acres. It provides for the formation of reclamation districts to reclaim such of said lands as should not be suitable for cultivation without reclamation.

[1, 2] It will be observed that the Legislature has followed the constitutional mandate and has authorized sales of such lands only when the conditions of the Constitution are fulfilled. The surveyor general is given authority to sell land suitable for cultivation, in tracts not exceeding 320 acres to one person, and to persons who are actual settlers thereon, and not otherwise. Before making a sale of such land the duty rests upon him to ascertain its character, and, if it is suitable for cultivation to make the sales only to the persons and in quantities authorized by the statute. In making this inquiry he is acting as the agent of the state with authority to determine the fact. It would seem to follow, therefore, that in the absence of fraud or mistake such as would authorize an application for relief in equity, the state is bound by his decision thereon. Such is the uniform rule of decision regarding patents issued by the officers of the United States in pursuance of acts of Congress giving them similar authority. Gage v. Gunther, 136 Cal. 338, 344, 68 Pac. 710, 89 Am. St. Rep. 141. We perceive no reason why the same rule should not be applied to the decisions of the surveyor general of the state regarding land subject to sale under this act. The power to sell depends upon the determination of a fact, as in the cases relating to the United States officers, and the determination of the fact by an officer authorized to make it, should be binding to the same extent. On the other hand, if we hold that the constitutional provision deprives the Legislature of the state of power to sell or authorize officers to sell such land in quantities exceeding 320 acres to a single person, or to those not actual settlers, unless it is in fact unsuitable for cultivation at the time, and that no officer of the state has any power to determine this question so as to bind the state, the result would be to place the titles of such lands, even in the hands of innocent purchasers from the patentee, continually in jeopardy thereafter at the instance of the state, as succeeding officers may see cause for changing the original decision as to its character. It is clear that this would not be a sound public policy. It is to the interest of the state that when persons have honestly acquired title from the state to such lands, upon applications made in good faith, and upon a decision thereon by the state officers of the facts involved, such titles should not be subject to attack in future on the ground that the original decision was wrong.

[3] The first count does not allege that the decision of the surveyor general was made by reason of any mistake, and it is not claimed by the attorney general that this count is based upon the theory of equitable relief on the ground of mistake. It is based solely on the theory that no power exists in any state officer to grant land of that character to one not an actual settler, or in excess of the prescribed area. For these reasons we think the first count does not state facts sufficient to constitute a cause of action.

[4] The addition in the second count of allegations of fraud on the part of the purchasers, and of knowledge thereof on the part of the present owners, clearly bring it within the rules regarding fraud, and render that count good as a cause of action to set aside the patent upon the ground that it was procured by actual fraud.

[5] The main controversy upon this appeal arises over the question whether or not the action is barred by the statute of limitations. Section 315 of the Code of Civil Procedure provides the general statute of limitations which runs against the state. It declares that the state will not sue any person "for or in respect to any real property" unless the state's "right or title shall have accrued within ten years before" the action or proceeding is commenced. The words "right or title" in this passage are to be construed to mean "cause of action." People v. Banning Co., 167 Cal. 643, 646, 140 Pac. 587. If this section applies to the case, it would follow that the action is not barred. There can be no dispute over the proposition that the cause of action stated in the complaint is an action in respect to real property. It asks that a patent for real property be canceled, and that the state be declared to be the owner of the land which the patent apparently disposed of. The respondents claim that the case is governed by subdivision 4 of section 338, providing that an action for relief on the ground of fraud or mistake is barred within three years from the time of the discovery of the fraud or mistake. This theory is based upon the language of sections 335 and 345 of the same chapter in which section 338 is found. Section 335 is the first section of chapter 3, tit. 2. It declares that:

> "The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows."

Then follow the remaining sections of the chapter, including those last mentioned. Section 345 declares that:

> "The limitations prescribed in this chapter apply to actions brought in the name of the state or for the benefit of the state, in the same manner as to actions by private parties."

We cannot agree with the contention of the respondent that these provisions make the three-year statute applicable to an action of the character herein presented. Although the second count is based upon an alleged fraud perpetrated by the applicant and the syndicate which procured the conveyance to the defendant, yet it is not exclusively an action for relief on the ground of fraud. Its main purpose is to obtain for the state a cancellation of the patent, issued for its land by its officers acting under the influence of the fraudulent acts alleged, and to have the state declared to be the owner of that land. It is clearly an action in respect to land, as well as an action for land, and it is governed by the provisions of section 315 aforesaid. This proposition is well settled in this state. Sections 315, 318, and 319 are contained in chapter 2 of the article aforesaid. This chapter is entitled "Time of Commencing Actions for Recovery of Real Property." Its provisions relate to that subject, and fix the period of limitation for actions by private persons to recover real property or the possession thereof, and also for actions by the state, as above mentioned. It has been held in a number of cases that an action by a private person to recover real property, based upon allegations that the title was procured to be conveyed by such person by means of fraud, though an action seeking relief on the ground of fraud, is nevertheless an action for the recovery of real property, and is not barred by the period of three years fixed by section 338, but by the five-year period fixed by section 318. These decisions are based on the proposition that the actions referred to in chapter 3 of said article are "actions other than for recovery of real property," and that, when the main purpose of an action is to recover real property for the plaintiff, it is barred in five years, and not in three years. Oakland v. Carpentier, 13 Cal. 552; Goodnow v. Parker, 112 Cal. 441, 44 Pac. 738; Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820; South Tule, etc., Co. v. King, 144 Cal. 454, 77 Pac. 1032; Hager v. Shindler, 29 Cal. 47; Scholle v. Finnell, 166 Cal. 551, 137 Pac. 241. This proposition is elaborately stated and argued in the cases cited, and it is unnecessary to discuss it further in the present case. The same rule must obviously be applied to an action by the state in respect to land claimed by it, the object of which is to have the state declared to be the owner thereof, and to have a fraudulent patent therefor canceled. Such action is not barred until the expiration of ten years from the issuance of the patent attacked.

In support of their claim regarding the statute of limitations, the defendants rely on People v. Blankenship, 52 Cal. 619. In that case the only relief asked was the cancellation of the patent. Apparently no relief was asked regarding the land itself, and the sole discussion was upon the proposition that it was an action solely for relief on the ground of fraud within the meaning of subdivision 4 of section 338 aforesaid. The principle of the case was condemned in Goodnow v. Parker, supra, and in Murphy v. Crowley, supra. Both of these cases were suits by private persons similar to the case at bar to recover possession of land and set aside deeds therefor under which the defendants held, alleged to have been obtained by fraud, and so far as People v. Blankenship may be deemed to be a decision that, where the restoration of the land to the rightful owner is the main object of the action, the three-year statute applies, it must be considered as overruled by the later cases. The same must be said of People v. Noyo Lumber Co., 99 Cal. 456, 34 Pac. 96, which is also cited by the respondent. There was no serious discussion in either case of the question involved in the present case. We are of the opinion that the demurrer was improperly sustained, as to the second count.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; VICTOR E. SHAW, Judge pro tem.; MELVIN, J.; WILBUR, J.; RICHARDS, Judge pro tem.

177 Cal. 488

In re VERWOERT. (Sac. 2626.)

(Supreme Court of California. Feb. 13, 1918.)

1. GUARDIAN AND WARD 🔑97 — PRIVATE SALE—POWER OF COURT.

Under Code Civ. Proc. § 1787, providing that upon the petition of a guardian for sale of property the court may, if the same has been prayed for in the petition, order such sale to be made either at public or private sale, and section 1789, providing that provisions of the chapters of the Code relating to sales of property by administrators shall apply to sales by guardians, where the petition of a guardian for sale of land was silent as to whether the sale should be private or public, the court could direct a private sale, in view of section 1544, providing that every such sale must be ordered to be made at public auction, unless in the opinion of the court it would benefit the estate to sell at private sale.

2. GUARDIAN AND WARD 🔑101—SALE OF REALTY—RIGHTS OF PURCHASER.

Where petition for sale of ward's land gave full information as to trust deed against same, and stated that it was the purpose of the guardian to pay the debts of the ward, including that secured by the trust deed, the purchaser could not refuse to go on with the sale because of such incumbrances; the rule of caveat emptor applying to such sales.

3. GUARDIAN AND WARD 🔑101—SALE—VACATION.

Where bidder refused for unfounded reasons to comply with the terms of the sale, and the guardian asked to have order of confirmation revoked for such cause, bidder cannot be heard to complain of vacation of order confirming sale.

4. GUARDIAN AND WARD 🔑101—SALE OF REALTY—VACATING ORDER.

Where bidder refused for unfounded reasons to comply with the terms of the sale, and the guardian asked to have order of confirmation revoked for such cause, the court was justified in making an order vacating order confirming sale.

5. GUARDIAN AND WARD 🔑101—VACATING ORDER CONFIRMING SALE—FINDING.

On application of guardian for vacation of order confirming sale of land, where the purchaser's answer was in effect a repetition of his refusal to carry out the terms of the sale for unfounded reasons, there was no real issue of fact, and it was unnecessary for the court to make and file findings of fact and conclusions of law.

6. GUARDIAN AND WARD 🔑101—REFUSAL OF PURCHASER TO CARRY OUT SALE—RIGHT OF GUARDIAN.

The guardian had the right to endeavor to secure another purchaser after defendant's refusal for unfounded reasons to carry out the terms of the sale.

Department 1. Appeal from Superior Court, Kings County; M. L. Short, Judge.

In the matter of the guardianship of Herman C. Verwoert. From an order vacating an order confirming sale and vacating the order of sale, W. O. Jenkins, purchaser at the sale, appeals. Affirmed.

H. Scott Jacobs, of Hanford, and W. O. Jenkins, for appellant. John G. Covert, of Hanford, for respondent.

SHAW, J. Alfreda Verwoert, as guardian of the estate of Herman C. Verwoert, obtained an order directing the sale by her as such guardian, of certain real estate belonging to the ward. The order directed that the sale be made at private sale, one-half cash, the balance on a credit not to exceed three years, with interest. The petition did not ask that the sale be at private sale, but was silent on that point. The guardian made a sale to W. O. Jenkins, appellant herein. A return of said sale was duly made, and the court made an order confirming the same. Thereupon Jenkins gave notice to the guardian that there were certain defects in the title to the land, and in the proceedings for the sale, and that as soon as such defects were removed he would complete the first payment and comply with the terms of the order of sale. The alleged defect in the title consisted of the fact that there was an outstanding deed of trust conveying the property to trustees to secure the sum of $21,000 owing to the Sacramento Bank. The defect alleged to exist in the proceedings was that the petition for the sale did not ask that the sale be made at private sale. Thereupon the guardian moved the court to vacate the order confirming the sale, upon the ground that the purchaser had refused to complete the same, unless the alleged defect in the proceedings was removed and the incumbrance arising from said deed of trust satisfied. The appellant appeared and resisted the motion. After hearing the evidence, the court granted the motion, and thereupon made an order vacating the order confirming the sale, and also the order directing the guardian to make the sale. From this order the said Jenkins prosecutes this appeal.

[1] The objection made by Jenkins to the validity of the sale is untenable, and his objection to the title of the ward in the land sold to him was not sufficient cause for his refusal to go on with his purchase. The claim that such a sale is invalid, if made at private sale, where the petition therefor did not ask for a sale at private sale, is not supported by the statute. Section 1787 of the Code of Civil Procedure provides that upon the petition of a guardian for a sale of property the court "may, if the same has been prayed for in the petition, order such sale to be made either at public or private sale." Section 1789 provides that the provisions of the chapters of the Code relating to sales of property by administrators, shall apply to proceedings for such sales by guardians, unless otherwise specially provided in the chapter relating to guardians' sales. Section 1544 of the chapter relating to sales by administrators provides that:

> "Every such sale must be ordered to be made at public auction, unless, in the opinion of the court, it would benefit the estate to sell the whole or some part of such real estate at private sale; the court may, if the same is asked for in the petition, order or direct such real estate or any part thereof to be sold at either public or private sale, as the executor or administrator shall judge to be most beneficial for the estate."

The effect of these provisions is not, as the appellant contends, to require the petition to pray for a private sale in order to give the court authority to order such private sale. The Code provides for two contingencies relating to private sales. The semicolon in the above quotation from section 1544 separates two distinct propositions. The first proposition is that if the court, exercising its own discretion, believes that a private sale would benefit the estate, it can so determine, and thereupon make the order accordingly. Section 1787 does not expressly declare in such a case whether the court can order the sale at private sale, or must order it at public sale; but by virtue of section 1789 the provisions of section 1544 are carried into the law respecting sales by guardians, and the court is authorized to order a guardian to sell at private sale if it deems the same beneficial to the estate. But the court may take another course, in case the petition lays the foundation therefor, which is to leave the question of selling at public or private sale to the discretion and judgment of the administrator or guardian. This is provided for both in section 1544 and in section 1787. By each, however, in order to give the court this power to commit the matter to the discretion of the guardian or administrator, it is necessary that the same be prayed for in the petition. In the present case the petition was silent on the subject, but the court had power, under section 1544, in the exercise of its own discretion, to direct that the same be made at private sale.

[2] With respect to the title, the rule of caveat emptor applies. A guardian, in making a sale in pursuance of an order of court, does not warrant the title to the property sold. He merely sells such title as the ward may have therein, and, unless the order of sale provides otherwise, the purchaser takes the property subject to all incumbrances thereon. He is bound to examine the title and satisfy himself regarding it before he makes his bid. Halleck v. Guy, 9 Cal. 197, 70 Am. Dec. 643; Miller & Lux v. Gray, 136 Cal. 261, 68 Pac. 770. In this case the petition for sale gave full information of the trust deed, and stated that it was the purpose of the guardian to use the money derived from the sale to pay the debts of the ward's estate, including that secured by the trust deed. The order of sale was general, and made no provision for the discharge of the trust deed. Having bid with this information, Jenkins could not claim to have been misled, and he had no right to raise the objection or refuse to go on with the sale because of said incumbrance.

[3] Appellant further insists that the court below had no power or jurisdiction to vacate the order confirming the sale to him. In support of this proposition he cites Estate of West, 162 Cal. 352, 122 Pac. 953; Estate of McCarthy, 169 Cal. 708, 147 Pac. 941, and Estate of Leonis, 138 Cal. 194, 71 Pac. 171. These decisions, in effect, merely declare that after a sale has been made, and either before or after the confirmation thereof, the bidder at the sale has a vested interest in the proceedings, and a right to have the sale carried out, upon compliance on his part with the terms specified in the order under which it was made. They do not hold that he has such right without such compliance. The decision in the Estate of Leonis does not, as appellant contends, hold that the court is without any power whatever to vacate a sale of real property made by an administrator or guardian, except where the proceedings are unfair or the price disproportionate to the value, as provided in section 1552 of the Code of Civil Procedure. All that the case really decides on that point is that, under the facts shown in that case, the court had no power to vacate the sale, except for those reasons. It cannot reasonably be claimed that after a bidder for unfounded reasons refuses to comply with the terms of the sale made to him in pursuance of an order of the court, and the guardian for that cause asks to have the confirmation revoked, such purchaser, still refusing to go on, can be heard to object to the revocation, and by that means prevent a sale to another who will comply or compel the sale to himself upon terms other than those prescribed in the order. This is, in effect, what the appellant is here attempting.

[4] There is no merit in the claim that the application to set aside the order confirming the sale, and the order directing the sale did not show sufficient facts to justify such order. The facts we have stated appear therein. What we have already said is sufficient upon that point.

[5] It was not necessary, in proceedings of this character, for the court below to make and file findings of fact and conclusions of law. There was no real issue of fact. The answer of the appellant to the application of the respondent was a mere reiteration of his objections to the validity of the order of sale and to the title of the ward to the property sold, and a demand that the guardian be required to remove the objections and make the title good. It was, in effect, a repetition of his refusal to carry out the sale on the terms of the order. No evidence was necessary to sustain the order of the court. There was, however, sufficient evidence of the facts.

[6] It is claimed that the court erred in refusing to permit the purchaser to show that, after appellant's refusal to complete the sale as above stated, the guardian had been endeavoring to secure other purchasers. She had a right to do so after the appellant's refusal. These comprise all the questions discussed in the briefs.

The order appealed from is affirmed.

We concur: RICHARDS, Judge pro tem.; SLOSS, J.

35 Cal. App. 796

BECKETT v. STUART. (Civ. 2501.)

(District Court of Appeal, Second District, California. Jan. 9, 1918.)

APPEAL AND ERROR ⚿631—RECORD—SUFFICIENCY.

On appeal from the judgment alone under the alternative method where there is before the court a typewritten copy of the judgment roll certified by the clerk of the trial court, the appeal will not be dismissed because of the absence of record showing proceedings at trial, as is designated under Code Civ. Proc. § 953a, to take the place of a bill of exceptions, a typewritten copy of the judgment roll presenting such record as entitles the appeal to be heard on the merits.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Ida R. Beckett against Z. B. Stuart. On motion to dismiss defendant's appeal. Denied.

Hocker & Austin, Simms & Fulwider, and Stephen Monteleone, all of Los Angeles, for appellant. Rupert B. Turnbull, of Pasadena, and Hugh Kelly and Joe Crider, Jr., both of Los Angeles, for respondent.

WORKS, Judge pro tem. This is an appeal from the judgment alone under what is known as the alternative method. There is before us no record showing the proceedings at the trial, but there is on file a typewritten copy of the judgment roll, certified by the clerk of the trial court. Respondent moves to dismiss the appeal because of the absence of such record of the trial as is designated, under section 953a, Code of Civil Procedure, to take the place of a bill of exceptions; but, under the opinion of the Supreme Court denying an application for rehearing in McKinnell v. Hansen, 167 Pac. 887, the typewritten copy of the judgment roll presents such a record as entitles the appeal to be heard on the merits. The record of the proceedings at the trial is not necessary as a predicate to the right to such hearing.

The motion to dismiss the appeal is denied.

We concur: CONREY, P. J.; JAMES, J.

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35 Cal. App. 793

BALBOA AMUSEMENT PRODUCING CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 2453.)

(District Court of Appeal, Second District, California. Jan. 9, 1918.)

MASTER AND SERVANT ⚷373—WORKMEN'S COMPENSATION ACT — ACCIDENT "ARISING OUT OF EMPLOYMENT."

Where a motion picture company plant occupied four corners of a street intersection, and an employé, whose duty it was to remain in the vicinity until needed, was loitering in the street talking with other employés about social affairs and was run over by a director's automobile, the accident was not one arising out of the employment within the meaning of the Workmen's Compensation Act (St. 1913, p. 279).

Proceedings under the Workmen's Compensation Act by Henry Stanley to obtain compensation for personal injuries. Opposed by the Balboa Amusement Producing Company, a corporation, the employer, and the Georgia Casualty Company, a corporation. There was an award by the Industrial Accident Commission, and the employer and the insurance company apply for a writ of review. Award annulled.

Redman & Alexander, of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

WORKS, Judge pro tem. The Balboa Amusement Producing Company was engaged in the making of motion pictures, and Henry Stanley was an actor employed by it. On the day of the accident out of which this controversy arises, Stanley reported to the company for duty at the usual time in the morning, but was told that his services were not then needed. However, the rules of the business required him to remain at the plant of the company, or on the "lot," to adopt the parlance of the motion picture industry, for possible service during the day. The situation of the company's lot was peculiar, and out of the peculiarity arises the question to be decided in this proceeding. Parts of the plant occupied the four corners of intersecting streets in the city of Long Beach, and the two thoroughfares were constantly used by the officers and employés of the company in passing between the portions of the plant on the respective corners in the discharge of their duties. On the morning of the accident, after reporting for service, Stanley crossed one of the streets, proceeding from the place where he had reported to a dressing room on one of the other corners. His purpose in going to the dressing room was to change his coat, merely for his own comfort, after which he intended to recross the street to play a game of chess in a part of the plant known as the extra room. On his return from the dressing room he stopped in the street, where he engaged in conversation with two other employés of the company. The conversation was purely social, and related to the private affairs of the participants in it. While the little knot of persons was congregated in the street, one of the directors of the company approached in an automobile, intending to stop at the location of the group. In attempting to stop his car the driver accidentally struck the accelerator, with the result that the car pitched forward, struck Stanley, and injured him. He applied to the Industrial Accident Commission for relief under the Workmen's Compensation, Insurance, and Safety Act, and the Commission made an award in his favor. The petitioners, admitting that the accident occurred in the course of Stanley's employment, contend that his injuries are not compensable under the statute, for the reason that they did not arise out of the employment.

The respondents, in justification of the award, cite many cases from jurisdictions outside of California in which compensation has been made for injuries suffered by employés while on public streets, but to them we need not specifically refer, as we believe them to be distinguishable from the case now before us and because the decisions of the Supreme Court of this state upon the present question are both numerous and clear. We cite Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164; Fishering v. Pillsbury, 172 Cal. 690, 158 Pac. 215; Kimbol v. Industrial Accident Commission, 173 Cal. 351, 160 Pac. 150, L. R. A. 1917B, 595, Ann. Cas. 1917E, 312; Ward v. Industrial Accident Commission, 164 Pac. 1123, decided May 2, 1917. In the first of these cases it is said (172 Cal. 685, 158 Pac. 213, L. R. A. 1916F, 1164):

> "The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employé's work or to the risks to which the employer's business exposes the employé. The accident must be one resulting from a risk necessarily incident to the employment. * * * It 'arises out of' the occupation when there is a causal connection between the conditions under which the servant works and the resulting injury. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

There is also a very complete statement of the same rule, in different language, in Kimbol v. Industrial Accident Commission, supra, a part of the statement being:

> "The causative danger must be peculiar to the work and not common to the neighborhood."

When measured by the standards set down in these cases, it is not difficult to satisfactorily conclude the present proceeding. Even if it were conceded that injuries suffered by Stanley would have been compensable if they had resulted from an accident happening to him while actually traversing the street on the way from changing his coat, for his own convenience, to a contest at chess, for his own pleasure, we have by no means settled the matter. If we admit that his risk in crossing the street was a risk incident to his employment, upon the theory that, for the purpose of crossing and recrossing, the street was a part of the company's lot, we are yet afield. The thoroughfare was certainly not a part of the lot in the sense that Stanley might properly have loitered, or stood in social converse, upon it, as he might very properly have done upon any part of the lot located upon the corners of the intersection. When he stopped in the street he assumed a risk common to all who might sojourn there in the same manner. Under such circumstances his employer is not called upon to make compensation for his injuries. They did not arise out of the employment.

The award is annulled.

We concur: CONREY, P. J.; JAMES, J.

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35 Cal. App. 797

Ex parte MOONEY. (Cr. 709.)

(District Court of Appeal, First District, California. Jan. 9, 1918.)

Bail 🔑49—Capital Cases — Controlling Factor.

That petitioner has been acquitted upon one of several indictments for murder pending against her, while persuasive, is not a controlling factor in the determination of an application for bail.

In the matter of the application of Rena Mooney for a writ of habeas corpus. Petition denied, and petitioner remanded.

Maxwell McNutt and Nathan C. Coghlan, both of San Francisco, for petitioner. F. L. Berry, Deputy Dist. Atty., and John D. Harloe, both of San Francisco, for respondent.

PER CURIAM. The defendant is restrained of her liberty under a bench warrant issued out of the superior court of the state of California, in and for the city and county of San Francisco, upon eight separate indictments presented by the grand jury in cases entitled "People of the State of California v. Rena Mooney" numbered 7530 to 7537, inclusive, wherein the defendant was charged with the murder of eight different persons. Upon one of these indictments only the defendant has been tried and acquitted by a jury. The record of that case is before us, as are also the proceedings before the grand jury in each of these several indictments which have not yet been put to trial.

The rule by which this court must be governed in determining this matter was early laid down in the case of Ex parte Troia, 64 Cal. 152, 28 Pac. 231, and was later followed and reaffirmed in the case of Ex parte Curtis, 92 Cal. 188, 28 Pac. 223, in which latter case Chief Justice Beatty declared the rule to be that bail should be denied in capital cases "when the evidence is sufficient to warrant a grand jury in bringing in an indictment, or, what practically amounts to the same thing, when the evidence is sufficient in law to sustain a capital conviction." Quoting from the case of Ex parte Troia, supra, the learned Chief Justice further stated:

> "This court, in denying the application for bail, said: 'We cannot say, upon the evidence before us, that the superior court ought to set aside the verdict, as not justified by the evidence, should the jury find the petitioner guilty of the higher degree of the crime charged. We ought not to anticipate the action of the jury by discharging the prisoner from actual custody, with or without bail, upon evidence which we are not prepared to say is so insufficient as that a verdict requiring a capital sentence, based upon it, should not be permitted to stand.' I do not doubt," says the Chief Justice, "the soundness of this rule."

It is needless to say that the rule thus early stated, and since uniformly adhered to in this state, is binding upon this court.

After a careful examination of the record before us we are satisfied that it is to be given full application to the facts of the matter now under consideration.

It is, however, urged by the petitioner that the fact that in one of these several causes she has been tried and has been found not guilty by a jury is a controlling circumstance, requiring a variance in the instant case from the rule above stated. After an examination of the authorities bearing upon this question we are satisfied that the fact of the petitioner's acquittal upon one of these several indictments pending against her, while ordinarily persuasive, nevertheless it is not a controlling factor in the determination of an application for bail. It is to be presumed that the courts and prosecuting officers will perform their duty promptly in presenting others of these several causes for trial. Upon the present state of these causes we are of the opinion that the rule set forth in the case of Ex parte Curtis, supra, should be given application.

It follows that the petition will be denied, and the petitioner remanded; and it is so ordered.

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35 Cal. App. 806

Ex parte WEINBERG. (Cr. 723.)

(District Court of Appeal, First District, California. Jan. 9, 1918.)

In the matter of application of Israel Weinberg for a writ of habeas corpus. Denied, and petitioner remanded.

Maxwell McNutt and Edwin V. McKenzie, both of San Francisco, for petitioner. Louis Ferrari, Deputy Dist. Atty., of San Francisco, for respondent.

PER CURIAM. The defendant is restrained of his liberty under a bench warrant issued out of the superior court of the state of California, in and for the city and county of San Francisco, upon eight separate indictments presented by the grand jury in cases entitled "The People of the State of California v. Israel Weinberg," numbered 7530 to 7537, inclusive, wherein the defendant was charged with the murder of eight different persons. Upon one of these indictments only the defendant has been tried and acquitted by a jury. The record of that case is before us, as are also the proceedings before the grand jury in each of these several indictments which have not yet been put to trial.

We are of the opinion that the rule adopted in the matter of Ex parte Mooney, No. 709, 171 Pac. 109, this day decided by this court, as well as the reason for its application, are to be given full application to the instant case. Upon the reasoning and authorities in the case of Ex parte Mooney, supra, the application herein will be denied, and the petitioner remanded; and it is so ordered.

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35 Cal. App. 802

In re WELLS. (Cr. 336.)

(District Court of Appeal, Third District, California. Jan. 10, 1918.)

1. Appeal and Error 🔑655(1)—Motion to Strike Testimony — Sufficiency of Motion.

Where the index to reporter's transcript contains no reference to the exhibits, a motion to strike out an exhibit, which fails to point out where the exhibit can be found, will be denied.

2. Evidence 🔑314(1) — Hearsay — Judgments—Admissibility to Show Fact.

A finding of a court on conflicting evidence in an action for fraud is hearsay in a hearing on application to practice law, in which respondent is entitled to examine witnesses as to the charges made against him.

3. Appeal and Error 🔑656(1)—Correcting Errors in Transcript.

The appellate court in an original proceeding cannot correct errors in a transcript of evidence taken before a referee, where there is nothing to show whether or not the stenographer took down the evidence as given.

In the matter of the application of T. Alonzo Wells to practice law. Motion to strike out testimony taken before a referee. Granted in part.

See, also, 174 Cal. 467, 163 Pac. 657.

Clyde Bishop, R. Y. Williams, Joe C. Burke, L. A. West, and S. M. Reinhaus, all of Santa Ana, for petitioner. T. Alonzo Wells, in pro. per. S. N. Johnstone, of Los Angeles, H. N. Mitchell, of Sacramento, and M. C. Atchison, of Los Angeles, for respondents.

PER CURIAM. Counsel for respondent have filed a motion to strike out certain portions of the testimony taken before the referee named, designated, and appointed by the court to take testimony in this proceeding. It was understood and agreed by and between counsel on both sides that this motion should be disposed of before briefs addressed to the merits are filed. The portions of the testimony which respondent asks be stricken out are specified in the written motion, and, having considered the same, we now state the conclusions arrived at. The grounds of the allowance of the motion as to certain testimony are those stated by respondent in his written application to strike out. Where the motion is denied it is because the reasons stated for striking out are not legally tenable as to those portions of the testimony.

1. The motion as to all the testimony of the witnesses George W. Minter and G. W. Stevens is granted.

2. The motion as to the testimony of the witness R. Y. Williams, designated as subdivisions a, b, and c in the written motion, is granted.

3. The testimony of the witness W. H. Thomas, designated as subdivisions a, b, c, and d in said written motion, is stricken out.

[1] 4. The motion to strike out petitioner's Exhibit D is denied for the reason that the written motion fails to point out where the said exhibit may be found in the transcript. The index to the reporter's transcript contains no reference to the several exhibits, and it is not the duty of this court to search that voluminous document to find the exhibit, counsel themselves not having taken the pains to designate the particular part of the transcript in which it may be found.

5. The motion to strike out those portions of the testimony of the witness Clyde Bishop, designated as subdivisions a, b, c, i, m, n, o, and s, is granted. The motion as to those portions designated as subdivisions d, e, f, g, h, j, k, l, p, q, r, and t is denied.

6. The motion to strike out petitioner's Exhibit E is denied for the reason given above for the ruling as to petitioner's Exhibit D.

7. The motion as to the portions of the testimony of the witness George W. Moore,

designated as subdivisions a, b, c, and d, is denied.

8. The motion as to the portions of the testimony of the witness C. C. Johnson, designated as subdivisions a and b, is denied.

9. The motion as to the testimony of James McMillan, subdivisions a and b, is denied.

10. The motion as to the testimony of the witness C. E. Lavering, subdivisions a and b, is denied.

11. The motion as to the testimony of W. D. Seeley, subdivisions a and b, is denied.

12. The motion as to the testimony of J. E. McGowen, subdivisions a and b, is denied.

13. The motion as to the testimony of Sterling Price, subdivisions a and b, and the motion as to the testimony of the following witnesses, is denied: J. T. Stockton; A. W. Morehouse; R. L. Draper and Henry Brooks; Joe Gothard, Dr. G. A. Shank, and C. H. Mansur.

14. The motion to strike out all the testimony of Henry Brooks, Joe Gothard, and C. H. Mansur is denied.

15. The motion as to the testimony of H. J. Forgy, subdivisions a and d, is denied. As to the testimony of said Forgy, designated as subdivisions b and c, the motion is granted.

16. The motion as to the testimony of the witness James J. Conrad, designated as subdivisions a and b, is denied.

[2] 17. The motion to strike out the statement on motion for a new trial in the case of Commercial Bank of Santa Ana, a Corporation, Plaintiff, v. T. A. Wells and J. E. Wells, Defendants, is granted. The said statement is in the transcript before us, beginning on page 279 and ending on page 290 thereof. The general ground upon which we base the order striking out the said statement is that it is hearsay. This testimony was offered for the purpose of showing that, in the above-mentioned case, in which the statement was prepared, the respondent fraudulently secured a loan of $550 from the said Commercial Bank, Wells and his wife having joined in making a promissory note to the bank for said sum. From the said statement on the motion for a new trial it appears that, about a year and a half before the $550 transaction with the said bank was had, Wells borrowed from the latter the sum of $350. It further likewise appears that, either on the first or second of the two said occasions on which he borrowed money from the bank, Wells told the cashier that a certain tract of land in his wife's name was unimcumbered. After the $550 loan was made to the respondent by the bank, the latter learned that the wife of the respondent had, on the 3d day of June, 1903, filed a homestead on said land. The $550 loan was made on the 31st day of August, 1903.

As a defense to the action by the bank on the $550 note, Wells pleaded and proved his discharge in bankruptcy by the United States District Court for the Southern District of California on the 29th day of January, 1906. It was admitted by Wells at the trial that his note to the bank for $550 was included in his schedule of liabilities filed in the proceeding in bankruptcy, and was therefore affected by the adjudication discharging him from all obligations or liabilities then existing against him.

Thus, it will be seen, it became a question of vital importance in that case whether the representation made to the bank by Wells that his wife's land was unincumbered was made when he obtained the loan for $350 or when be obtained the loan for $550. Upon this question there was, according to the statement on motion for a new trial, a sharp conflict in the testimony, Wells having testified that the representation was made when he borrowed the $350 and the bank officials having testified that the representation was made when he borrowed the sum of $550. Of course, the trial court had to determine this conflict and did so by finding in favor of the bank. Manifestly, this was only the opinion or judgment of the trial judge, and, while such opinion or judgment would be conclusive against the respondent here in certain instances which could be mentioned, still it cannot be held to be otherwise than hearsay in this proceeding, in which the respondent is entitled, as to all of the several distinct charges formally preferred against him, to be confronted by the witnesses called to support those charges, and to have their testimony taken directly before, and to cross-examine them in the presence and hearing of, the tribunal which must ultimately pass upon the question whether said charges have been sustained by sufficient proof.

[3] 18. This court is in no position to order the transcript of the testimony corrected in the several particulars indicated on pages 24 and 25 of the motion to strike out. We have no way of knowing whether, as respondent contends, the alleged errors are in fact errors or whether the testimony in those particulars was taken down and transcribed by the stenographer as it was given before the referee. We suggest, however, that the attorneys on both sides join in having the stenographer who took the testimony read to them his notes touching the particulars as to which errors are claimed to have been made and agree upon and make such corrections in the particulars referred to as the notes of the reporter may justify.

35 Cal. App. 799

PEOPLE v. HANFORD. (Cr. 697.)

(District Court of Appeal, First District, California. Jan. 10, 1918.)

1. PROSTITUTION 🔑1—INDUCING MINOR TO BECOME INMATE—ELEMENTS OF OFFENSE.

Under Juvenile Court Law (St. 1915, p. 1246) § 21, providing that any person who shall induce or endeavor to induce any person under the age of 21 years to so live as would cause such person to become or remain a prostitute, within section 1, subds. 1–13, inclusive, shall be guilty, where defendant knowingly permitted prosecuting witness, a minor, to commit acts of prostitution in defendant's house and encouraged the commission of the same, she was guilty, though prosecuting witness may have been previously immoral.

2. WITNESSES 🔑288(2)—PARTS OF DOCUMENT—RIGHT OF ADVERSE PARTY.

Where defendant's counsel during cross-examination of prosecuting witness read into the record a certain portion of her testimony given before the judge of the juvenile court, the prosecuting attorney had the right on redirect examination to read the portion omitted by defendant's counsel.

3. PROSTITUTION 🔑4—REPUTATION OF PLACE—ADMISSIBILITY.

The character of a house of prostitution may be established by evidence of its general reputation.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Jennie Hanford was convicted of violating Juvenile Court Law, § 21, and appeals from the judgment of conviction and from an order denying her motion for new trial. Affirmed.

Walter J. Thompson and Edward Lomasney, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

LENNON, P. J. Defendant was charged by an information filed in the superior court of the city and county of San Francisco with the crime of violating the provisions of section 21 of the Juvenile Court Law. She was tried, convicted, and sentenced to imprisonment in the county jail of said city and county. Defendant has appealed from the judgment and the order denying her motion for a new trial.

The evidence is sufficient to establish the crime charged. It shows that the defendant knowingly permitted the prosecuting witness to commit acts of prostitution in the defendant's house and encouraged the commission of the same.

[1] It is no defense that the prosecuting witness may have been leading an idle, dissolute, and immoral life prior to and at the time she went to the house of defendant. The statute under which the defendant was convicted in part provides that:

> "Any person who shall, by an act or omission, or by threats, or commands, or persuasion induce or endeavor to induce any * * * person, under the age of twenty-one years, to do or to perform any act or to follow any course of conduct, or to so live as would cause or manifestly tend to cause any such person to become or to remain a person coming within the provisions of any of subdivisions 1 to 13 inclusive of section 1 of this act, shall be guilty of a misdemeanor. * * *" St. 1915, p. 1246.

Thus it is apparent that the Juvenile Court Law not only denounces and condemns acts which tend to make a minor a prostitute, but also those which tend to cause one, already a prostitute, to remain a prostitute. In short, the clear purpose and intent of the statute is to reclaim the fallen as well as protect the virtuous.

Complaint is made of the alleged misconduct of the trial court, but the record does not show that the remarks of the court in response to an objection which it is claimed constituted misconduct were objected to or assigned as misconduct. Moreover, the record shows that the objection which provoked the remarks of the court was immediately withdrawn. This, we take it, was an acquiescence in the pertinency and propriety of the court's remarks, which were addressed solely to counsel for the defendant.

[2] Defendant's counsel, during the cross-examination of the prosecuting witness read into the record a certain portion of her testimony given before the judge of the juvenile court. On her redirect examination the prosecuting attorney read into the record a portion of the same testimony given by the witness in the juvenile court which counsel for the defendant omitted to read. This he had a right to do, for "where parts of a conversation or act or writing are proved, other connected parts should be received." Jones on Ev. (2d Ed.) p. 192. Moreover, even if this had been erroneous defendant failed to make either a timely objection or a motion to strike out.

[3] The court did not err in admitting evidence concerning the reputation of the defendant's house. The character of a house of prostitution may be established by evidence of its general reputation. People v. De Martini, 25 Cal. App. 9, 142 Pac. 898

Judgment and order affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

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35 Cal. App. 788

ZIERATH et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 2510.)

(District Court of Appeal, Second District, California. Jan. 8, 1918.)

1. CERTIORARI 🔑28(2)—ORDERS REVIEWABLE.

To be reviewable on certiorari, an order of the superior court must have been in excess of the court's jurisdiction.

2. JUDGMENT 🔑150 — OFFERING DEFAULT — AMENDMENT OF PLEADING.

After default of a defendant, amending of the complaint in a matter of substance opens the default, and judgment cannot be entered unless the amended complaint is served on the defendant, but if the complaint is only amended as to form, the default is not opened.

3. JUDGMENT 🔑144—OPENING DEFAULT.

In entering judgment on an amended complaint, not served on a defendant who defaulted, the court necessarily decided that the amendment was not one in substance, and it was without power to set aside the default on a motion based on the theory that the court did not have jurisdiction to enter the judgment, and it makes no difference how erroneous the judgment was.

Certiorari by A. C. Zierath, W. F. McCann, J. B. Giel, T. E. Amlin, and Walter S. Booth, Jr., as trustees for the stockholders and creditors of Zierath Combination Drill Company, to review an order of the superior court of the state of California, in and for the county of Los Angeles and the Judge thereof, setting aside a judgment against A. B. Small in the action of Zierath and others against the Midway Southern Oil Company of Long Beach and others. Order annulled.

Alfred H. McAdoo and David E. Bergman, both of Los Angeles, for petitioners. John E. Daly and James H. Daly, both of Long Beach, for respondents.

CONREY, P. J. This is a proceeding by writ of review whereby petitioners are seeking to have annulled an order setting aside a default judgment entered against one A. B. Small in an action of Zierath et al. v. Midway Southern Oil Co. of Long Beach et al. In that action the plaintiffs as judgment creditors of the corporation sued to obtain judgment against stockholders for the amount due on said previous judgment, but not exceeding as to any stockholder the amount of his liability for the unpaid portion of the amount subscribed by him or by his predecessor in ownership of the stock as a subscribing purchaser of such stock. An amended complaint was filed, in the ninth paragraph of which it was alleged that upon each of the shares of stock of said corporation there has been paid by the subscriber, owner and holder thereof an amount equal to 20 cents and no more per share; also that each of the defendant stockholders agreed with said corporation, at the time when he subscribed to and became the owner and holder of the shares of stock charged to him in the complaint, that he would pay the balance of the par value of said shares of stock so remaining unpaid to said corporation, or for its use, when legally called upon to so do. On March 1, 1915, the summons and a copy of this amended complaint were served upon the defendant A. B. Small, and his default for not appearing in the action was duly entered on January 19, 1916. No judgment was entered against him, except as hereinafter stated. On November 17, 1916, an amended complaint was filed in two counts. The first count duplicated the allegations of the first amended complaint. The second count was a copy of the first count, except that it omitted the ninth paragraph and substituted therefor other allegations. These substituted allegations described certain transactions whereby all of the capital stock of the corporation, except five $1 shares theretofore issued was originally issued to C. R. Faulstick as fully paid and nonassessable stock at the par value of $1 per share; the defendants being transferees of portions of that stock. It was alleged that the stock was so issued in consideration of the transfer by Faulstick to the corporation of certain interests in real property; that said property was not at that time worth any sum substantially near the value at which it was received, and that neither Faulstick nor the directors of the company who consummated said transaction with him either knew, thought, or believed that said interests in real property had a market value of the sum of $1,000,000, at which it was received, or a market value substantially near said sum. Further allegations were made tending to show that said transaction and the issuance of said stock for said insufficient consideration was intended to operate as a fraud upon future creditors of the corporation. The allegations of said substituted paragraph did not admit that the consideration paid to the corporation for said stock was equal in value to 20 cents per share of the stock or equal to any other specified sum.

The second amended complaint having been served upon some of the defendants, but not upon the defendant A. B. Small, and some of those defendants having answered, the case came on for trial, and at the conclusion thereof findings were filed and judgment was entered against certain of the defendants named in the complaint. We may disregard the findings, as they would be surplusage so far as a defaulting defendant was concerned. The judgment recited that the summons and complaint and amended complaint were duly and regularly served upon the defendant A. B. Small, and that his default had been duly and regularly entered. That this recital was not intended to assert that the second amended complaint was served upon Small is made clear by the fact that other recitals of the judgment show that the second amended complaint was served upon other defendants therein named. It is conceded by petitioners herein that the second amended complaint in that action was not served upon the defendant A. B. Small. The judgment was entered on September 21, 1917. Thereafter, on October 23, 1917, notice was given on behalf of A. B. Small, and pursuant thereto a motion was duly made for an order to vacate and set aside said judgment as to the defendant A. B. Small. The motion was supported by an affidavit which we may disregard here, since the facts therein stated, so far as necessary to be considered here, appear in the judgment

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

roll. On November 16, 1917, the court entered a minute order, to the effect that said motion "to vacate and set aside judgment as to said defendant Small is by the court granted." It is this order which the petitioners seek to have reviewed and annulled.

[1] Petitioners necessarily rely upon the proposition that the order in question was in excess of the court's jurisdiction. If in making said order the court acted in an unauthorized mode and thereby exceeded the bounds of its power, its action may be reviewed on certiorari. Carpenter v. Superior Court, 75 Cal. 596, 19 Pac. 174.

[2] The judgment which said order purports to vacate could not be vacated in response to such a motion as made in this case, unless the judgment was one which the court did not have power to render. This in turn depends upon the more specific proposition that the court was without jurisdiction to enter its judgment against the defendant A. B. Small (he not having appeared in the action) without service upon him of a copy of the second amended complaint. "It is settled by a long line of decisions that where, after the default of a defendant has been entered, a complaint is amended in matter of substance as distinguished from mere matter of form, the amendment opens the default, and unless the amended pleading be served on the defaulting defendant, no judgment can properly be entered on the default." Cole v. Roebling Construction Co., 156 Cal. 443, 446, 105 Pac. 255, 257. Petitioners herein contend that the second amended complaint did not contain any amendment of a substantial nature, or which could in any manner affect the rights of the defendant A. B. Small. We are referred to the cases of R. H. Herron Co. v. Shaw, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265, and Harrison v. Armour, 169 Cal. 787, 147 Pac. 1166. Those were actions similar to the action under consideration here. In Harrison v. Armour the shares of the corporation were $1 each, and it was alleged that no more than 25 cents per share had been paid on the stock subscription. The court said (169 Cal. 792, 147 Pac. 1168) that under the allegations of the complaint "it would have been open to the plaintiff to prove that the patent rights, although turned in at a valuation of $60,000, were and were known or believed by the parties to be worth much less." So the petitioners argue here that the new matter contained in the second count of the second amended complaint consisted of nothing more than evidentiary matter which might have been proved under the allegations of the first amended complaint, which proof would have been for the purpose of showing that only 20 cents per share had been paid on account of the stock held by defendant A. B. Small. For reasons which will next appear we find it unnecessary to express an opinion upon this question.

[3] If the second amended complaint differed from the first amended complaint only in matters of form not in substance affecting any right of the defendant A. B. Small, his default would not be opened by the filing of the last amended pleading. Cole v. Roebling Construction Co., supra; San Diego Savings Bank v. Goodsell, 137 Cal. 420, 425, 70 Pac. 299; Woodward v. Brown, 119 Cal. 283, 304, 51 Pac. 2, 542, 63 Am. St. Rep. 108. In order to determine that the plaintiffs were entitled to judgment against defendant A. B. Small, it was necessary that the court consider the allegations of the amended complaint and of the second amended complaint and determine that the amendments were merely matters of form and not of substance. The court had jurisdiction of the subject-matter, and by service of the summons and amended complaint it obtained jurisdiction over the defendant A. B. Small. It, therefore, had power to determine the effect of amendments to the pleadings and had jurisdiction to render judgment in accordance with such determination. If the judgment was based upon erroneous conclusions upon the questions thus presented, it was none the less a judgment rendered in the exercise of an established jurisdiction, and could not be set aside except by a mode of procedure provided by law for the review of such judgments. The judgment having been one entered as upon a default, there could not have been a motion for a new trial, nor could there have been a motion for "another and different judgment" under the provisions of section 663, Code of Civil Procedure. The motion to vacate the judgment in question does not purport to have been made to obtain relief under section 473, Code of Civil Procedure. The motion was based, and must have been granted entirely upon the theory that the judgment was void for want of jurisdiction in the court to render any judgment against the nonappearing defendant A. B. Small without service upon him of a copy of the second amended complaint. As we have seen, the court did have jurisdiction to render such judgment. This is so, even though it were conceded now that such action of the court was erroneous. It follows that the court was without jurisdiction to make the order which is here under review.

The order of the court below vacating its judgment against the defendant A. B. Small is annulled.

We concur: WORKS, Judge pro tem.; JAMES, J.

36 Cal. App. 4

SPIER v. PECK, County Treasurer.
(Civ. 2512.)

(District Court of Appeal, Second District, California. Jan. 14, 1918.)

1. STATUTES 🔑181(2)—CONSTRUCTION.

Statutes are to be so construed as not to give rise to an absurdity in their attempted application nor to destroy their efficacy as a whole or in substantial part.

2. STATUTES 🔑184—CONSTRUCTION—PURPOSE.

Strong indices to the legislative intent will always be found upon an inquiry into the nature of the evil sought to be remedied by a statute and the object to be accomplished.

3. OFFICERS 🔑30—SALARIES—HOLDING TWO OFFICES.

Juvenile Court Act (St. 1915, p. 1225) § 18, providing that all probation officers receiving a salary of $75 or more per month shall devote their entire time and attention to the duties of their offices, and no such probation officer, while holding such office and receiving salary therefor, shall be a candidate or seek the nomination for any other public office or employment, prohibits probation officers from acting and receiving the salary under appointment as superintendent of the detention home; the prohibition against being a candidate and seeking nomination in view of the requirement of devotion of entire time being against the holding as well as the seeking of another office.

Original application for writ of mandate by Thomas W. Spier against H. E. Peck, as Treasurer of the County of Ventura. Application denied.

Robert M. Clarke, of Los Angeles, for petitioner. Don G. Bowker, Dist. Atty., of Ventura, for respondent.

WORKS, Judge pro tem. Petitioner is probation officer of the county of Ventura and is also acting under appointment as superintendent of the detention home for the same county, both of the offices, or positions, having their existence under what is known as the Juvenile Court Act (Stats. 1915, p. 1225, Deering's Gen. Laws, Act No. 1770a). The law fixes petitioner's salary as probation officer at $100 per month, and as superintendent of the detention home at $50 per month. Section 18 of the Juvenile Court Act provides, among other things:

> "All probation officers * * * receiving a salary of seventy-five dollars or more per month shall devote their entire time and attention to the duties of their offices, and no such probation officer, * * * while holding such office and receiving salary therefor, shall be a candidate for or seek the nomination for any other public office or employment."

The petitioner presented to the board of supervisors of the county his claim for salary for June, 1917, as superintendent of the detention home, and the claim was allowed. The county auditor approved the demand and issued his warrant for its payment, but the respondent, who is the county treasurer, refused to make payment of the warrant upon its presentation. Thereupon the petitioner instituted this proceeding to enforce the payment.

[1, 2] The respondent contends that section 18 of the Juvenile Court Act, in that part of it from which we have quoted, disqualifies the petitioner, while holding the post of probation officer, from being superintendent of the detention home and, therefore, from drawing the salary annexed to that position. Can the language forbidding a probation officer to "be a candidate for or seek the nomination for any other public office or employment" receive that construction? Statutes are to be so construed as not to give rise to an absurdity in their attempted application and as not to destroy their efficacy as a whole or in substantial part (Murphy v. City of San Luis Obispo, 119 Cal. 624, 628, 51 Pac. 1085, 39 L. R. A. 444; Hannon v. Southern Pacific R. R. Co., 12 Cal. App. 350, 355, 107 Pac. 335; Madary v. City of Fresno, 20 Cal. App. 91, 96, 97, 128 Pac. 340); all rules of construction having their existence, of course, for the purpose of ascertaining the intent of the Legislature, that being the prime object of the construction and interpretation of statutes. Strong indices to the legislative intent will always be found upon an inquiry into the nature of the evil sought to be remedied by a statute or into the object to be accomplished by it. Bannerman v. Boyle, 160 Cal. 197, 200, 116 Pac. 732; Patton v. Los Angeles Pacific Co., 18 Cal. App. 522, 525, 123 Pac. 613; Odell v. Rihn, 19 Cal. App. 713, 719, 127 Pac. 802; Gise v. Myers, 22 Cal. App. 127, 133 Pac. 500.

In one of the cases above cited (Patton v. Los Angeles Pacific Co.), a statute was under review which provided:

> "An employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employé, * * *; provided, nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect or default of * * * a coemployé engaged in another department of labor from that of the employé injured, or employed upon a machine, railroad train, switch-signal point, locomotive engine, or other appliance than that upon which the employé is injured is employed. * * *"

The facts of the case were that the motorman of an electric interurban car was injured by the negligence of the conductor of another car. The motorman brought suit against the railroad company for damages. His complaint was assailed by general demurrer and in passing on the demurrer the court said:

> "The objection urged is that single cars, like those upon which the plaintiff and the negligent conductor were employed, are not to be considered as machines or railroad trains, or to be comprehended within the term 'other appliances' as used in the statute. To our minds, influenced

> by the consideration that the statute must be given a fair and reasonable meaning and be liberally construed to effect the purposes of its enactment (Judd v. Letts, 158 Cal. 359 [111 Pac. 12, 41 L. R. A. (N. S.) 156]), this contention of appellant is without merit. From the phraseology of the provision quoted it is evident that the Legislature intended to make the law broad in its scope and to preserve the liability of the employer for the employé's benefit in all cases generally where the mechanical device upon which the injured servant is employed is separate and different from that being operated by the negligent employé. By way of closer definition of the department of labor classification, the legislators undertook to and have said in effect that a person is not employed in the same department with another servant where he is at work with or upon a different machine, railroad train, etc.; and in consonance with a rule of fair construction it would be proper to say, if the words 'railroad train' were the only descriptive ones contained in that portion of the statute quoted, that that term as applied to an interurban railway is sufficient to include a single trolley car. Such cars combine in their construction both motors for propulsion and seats for the accommodation of passengers. Used in interurban traffic they perform the same work over long distances as does the steam-propelled train. While a train usually consists of a motor vehicle and cars attached thereto, where these adjuncts are combined in one carriage and serve the same uses, there is no good reason why the one should be said to be a train, within the meaning of the statute, and the other not be so classed. In construing statutes courts are not bound to an interpretation which shall give to words or phrases a literal, close dictionary definition."

In Odell v. Rihn, another of the cases we have cited, the litigation was instituted under the following circumstances: At the time the controversy arose section 4014 of the Political Code provided:

> "The officers of a township are two justices of the peace. * * * In townships containing cities in which city justices or recorders are elected, there shall be but one justice of the peace, and in townships having a population of less than 5,000 there shall be but one justice of the peace. * * *"

It was contended that the city of Richmond was entitled to two justices of the peace under this section. In disposing of the question the court said:

> "We are satisfied that the fifteenth judicial township of Contra Costa county was not at the time of the election in 1910 entitled, under the provisions of section 4014 of the Political Code, to more than one justice of the peace. * * * It is conceded that the judicial township in question consists entirely of the city of Richmond, which, although it has a population of more than 5,000, is provided by charter with a city justice of the peace, who is appointed by the city council. His jurisdiction and duties are concurrent and co-ordinate with those conferred generally upon justices of the peace throughout the state. It is petitioner's contention that the term 'elected' as employed in section 4014, Political Code, should be construed to mean elected by the popular vote of the people. In this contention we cannot concur. Statutes must be read and considered in conjunction with the legislative intent, and then be liberally construed with the object in view of effecting such intent. In restricting the number of justices of the peace to one in townships which include cities in which city justices or recorders are elected, it was evidently the legislative intent not to burden the people of the state with the expense of maintaining more judicial officers than were actually necessary to the needs of the people. The narrow construction of the statute here contended for by petitioner obviously would result in defeating the legislative purpose and intent in that behalf, and is therefore to be avoided if possible. The words 'elected' and 'appointed' ordinarily are not synonymous. In its limited sense the word 'elected' is usually employed to denote the selection of a public officer by the qualified voters of a community. On the other hand the word 'appointed' is generally understood to mean the selection of a public officer by one person who is empowered by law to make the appointment. In its broadest sense, however, the word 'elected' means merely selected. When used in that sense the word 'elected' is synonymous with the word 'appointed'; and where, as in the case at bar, a public officer has been selected by the votes of several members of a city council, it may be truly said in the broadest sense of the term that he was elected. * * * Having in mind the spirit and purpose of the Code section under discussion, it seems to us that the word 'elected,' as used therein, was not intended to apply solely to the election of a city justice by the votes of the people at large; but included as well the selection of a city justice of the peace by the city council or other legislative body in whom the power of election is conferred by law. In other words, it is our opinion that the appointment of a city justice of the peace by the votes of the city council [of the city] of Richmond was tantamount to the election of such justice of the peace in the sense contemplated by the Legislature, and that therefore the fifteenth judicial township of Contra Costa county was entitled to have but one justice of the peace at the time of the election in 1910."

[3] In the present case we have a potent index to the legislative intent in using the words "be a candidate" and "seek the nomination," in the very language of section 18 of the Juvenile Court Act. In the same sentence in which these words are found, and preceding them, it is declared that probation officers "shall devote their entire time and attention to the duties of their offices." It is therefore manifestly in aid of this provision that probation officers shall not be candidates nor seek nominations for other offices or employments. But this plain legislative intent will be frustrated and the provision be reduced to an absurdity if the language employed is to receive a literal construction. The time to be expended by a probation officer in seeking or being a candidate for another office or employment would ordinarily be inconsiderable when contrasted with the time expended by him in occupying and discharging the duties of the new office or employment, if his seeking, or his candidacy, were successful. Moreover, a literal construction would serve to disqualify a probation officer who sought another office or employment successfully, but would not disqualify one who procured and occupied another post without actually or technically seeking it. We are convinced that the Legislature did not intend such an anomaly to arise through the application of the provision now under examination. When probation officers were

commanded not to seek other places they were disqualified from occupying such places.

The application for a peremptory writ of mandate is denied.

We concur: CONREY, P. J.; JAMES, J.

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35 Cal. App. 788

JAMES v. P. B. STEIFER MINING CO. et al.

(Civ. 1742.)

(District Court of Appeal, Third District, California. Jan. 8, 1918.)

1. CORPORATIONS 🔑320(1) — STOCKHOLDER'S SUIT—RESTRAINING APPROPRIATION BY DIRECTORS.

Fraudulent appropriation of the funds and the spoliation and destruction of the property of a corporation through the agency of its directors justifies the interposition of equity at the suit, against the corporation and directors, by a stockholder or stockholders, who sustain a fiduciary relation to the corporation whose interests they really represent in the action.

2. CORPORATIONS 🔑110 — STOCKHOLDER'S SUIT—CANCELLATION OF STOCK.

Issuance of corporation stock without consideration, being a violation of the express provisions of Const. art. 12, § 11, and Civ. Code, § 359, and a breach of trust by the directors, may be redressed in suit against the corporation and directors by stockholder for cancellation of such stock; the corporation being concerned in the cancellation of certificates of stock that have been fraudulently issued and are void.

3. CORPORATIONS 🔑110 — STOCKHOLDER'S SUIT—CANCELLATION OF STOCK—PLEADING.

In action by stockholder against corporation and directors for cancellation of stock, the allegation of the issuance of such stock without consideration, and in fraud and damage of said company, and in violation of the laws of the state, while subject to criticism, was sufficient as against general demurrer.

4. CORPORATIONS 🔑312(3) — LIABILITY OF DIRECTORS—FRAUDULENT APPROPRIATION.

Where treasury stock is sold, and the proceeds fraudulently appropriated by one having no right thereto with the approval, sanction, and connivance of the directors, they are liable to the corporation, in action by a stockholder, for the amount.

5. CORPORATIONS 🔑110—CANCELLATION OF STOCK.

Issuance of corporate stock in exchange for worthless land is a fraud against the corporation cognizable in a stockholder's action for cancellation of such stock.

6. CORPORATIONS 🔑320(7)—DEBTS — NOTES GIVEN WITHOUT CONSIDERATION.

In stockholder's action for cancellation of corporation notes and mortgage, allegations that they were given for specified sums, and stating, on information and belief, that the company was not at any time indebted to the payee in any sum whatever, were sufficient to entitle plaintiff to be heard in a court of equity.

7. CORPORATIONS 🔑320(5) — STOCKHOLDER'S ACTION—DEMAND.

Demand upon directors to bring action to recover corporation money or property which they have fraudulently appropriated is not required precedent to action by stockholder, if it appears such demand would have been futile.

8. LIMITATION OF ACTIONS 🔑100(1)—PLEADING—DISCOVERY OF FRAUD—STOCKHOLDER'S ACTION.

In stockholder's action against corporation and directors for fraudulent appropriation, etc., where some of defendants' acts were quite remote, there should have been an allegation as to when their fraudulent character was discovered by plaintiff; the applicable statute of limitations being Code Civ. Proc. § 338, subd. 4, requiring actions for fraud to be brought within three years from its discovery.

9. ACTION 🔑50(9)—STOCKHOLDER'S ACTION—IMPROPER JOINDER.

In stockholder's action against corporation and directors, a complaint stating a cause of action for fraudulent misappropriations, etc., but also alleging false representations of certain defendants inducing plaintiff's purchase of his stock, and illegal levy of assessment on his stock, was demurrable as improperly joining a cause of action for personal wrongs with one for injuries to the corporation.

10. PLEADING 🔑225(1)—SUSTAINING DEMURRER—LEAVE TO AMEND.

Where a demurrable defect in the amended complaint could easily be remedied, it was error to sustain demurrer without leave further to amend.

Appeal from Superior Court, Butte County; Henry C. Gesford, Judge.

Action by Henry T. James, in behalf of himself and all other stockholders desiring to join, against the P. B. Steifer Mining Company and others. From judgment for defendants, plaintiff appeals. Reversed, with directions.

Frank D. McClure, of Minneapolis, Minn., and Franklin P. Bull, of San Francisco, for appellant. Frank Freeman, of Willows, W. M. Brown, of Los Angeles, and George E. Gardner, of Oroville, for respondents.

BURNETT, J. This appeal, coming up on the judgment roll, is from a judgment duly rendered after a demurrer, both general and special, to the amended complaint, had been sustained without leave further to amend. The order does not specify the ground upon which the demurrer was sustained, but merely sustains the demurrer generally.

The grounds of demurrer are: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) that several causes of action have been improperly united, namely, a cause of action in favor of and on behalf of the corporation against said defendants other than the corporation and a cause of action in favor of plaintiff stockholders in their personal capacity, for injuries to their personal rights by said defendant; (3) that the complaint is respectively ambiguous, uncertain, and unintelligible. It may be here interjected that defendants also filed an answer denying all material allegations as to fraudulent conduct and controverting any imputation of evil motives on the part of defendants. With the grounds of demurrer in mind we may turn to the complaint.

The first part of the complaint alleges generally the incorporation of the defendant corporation, the names of its directors and officers, the amount and par value of its capital stock. In paragraph 7 it is alleged that there has been issued to P. B., M. V., S. M.,

H. M., Mrs. Barbara A., and Mary C. Steifer each 56,729⅓ shares of the stock of said corporation "without consideration, and in fraud and damage of said company, and in violation of the laws of the state of California." Plaintiff then purports to set forth the elements excusing a demand upon the directors as being useless and futile to bring an action to vindicate his rights and redress his wrongs.

In paragraphs 9 and 10 plaintiff alleges the purchase by him in August and December, 1911, of 825 shares of supposed treasury stock for which he paid $3,750; that no part of said sum was received by the treasury of said company, "and said money was wrongfully converted from the funds of said company by said M. V. Steifer and Mary C. Steifer and other persons unknown to plaintiff, for their own personal possession and uses, with the approval, sanction, and connivance of the directors of said company, all to the detriment, damage, and fraud of said company, and the stockholders thereof."

Paragraph 11 purports apparently to set forth facts constituting a fraud upon plaintiff (and others named) personally. It avers that in January, 1902, defendants, other than defendant corporation, and others unknown to plaintiff, unlawfully and fraudulently conspired and combined to defraud plaintiff and all others who should purchase stock by organizing a corporation to be known as the P. B. Steifer Mining Company, and placing certain shares on the market for sale and selling the same by false representations. The alleged false representations are then particularly set forth and alleged to be false. Paragraphs 11a and 11b allege that plaintiff and the other stockholders believed the foregoing fraudulent representations; otherwise they would not have purchased stock. Plaintiff, however, does not aver that the stock was not of the value which he gave for it at the time he purchased, nor that he was otherwise damaged by the reliance on said representations.

The complaint then proceeds to set forth the issuance of 347,500 shares of capital stock to P. B. Steifer in return for certain mining land conveyed by P. B. Steifer to the corporation, that said land was worthless, and known to be so by the defendant directors, all of which is a fraud upon the company and a breach of trust. In the same paragraph is alleged the fraudulent expenditure of the corporate money in useless buildings, flumes, and machinery and in the payment of excessive and illegitimate salaries and commissions; that certain shares of stock were sold for sums ranging from $5 to $8 per share; but that of said sums the corporation received at times but $1 a share, and at others nothing, the difference being pocketed by defendants and their confederates. It is then stated that 300 shares of stock were sold to Alice I. Hunt and Louise I. Hunt upon a guaranty that a dividend of $1,500 would be paid thereon, or in default thereof the company would loan said Hunts the difference between the dividend and $1,500; that no dividend was paid, and the officers fraudulently and without authority loaned said Hunts $952.50. It nowhere appears, however, that said sum has not been repaid nor that the Hunts were not responsible persons. Continuing, the paragraph avers the fraudulent issuance to Mary C. Steifer, without consideration, of thousands of shares of stock, the subsequent sale by the corporation of said stock and payment of exorbitant commissions by the corporation, the proceeds going to Mary C. Steifer, the subsequent borrowing by the corporation of said sum from Mary C. Steifer, and the giving to her of the company's notes and mortgage therefor.

Further alleging details of the transaction last above referred to, in paragraph 13 it is stated that the company gave to Mary C. Steifer its promissory notes (setting forth amounts and terms) and a mortgage to secure payment thereof on all the real and personal property of the corporation, and it is stated, on information and belief, that the company was not at any time indebted to said Mary C. Steifer in any sum whatever.

The rest of the complaint complains of the assessment levied on the stockholders of the corporation. It is averred that said assessment is, by the resolution creating it, for the purpose of paying in part an indebtedness of some $89,000 alleged to be due Mary C. Steifer, whereas the total corporation debts amounted only to $7,000, and therefore said assessment is unnecessary; that plaintiff and others have not paid the same, and their stock is advertised for sale; that the said Steifers have never paid the assessment upon their stock, but have fraudulently marked their assessments as paid upon the books of the corporation.

In paragraph 16 it is alleged, on information and belief, that the directors on January 4, 1915, did not levy an assessment upon all the stock of the corporation, to wit, 515,429 shares, but upon 511,949 shares only.

The prayer in substance purports to ask: (1 and 2) That the issuance of the capital stock to the defendants and others named, other than the corporation, be declared illegal and void, and a fraud on the corporation and the shareholders thereof; (3) "that the sale of said capital stock to plaintiff and all other stockholders, other than defendants, was made in furtherance of said conspiracy to defraud them and made upon false and fraudulent representations;" (4) that the mortgage and notes given by the corporation to Mary C. Steifer be declared to have been given without consideration and be declared null and void and canceled; (5) that the assessment be declared unlawfully levied, and that it be set aside and its collection be restrained; (6) that the sale of the stock be restrained; (7) that plaintiffs be given costs and general relief.

That the amended complaint states a cause of action in behalf of the corporation against the directors and those co-operating with them cannot be doubted. The case is brought clearly within the rule announced and illustrated by many authorities to which attention is directed in the brief of appellant. It is sufficient to refer to Woodruff v. Howes, 88 Cal. 184, 26 Pac. 111; Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788; California Calaveras Min. Co. v. Walls, 170 Cal. 285, 149 Pac. 595; Whitten v. Dabney, 171 Cal. 621, 154 Pac. 312; Harvey v. Meigs, 17 Cal. App. 353, 119 Pac. 941.

[1] The fraudulent appropriation of the funds and the spoliation and destruction of the property of the corporation through the agency of the directors present an obvious instance for the interposition of equity at the suit of a stockholder or stockholders who sustain a fiduciary relation to the corporation whose interests they really represent in the action. The general principle is stated in High on Injunctions, vol. 2, § 1203, as follows:

> "The protection of the rights of shareholders in incorporated companies against the improper or illegal action of other shareholders, or of the officers of the company, is a favorite branch of the jurisdiction of equity by injunction. And it may be asserted as a general rule that courts of equity may enjoin, in behalf of the stockholders of an incorporated company, any improper alienation or disposition of the corporate property for other than corporate purposes, and will restrain the commission of acts which are contrary to law and tend to the destruction of the franchise, as well as the improper management of the business of the company, or a wrongful diversion of its funds or from depriving plaintiff of his rights as a corporator."

And it is equally clear from the authorities that a court of equity, as far as it can be done, will compel the restitution and restoration of the funds or property of the corporation that have been misappropriated or destroyed by the directors and those acting in concert with them. To make it manifest that such is the case before us we may recall more specifically a few of the facts set forth in the amended complaint.

[2, 3] The allegation in the seventh paragraph as to the issuance of over 300,000 shares of the capital stock without consideration affords an instance of the violation of article 12, § 11, of the Constitution of the state and section 359 of the Civil Code, and the directors thereby committed a breach of trust to be redressed in an action of this character. Naturally the corporation is concerned in the cancellation of certificates of stock that have been fraudulently issued and are void. Cortelyou v. Imperial Land Co., 156 Cal. 376, 104 Pac. 695. The form of said allegation is subject to criticism, but the averment should be deemed sufficient as against a general demurrer.

[4] In the ninth paragraph there is an imperfect attempt to allege that treasury stock was sold to plaintiff and the proceeds fraudulently appropriated by M. V. Steifer with the approval, sanction, and connivance of the directors of the company. If true, the directors would, of course, be liable to the corporation for the amount of the sale, and it could be recovered in this action.

[5] In the twelfth paragraph it appears that the defendants, other than the corporation, issued to said P. B. Steifer 347,500 shares of the capital stock for the right, title, and interest of said Steifer in and to certain alleged mining land when said defendants knew that said right, title, and interest of said P. B. Steifer "was worthless and without value, and that the transfer of said capital stock to said P. B. Steifer was without consideration," etc. Therein, as we view it, is presented, though somewhat inartificially, another instance of fraud against the corporation and cognizable in this proceeding. In the same paragraph is set forth, as we have seen, the useless expenditure of a large amount of the funds of the corporation in the erection of buildings that were not designed or needed for the legitimate purposes of the corporation, and also that large blocks of treasury stock were sold and the money derived therefrom converted to their own use by said defendants; that they also paid to themselves large sums of money for traveling expenses, hotel bills, and salaries out of all proportion to the expenses incurred and the services rendered; that certain shares of stock belonging to the corporation were sold, and only a portion of the proceeds accounted for; that thousands of shares were issued to Mary C. Steifer without consideration; that portions of said stock were sold by the secretary of the corporation, and he was paid therefor out of the funds of the company a large sum for commissions; and that a note and mortgage were given to said Mary C. Steifer to cover money borrowed from her, but which she had received as the proceeds of the sale of said stock fraudulently issued to her as above stated.

[6] In the thirteenth paragraph there is the additional allegation that two notes and a mortgage were given to said Mary C. Steifer for the sum of $49,837.07 and $40,000, respectively, whereas the corporation was not indebted to her in any sum whatever. The foregoing are deemed sufficient specifications of fraudulent transactions affecting the interests of the corporation to establish the right of plaintiff to be heard in a court of equity in this kind of proceeding. As indicated, some of the allegations are subject to verbal criticism, but we think respondents seek to apply too strictly the technical rule of pleading. One or two specifications may be noticed briefly.

[7] The failure of plaintiff to make dem [illegible] directors to bring the action

is sufficiently excused. Of course, it is improbable that they would be guilty of such stultification as to sue themselves to recover for the corporation money or property which they had wickedly and fraudulently appropriated and sequestered. The facts alleged show that such demand would have been ignored or scornfully refused. It is well settled that, where it appears that a demand, if made, would have been futile, it is not required. We may add that the answer furnishes additional confirmation that no such suit would have been brought by the directors. Therein they disavow any corrupt motive, deny any improper disposition of the property of the corporation, and affirm the utmost good faith in all their transactions relating to the affairs of the company.

"While it is a general rule that a member or stockholder of a corporation cannot have redress from any wrong or injury to the corporation until he has made an earnest effort to secure proper action by the managing body of the corporation, yet when it appears that it would be futile and useless to make a demand upon the corporation or upon its trustees or officers to commence a suit to obtain relief, or that the trustees are parties to the suit complained of and claim the right to do what they did, no such demand may be made." Ashton v. Dashaway Ass'n et al., 84 Cal. 61, 22 Pac. 660, 23 Pac. 1091, 7 L. R. A. 809; Woodruff v. Howes, supra; Von Arnim v. American Tube Works, 188 Mass. 515, 74 N. E. 680; Simon v. Weaver, 143 Wis. 330, 127 N. W. 950.

[8] Nor can it be maintained that the action is barred by the statute of limitations or by the laches of plaintiff. The suit was brought certainly within a reasonable time after the commission of some of the reprehensible acts. This is especially true of the execution of the notes and mortgages to said Mary C. Steifer. Some of the other instances were quite remote, and there should have been an allegation as to when discovery of their fraudulent character was made by plaintiff. The pleading is silent as to that point. In the Whitten Case, supra, it is declared that a stockholder who institutes such an action as this does so "in a purely representative character and as a trustee to redress corporate injuries," and that the provision of the statute of limitations applicable to such action is subdivision 4 of section 338 of the Code of Civil Procedure, providing that actions for relief on the ground of fraud or mistake must be commenced within three years, but the cause of action is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

While the complaint as to some of the specifications is therefore defective in this particular, yet upon the whole there is a sufficient designation of fraudulent acts within a short period anterior to the filing of the complaint to avert this general attack upon the pleading.

[9] As to the misjoinder of causes of action it is undoubtedly true that certain acts of a personal nature resulting in injury to plaintiff individually, and not producing any wrong to the corporation, have been set forth in the complaint in connection with those of the nature to which we have referred. Such, for instance, is the purchase by plaintiff of his stock by reason of the false representations of said defendants. It does not appear that the corporation was damaged by such purchase. Nor can it be held that the corporation would be benefited by the annulment of said purchase. The disposition of the funds arising from the purchase is manifestly of concern to the corporation upon the theory that it was treasury stock, but if plaintiff by reason of false representations paid for the stock more than it was worth, that is a matter of his personal interest, and his wrong should be redressed in a personal action against those who made such representations. The matter of the assessment upon plaintiff's stock involves also, as we view it, a cause of action personal in its nature. The corporation would hardly be in a position to complain because the stockholders paid into its treasury more money than was needed. The individual stockholder is wronged when he is called upon to pay an assessment illegally levied upon his stock, and he may, under certain circumstances, restrain the sale to enforce such assessment, but such contingency does not constitute the basis for an action by or on behalf of the corporation. The observation herein does not refer to the allegation in the complaint as to the failure of the directors to assess a certain number of shares of the capital stock and their conduct in wrongfully crediting payment upon certain other shares. These latter, of course, are of corporate concern, and are properly included in an action like this.

As to this feature of the case we find some profitable suggestions in the opinion of Turner v. Markham, 155 Cal. 562, 102 Pac. 272, wherein it was held that:

"An action brought by a stockholder for the benefit of a corporation is in its nature and essence to recover redress for some legal wrong which the corporation itself has suffered and to prevent a failure of justice," but "if the corporation itself has suffered no wrong cognizable at law or in equity, it matters not how just and how grievous may be the complaint of the stockholder, nor how complete may be the proof of his individual loss, damage, or injury, but he will be compelled to resort to his individual action to obtain a personal recovery."

Therein is an illustration somewhat in point here to this effect:

"If A. upon the street sells to B. his own stock under the representation to B. that it is treasury stock, the corporation is not injured, nor is A. estopped in an action by the corporation from asserting that the stock was his own. B., to whom the representations were made, may have suffered by them, may have his cause of action for redress, and may insist upon an estoppel against A., but that estoppel only runs for his benefit and to prevent A. from taking advantage of the wrong which he has perpetrated not upon the corporation, but upon B."

[10] Without going further, we think it can be said that a cause of action for personal wrongs has been improperly joined with one for injuries to the corporation, and that the demurrer upon that ground was well taken. But it is manifest that this defect can be easily remedied, and we are satisfied that plaintiff should have been allowed to amend the complaint.

In Schaake v. Eagle, etc., Can Co., 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759, it was held that:

> "If a complaint states a cause of action, it is an abuse of discretion, apparent upon the face of the record, to sustain demurrers thereto on any ground without granting leave to amend. The fact that the complaint had been once before amended does not justify a refusal of leave to amend in such case. Where the order refusing leave to amend a complaint stating a cause of action was inserted in the order sustaining demurrers thereto, it cannot be presumed that the plaintiff asked leave to amend in advance of the ruling. The order is deemed excepted to by force of the statute, and the plaintiff is not required to move to vacate or modify it in order to have the abuse of discretion reviewed upon appeal."

We think the judgment should be reversed, with direction to allow the plaintiff to amend his complaint if he so elects.

It is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

176 Cal. 738

HALL v. THURSTON. (L. A. 4053.)

(Supreme Court of California. Dec. 14, 1917.)

1. Bills and Notes ⇨524—Title to Sustain Action—Evidence.

The possession of notes, showing no payments thereon duly indorsed by the payee, constitutes a prima facie showing of plaintiff's right to recover, which, coupled with proof that the transfer complained of made to plaintiff's assignor was done by order of the board of directors of a rightful holder, of which board defendant was a member present and acting, is sufficient.

2. Bills and Notes ⇨489(3) — Actions — Defenses—Pleading.

The rejection of defendant's offer in evidence of a purported agreement between himself and his assignee of his own indorsed notes for the purpose of showing equities in defendant's favor by which plaintiff would be bound is not error, where such equities or agreements were not pleaded.

3. Bills and Notes ⇨489(3)—Pleadings—Bona Fide Purchasers after Maturity.

Where, under Code Civ. Proc. § 368, a note is assigned, after maturity any defenses existing in favor of the maker at the time or before notice of assignment are not available, unless pleaded.

4. **Bills and Notes** ⟹427(3) — **Payment and Discharge.**

The maker's payment of a note to a former holder after notice of transfer was at his peril.

Department 2. Appeal from Superior Court, Los Angeles County; A. J. Buckles, Judge.

Action by F. R. Hall against L. F. Thurston. Judgment for plaintiff, and defendant appeals. Affirmed.

B. F. Woodard and E. J. Fleming, both of Los Angeles, for appellant. A. C. Routhe, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. This is an appeal by the defendant from a judgment entered in favor of plaintiff upon two promissory notes made by defendant, payable to his own order and by him indorsed and delivered to the International Security Company (a corporation), of which one Newton J. Skinner was at the time president.

The complaint alleges that after their maturity the notes were for a valuable consideration transferred by said corporation to said Skinner, who thereafter for value transferred them to one George C. Smith, by whom they were delivered to plaintiff. The answer admits the making and delivery of the notes to the International Security Company for a valuable consideration and as a defense to the cause alleges that at all the times mentioned the notes were the property of said corporation, and that "Skinner falsely and fraudulently secured possession thereof"; that no transfer of the same was made by said corporation; and "that prior to the commencement of the action plaintiff paid to said International Security Company the entire indebtedness represented by said promissory notes, together with interest thereon."

[1] Upon the ground of want of sufficient evidence to sustain the same appellant attacks the finding that after the maturity of the notes they were for a valuable consideration transferred to and became the property of Newton J. Skinner. In the absence of want of consideration pleaded for the making of the notes, we are unable to perceive the materiality of the finding so far as it concerns defendant. However, conceding it to be material, possession of the notes by plaintiff, duly indorsed by the payee therein named, and upon which no payments appear to have been made, was as to plaintiff a sufficient prima facie showing to establish his right to recover thereon. In addition to this fact, there was evidence tending to show that the notes were, by resolution of the board of directors of the International Security Company, ordered transferred in settlement of an account known as the Magee account in which Skinner had some interest, which transfer so made by the president of the company appears to have been ratified by the board of directors of which defendant was a member present and acting in the transaction.

[2] The action of the court in sustaining plaintiff's objection to defendant's offer in evidence of a written agreement made by him with the International Security Company acting through Skinner, then president of said company, is assigned as error. Appellant claims this agreement related to said notes and modified their terms in reference to his obligation for the payment thereof, and thus, as between the defendant and the company created equities in his favor whereby plaintiff was bound. A sufficient answer to his contention and the alleged error predicated upon the ruling of the court in sustaining plaintiff's objection to the question asked defendant, "Did you make an agreement (with the company) by which these notes were not to be paid?" is that no such equities or agreements were pleaded and no tender made by answer of any issue under which the document was admissible in evidence. Moreover, the agreement on its face makes no reference to the notes involved in the action. There was no error in the ruling.

[3] Immediately following the ruling upon the question last referred to counsel for defendant said, "Your honor rules that we cannot put in any evidence as to the payment of these notes?" to which the court replied, "It is just about that way." For the reason that the answer did not allege facts constituting any defense to the notes in the hands of plaintiff as legal holder thereof the ruling was correct. They were payable to the maker by whom they were indorsed, and hence passed by delivery. Bank of Lassen Co. v. Sherer, 108 Cal. 513, 41 Pac. 415. The delivery constituting an assignment thereof was made by the International Security Company after the notes had matured. As provided in section 368 of the Code of Civil Procedure, they were as to plaintiff subject to any defenses existing in favor of defendant at the time or before notice of the assignment. As stated, the only defense pleaded was that plaintiff was not the owner of the notes (as to which the court upon sufficient evidence found in favor of plaintiff), and the alleged fact that defendant prior to the commencement of the action paid, not the notes, but "the indebtedness represented by said promissory notes" to the International Security Company. Clearly if at the time of the transfer made by the company defendant had paid the notes, or if subsequent thereto he had without notice of the assignment made payment, such facts, if pleaded, would constitute a defense. Bank of Stockton v. Jones, 65 Cal. 437, 4 Pac. 418. It is not alleged, however, that payment was made before notice of the transfer. Indeed, we may say the state of the record is such that defendant could not truthfully have made such allegation. Hence, since proof of the allegation, in the absence of evidence that

payment was made prior to notice, as to which there was neither averment nor offer of evidence, would constitute no defense to the action.

[4] After the transfer of the notes prior to payment thereof, of which fact defendant by uncontradicted evidence is shown to have had notice, payment thereof if made by him to the International Security Company, having, as he knew, no interest therein, was at his peril.

The judgment is affirmed.

We concur: MELVIN, J.; HENSHAW, J.

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176 Cal. 745

DESERET WATER, OIL & IRRIGATION CO. v. STATE. (Sac. 2081.)

(Supreme Court of California. Dec. 14, 1917.)

APPEAL AND ERROR 🔑835(2) — REHEARING—MATTERS NOT URGED ON ORIGINAL HEARING.

Where, in a suit to condemn land within a national forest reservation as land of the state, the defense that the state had parted with its title by offering the land to the United States as a basis for lieu land selections was treated as in issue, and evidence thereon was introduced, and the decisions of the state and federal Supreme Courts were based thereon, the objection could not be made on a rehearing in the state Supreme Court that the pleadings were insufficient to present this defense.

In Bank. Appeal from Superior Court, Mono County; William S. Wells, Judge.

On rehearing. Judgment reversed.

For former opinion, see 167 Cal. 147, 138 Pac. 981.

U. S. Webb, Atty. Gen., and John T. Nourse, Deputy Atty. Gen. (Percy V. Long, City Atty., and J. F. English, Asst. City Atty., both of San Francisco, amici curiæ), for the State. A. H. Ricketts and Metson, Drew & Mackenzie, all of San Francisco, and Horatio Allen, for respondent.

PER CURIAM. Upon appeal to this court the judgment of the trial court was affirmed, for reasons given in the opinion. 167 Cal. 147, 138 Pac. 981. Under writ of error to the Supreme Court of the United States (243 U. S. 415, 37 Sup. Ct. 394, 61 L. Ed. 821), that court decided that the construction which this court put upon the federal statute, therein following the decision of the highest federal court which had spoken upon the matter (Hibberd v. Siack [C. C.] 84 Fed. 571), was erroneous, and that, while the state of California had acquired title to the lands in question it had waived its right to such lands. The lands were withdrawn from sale by the state by an act of the Legislature, and the surveyor general of the state had offered the land back to the United States as bases for lieu land selections. The effect of the acts of the state under the construction which the Supreme Court of the United States has put upon the federal statute is not doubtful. In equity the state of California has surrendered its title to these lands to the United States, and only the action of an executive department of the United States—the Land Office—is necessary to complete the legal transfer of title.

Upon rehearing before this court, however, it is argued that the sole allegation touching this matter is simply that the state alleges "that the land described in plaintiff's complaint is surveyed land and is wholly situate within the exterior boundaries of a permanent reservation." It is contended that this allegation is insufficient to present the defense that the state had thus parted with its title, and that to treat it as presenting such a defense would be to do violence to the admissions in the pleading that the land is owned by the state of California. But to this it must be answered that at the trial the pleadings were accepted as being sufficient to present the issue which was elaborately discussed in the former decision of the case and which formed the subject of review by the Supreme Court of the United States. The matters having been accepted as being questions in issue, evidence having been addressed to them pro and con, and the decision by this court and by the Supreme Court of the United States having been based thereon, respondent cannot be heard upon the objection which it now presents.

It follows therefrom that the judgment appealed from must be reversed, and it is ordered accordingly.

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176 Cal. 687

BUDD v. HUGHES et al. (L. A. 4068.)

(Supreme Court of California. Dec. 13, 1917.)

1. EVIDENCE 🔑391 — PAROL EVIDENCE AFFECTING WRITING—BILLS OF SALE.

Oral evidence will not be received to vary the terms of a written instrument, a rule applicable in actions between parties to a bill of sale.

2. EVIDENCE 🔑419(7)—PAROL EVIDENCE AFFECTING WRITING — NONAPPLICATION OF RULE WHERE CONTROVERSY IS BETWEEN PARTY TO WRITING AND ONE NOT A PARTY.

Where the lessor of a motion picture theater, having re-entered for nonpayment of rent, executed bill of sale of the personalty therein, including theater chairs installed by her tenant, to a corporation, selling and transferring the property for $7,500, in action by the assignee of the tenant against the lessor's executor and executrix to recover for the personalty thus wrongfully sold, evidence that other considerations than the tenant's personalty entered into the transaction resulting in the bill of sale was not inadmissible as varying the terms of the bill of sale, since where the controversy is between a party to a written contract, and one who is neither a party nor privy to one who is, the rule excluding parol evidence to explain, vary, modify, or contradict a writing does not apply.

3. APPEAL AND ERROR 🔑1071(1)—HARMLESS ERROR—FINDING OF NO INDEBTEDNESS.

In an action for money had and received by defendant for plaintiff's use, error in finding that defendant was not indebted to plaintiff's assignor in any sum was cured by judgment rendered for plaintiff for $2,000.

4. APPEAL AND ERROR ⚿883—HARMLESS ERROR—COMPELLING PLAINTIFF TO AMEND.

Where the court, at close of trial, stated the allegations of the complaint were such that judgment could not be given in plaintiff's favor without amending, though on the evidence he was entitled to recover, whereupon plaintiff under protest amended, he was not in a position to assert he was prejudiced by the court's action, as it was optional with him whether or not he amended and took judgment, or, in the absence of amendment to like effect in the answer, let judgment other than as confessed therein go for defendant.

5. PLEADING ⚿8(2)—CONCLUSION OF LAW.

A complaint alleging that defendant was holding certain property as trustee for plaintiff pleaded a mere conclusion.

6. TRUSTS ⚿352—CONVERSION OF PERSONALTY IN THEATER BY SALE—RIGHT OF TENANT TO ENTIRE PRICE.

Where the lessor of a motion picture theater, whose lessee placed certain personalty therein, after re-entry sold the whole business for a lump sum, there was no such commingling of goods as entitled the lessee to the whole purchase price received, when the value of his goods thus converted by the lessor was readily ascertainable.

Department 2. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Harold Budd against Henry West Hughes and Rosy B. Hughes, as joint executor and executrix, respectively, of the last will and testament of Mattie W. Hughes, deceased. From a judgment for plaintiff, and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

Willis S. Mitchell and Davis, Kemp & Post, all of Los Angeles, for appellant. W. W. Butler, of Los Angeles, for respondents.

VICTOR E. SHAW, Judge pro tem. This action grew out of the following facts: Under a lease executed to him by Mattie W. Hughes, the assignor of plaintiff was a tenant of a building in Los Angeles wherein he conducted a moving picture business known as the College Theater. In connection therewith he installed theater chairs and other personal property, the use of which was required in operating the playhouse. The lessee having made default in the payment of his rent, the lessor, pursuant to a judgment rendered in her favor in an action for unlawful detainer, re-entered the premises wherein plaintiff had left the personal property and used the same in carrying on the business from December 15, 1911, to January 15, 1912, upon which last-mentioned date she, by bill of sale executed to a corporation of which E. J. Tally was chief owner, sold and transferred the personal property for a consideration therein specified of $7,500 for the recovery of which sum this action was instituted. The court gave judgment in favor of plaintiff for the sum of $2,000, from which, and an order denying his motion for a new trial, he prosecutes this appeal.

The complaint contains two counts, one for money had and received by defendant for plaintiff's use, and the other based upon the theory that defendants' testatrix held the property as an involuntary trustee for plaintiff to whom she was accountable, not for the value of the goods converted, but for the $7,500 alleged to have been received therefor.

The chief error upon which appellant contends for a reversal is that the court over his objection received evidence tending to show that while the personal property described in the bill of sale as shown thereby constituted the sole and only consideration for the payment of the $7,500, other considerations did in fact enter into the transaction, chief among which was a five-year lease of the College Theater at a greatly reduced rental from that specified in plaintiff's lease, and the good will of an established business. That this was true clearly appears not only from uncontradicted testimony, but from the fact that the execution of the bill of sale followed a contract made the preceding day by the agent of Mattie W. Hughes, whereby as said agent he agreed for said sum of $7,500 to deliver the bill of sale transferring the personal property contained in said theater, together with a five-year lease of the premises, for a specified rental, which lease was executed by said Mattie W. Hughes as agreed to by her said agent.

[1, 2] In support of his contention appellant invokes the elementary principle that oral evidence will not be received to vary the terms of a written instrument, and hence the parties to this action are bound by the language of the bill of sale, the terms of which cannot, it is claimed, be varied by parol evidence. That such rule is applicable in actions between parties to a bill of sale is conceded. Hodson v. Varney, 122 Cal. 619, 55 Pac. 413. Plaintiff, however, was not a party to the written instrument, and in no wise bound thereby. Had the sale of the property by Hughes been made for one-half in value of the property, could it be said that such fact would limit plaintiff's right to recover in an action for the conversion? Clearly not. And in such controversy, since one of the parties is free to show the true character of the transaction, it must follow that the other party to the action is likewise free. "Where the controversy is between a party to a written contract and one who is neither a party to it or privy to one who is, the rule excluding parol evidence to explain, vary, modify or contradict the writing does not apply." 11 Am. & Eng. Ency. of Law, 550; Smith v. Moynihan, 44 Cal. 53; Greve v. Echo Oil Co., 8 Cal. App. 275, 96 Pac. 904; Hussman v. Wilke, 50 Cal. 250. The reception of evidence disclosing the true charac-

ter of the transaction to be otherwise than as shown by the writing was not error.

[3] Conceding the court erred in finding that Mattie W. Hughes was not indebted to plaintiff's assignor in any sum whatever for money had and received for his use and benefit, such error as to him was cured by the judgment rendered in his favor for $2,000.

[4] Error is predicated upon the fact that the court at the close of the trial stated that the allegations of the complaint were such that while upon the evidence plaintiff was entitled to recover judgment it could not be given in his favor without amending the complaint; that otherwise judgment must go for defendant. Thereupon plaintiff under protest amended his complaint. Clearly it was optional with plaintiff whether or not he amended and took judgment for $2,000, or in the absence of an amendment to like effect in the answer let judgment other than as confessed therein go for defendant. In no event is he in a position to assert that he was prejudiced by the action of the court.

[5, 6] The complaint alleged that "Mattie W. Hughes was holding the said property" as trustee for plaintiff. Other than this mere conclusion, the facts pleaded show an ordinary case of conversion of the property which it is alleged she sold for $7,500. This allegation is denied. Hence it devolved upon plaintiff to show what defendant received for the property, and this the court by sufficient evidence found to be the value thereof fixed at $2,000. Assuming that in the broad sense of the term a trust existed there was no such commingling of goods that entitled plaintiff to the whole purchase price received when as shown the value of the goods was readily ascertainable. As well might it be said that one who sells 100 head of cattle, among which is wrongfully included an animal belonging to his neighbor, must, on like ground, turn over to his neighbor the entire proceeds of sale received for the herd.

The judgment and order are affirmed.

We concur: MELVIN, J.; HENSHAW, J.

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176 Cal. 729

In re SMITH'S ESTATE. (L. A. 5227.)

(Supreme Court of California. Dec. 14, 1917.)

1. WILLS 🔑322—PROBATE—TESTAMENTARY CAPACITY—CONTEST—ORDER OF PROOF.

The court in its discretion could require proponents to make formal proof of the execution of the will before proceeding with the contest.

2. WILLS 🔑348 — DENIAL OF PROBATE — GROUNDS.

The court having ordered proponents to make formal proof of the execution of the will before proceeding with the contest, and they having refused to introduce any testimony, probate was properly denied.

3. WILLS 🔑334—ORDER DENYING PROBATE —FINDINGS—NECESSITY.

In such case, no findings were necessary to support the order denying probate; it not being a decision upon facts, but practically a nonsuit for want of evidence.

Department 1. Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

In the matter of the estate of William A. Smith, deceased. From an order denying probate granted on the motion of W. A. Snyder, contestant, D. O. Dobson and another, proponents, appeal. Affirmed.

Earl E. Moss, of Ventura, for appellants. J. W. Wiley and Wiley & Lambert, all of Bakersfield, for respondent.

SHAW, J. D. O. Dobson and Sarah J. Henderson filed a petition for the probate of a document alleged to be the last will of William A. Smith, deceased. Thereafter W. A. Snyder filed a contest of said will, on the ground that the same was not duly executed by the decedent. Upon the hearing the proponents, Dobson and Henderson, who are the appellants here, moved the court to require the contestant to prove that he was an interested party, entitled to maintain a contest of the will, before proceeding further in the case. Snyder moved the court to require the proponents to first make the formal proof of the execution of the will. The court granted the latter motion and directed the appellants to proceed first with their formal proof. This they refused to do, and thereupon refused to offer any proof whatsoever of the due execution of the will. The contestant then moved the court to deny the admission of the will to probate. The court granted the motion and, as we infer, made an order accordingly, from which the proponents appeal. The order appealed from is not a part of the record, as the Code requires. Code Civ. Proc. § 951. We gather the above facts from the notice of appeal and from the undisputed statements of the respondent's brief.

[1, 2] There is no merit in the appeal. The court may direct the order of proof in such cases, and in its discretion could require the proponents of the will to introduce their evidence of its execution before proceeding with the contest. Estate of Latour, 140 Cal. 437, 73 Pac. 1070, 74 Pac. 441; Estate of Cullberg, 169 Cal. 365, 146 Pac. 888. The court having so ordered, and the appellants thereupon refusing to introduce any testimony, the court could not do otherwise than to deny the probate of the document offered as a will. Though the court had power to require that the contestant first prove his interest in the estate, it was not bound to do so. Estate of Land, 166 Cal. 540, 137 Pac. 246.

[3] No findings were necessary to support the order complained of. It was not a decision upon facts, but practically a nonsuit for want of any evidence. Under the circumstances, the question whether or not the con-

testant had sufficiently alleged that he was interested in the estate is immaterial.

The order is affirmed.

We concur: SLOSS, J.; LAWLOR, J.

176 Cal. 731

HOME SAV. BANK OF LOS ANGELES v. LOS ANGELES CITY REALTY CO. et al. (L. A. 4065.)

(Supreme Court of California. Dec. 14, 1917.)

1. Corporations 🔑232(2)—Subscription to Stock—Full Payment.

If a corporation issued 300 shares of its stock, of a par value of $100, in return for the transfer to it of notes and real estate valued by it at $30,000, the transaction having been entered into in good faith, the shares were fully paid.

2. Corporations 🔑232(2)—Subscription to Stock—Payment.

If a corporation issued 300 shares of its stock, of a par value of $100 each, to D. for notes and property turned over to the corporation at less than $20,000, it having been agreed between D. and B. that out of the shares issued to D., B. should have 100, and the property transferred by D. having been intended to pay for his own 200 shares, nothing had been paid on B.'s 100 shares transferred to him by D.

3. Corporations 🔑232(1) — Minutes of Company—Conclusiveness against Creditors.

The entry in the minutes of a corporation that 300 shares of stock had been paid for in full was not conclusive against creditors of the corporation entitled to disclose the true nature of the transaction between the company and the two subscribers to the 300 shares.

4. Appeal and Error 🔑1011(1)—Review—Conflicting Evidence.

The Supreme Court on appeal cannot say that the trial court, in resolving a conflict of testimony, should have believed the evidence offered by one side rather than the other.

5. Corporations 🔑269(3) — Payment for Shares—Sufficiency of Evidence.

In an action by a creditor of a corporation to recover unpaid subscriptions from stockholders, evidence *held* to warrant the finding that nothing had ever been paid on the 100 shares issued to one stockholder and transferred by him to another.

Department 1. Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Action by the Home Savings Bank of Los Angeles, a corporation, against the Los Angeles City Realty Company, a corporation, C. M. Du Vernet, J. A. Bullard, and others. From judgment for plaintiff against defendants Bullard and Du Vernet, and from an order denying his motion for new trial, defendant Bullard appeals. Judgment and order affirmed.

F. C. Austin and Samuel Barnes Smith, both of Los Angeles, for appellant. Goudge, Williams, Chandler & Hughes, of Los Angeles, for respondent.

SLOSS, J. Los Angeles City Realty Company (a corporation) made and delivered its promissory note for $5,000 to C. M. Du Vernet, who indorsed it to the plaintiff. The plaintiff, having recovered judgment against said realty company and Du Vernet for the amount of said note, brought this action against J. H. Bullard and others, as stockholders of the Los Angeles City Realty Company, to recover the unpaid subscriptions alleged to be due from them on their shares. The complaint alleged that Bullard had subscribed for, and was the owner of, 95 shares, of the par value of $100 each, for which nothing had been paid to the corporation. Judgment was sought against him and his codefendants for the amounts remaining unpaid on their several subscriptions, not exceeding the amount due on the judgment against the corporation. The defendants answered, alleging, among other things, that the shares of stock held by them had been paid for in full. Findings were waived, and judgment was entered in favor of plaintiff against J. H. Bullard and C. M. Du Vernet. J. H. Bullard appeals from the judgment, and from an order denying his motion for a new trial.

The only point made in support of the appeal is that the evidence does not support the implied finding that nothing had been paid on the 95 shares of stock owned by appellant. It appears that J. H. Bullard had been the owner of 200 shares of the stock of the corporation. One hundred shares were issued to him January 31, 1907. For these he paid, in cash, $10,000, the full par value of the stock. No liability was claimed with respect to this issue. One hundred other shares were transferred to Bullard by Du Vernet. They formed a part of 300 shares which had been originally issued by the corporation to Du Vernet. Of the 100 thus transferred to Bullard, 5 were owned by Kittie L. Austin, leaving in Bullard the 95 shares mentioned in the complaint.

[1] The point in dispute between the parties was whether the 300 shares issued to Du Vernet had been fully paid for by him. The appellant introduced evidence which tended to answer this question in the affirmative. The resolution of the board of directors of the corporation authorizing the issue of the 300 shares to Du Vernet declared that said shares were issued in consideration of the transfer by Du Vernet of certain notes and certain real estate, valued at $30,000. The appellant Bullard testified that this value had been placed upon the notes and realty so transferred, and that the corporation had accepted them at that value. According to Bullard they were worth more than $30,000. If the transaction between the corporation and Du Vernet was truthfully described in the resolution, and if it was entered into in good faith, the shares must be regarded as fully paid. But, on the other hand, Du Vernet, who was called as a witness by the respondent, testified that he had been engaged in business for himself before the organiza-

tion of the Los Angeles City Realty Company; that when the corporation was formed it was agreed between him and Bullard that out of the 300 shares issued to him he was to have 200 and Bullard 100; that the notes and real property turned over by Du Vernet to the corporation were, in fact, valued and taken at something less than $20,000, and were intended to pay for the 200 shares which were to go to Du Vernet. The 300 shares were issued to him, and 100 of them were taken by Bullard.

[2-4] If this testimony was true, it supported the finding that nothing had ever been paid on the 100 shares thus passing to Bullard. To be sure, the records of the corporation showed on their face that the 300 shares had been paid for in full. But the entry in the minutes was not conclusive against creditors of the corporation, who were entitled to disclose the true nature of the transaction. Herron Co. v. Shaw, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265. It is argued by the appellant that Du Vernet's testimony should not have been accepted by the trial court. Such an argument is futile here. There was nothing inherently improbable in the story told by Du Vernet. The trial court was simply called upon to resolve a conflict of testimony, and we cannot, on appeal, say that it should have believed the evidence offered by the one side, rather than the other.

[5] It may be added that the corporate records themselves are not altogether in accord with the appellant's claim. In February, 1908, about a year after the issue of the stock in controversy, the president made a report in which he stated that the company had, on February 1, 1907, "purchased the assets consisting of secured and unsecured notes and certain real estate of C. M. Du Vernet, amounting to $19,945.95." With this evidence to support the theory of the respondent, there can certainly be no force in the claim that the evidence did not warrant the finding complained of.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; LAWLOR, J.

(176 Cal. 734)

FARR v. WOLCOTT et al. (L. A. 4063.)

(Supreme Court of California. Dec. 14, 1917.)

1. BILLS AND NOTES 🔑523 — ASSIGNMENT AND TRANSFER—SUFFICIENCY OF EVIDENCE.

In an action on a note, evidence *held* insufficient to show the sale, assignment, and transfer of the note by the payee to plaintiff's transferror bank, and the indorsement, transfer, and delivery by the bank to plaintiff.

2. PLEDGES 🔑44—PLEDGE OF NOTE AS SECURITY—PAYMENT OF LOAN.

Where the payee of a note borrowed its amount from a bank on the security of the note, accompanied by his own guaranty in the form of his personal check, until the loan was paid the note remained in the bank's hands as a pledge, but when the payee repaid the loan the bank's lien was extinguished, and it held the note thereafter as a mere depositary for the payee.

3. BILLS AND NOTES 🔑511—EVIDENCE—MATERIALITY.

In an action on a note on which the payee borrowed its amount from a bank on its security, accompanied by his own security, the bank transferring the note for collection to plaintiff, the payee being the real owner of the note having paid the loan, the makers thereof were entitled to credit for any payments received by him, and evidence that he had been paid $5,000 collected by him, which he had agreed to apply on the indebtedness, was admissible.

Department 1. Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Action by Roy J. Farr against N. A. Wolcott and others. From a judgment for plaintiff, and an order denying their motion for new trial, defendants appeal. Judgment and order reversed.

Roland G. Swaffield, of Long Beach, and Stutsman & Stutsman, Tanner, Odell, Odell & Taft and Williams, Goudge & Chandler, all of Los Angeles, for appellants. F. C. Austin and Samuel Barnes Smith, both of Los Angeles, for respondent.

SLOSS, J. The complaint alleges that on May 16, 1910, the Los Angeles City Realty Company, a corporation, made, executed, and delivered its promissory note, whereby it promised to pay to the order of J. H. Bullard, trustee, on or before three years after date, the sum of $15,000, and interest payable monthly, with an option to the holder to declare the principal due on default in the payment of interest; that before the delivery of said note the defendants, by writing thereon, guaranteed the payment of the note in words as follows:

> "For value received, we jointly and severally guarantee payments of this note, and any renewal thereof and hereby waive protest, demand and notice of nonpayment. [Signed] N. A. Wolcott. E. M. K. Wolcott. F. A. King."

The complaint alleges that on July 1, 1912, and before maturity, J. H. Bullard, trustee, sold, assigned, and transferred the note to the United States National Bank; that in due course of business said bank indorsed said note and delivered same to plaintiff, who is now the lawful holder thereof. It is alleged that the maker of the note has defaulted in the payment of interest since January 16, 1911; that no part of the principal has been paid, except $151.19, and that the balance of the principal, together with interest from February 16, 1911, is due. Prior to the filing of the complaint the plaintiff exercised his option to declare the whole sum due, and demanded payment from the maker, which was refused.

N. A. and E. M. K. Wolcott answered jointly, and defendant King filed a separate answer. The answers deny, among other things, the making of the note, its transfer to the United States National Bank by Bullard, or by said bank to the plaintiff. They also deny the allegation of nonpayment of the note. The answers seek, in addition, to set up the invalidity of the note itself, and the rescission by the defendants of their guaranty because of fraudulent misrepresentations alleged to have been made to them. The court found that the note was made as alleged, and found in favor of the plaintiff on the allegations of nonpayment and of indorsement and delivery of the note. It also found that no fraudulent representations had been made by the payee to the defendants. There is a finding:

> "That the allegations of the defendants that said note was not duly executed are not true; * * * and that the defendants have no legal standing to question the execution thereof."

Judgment was entered in favor of the plaintiff as prayed, and defendants appeal from such judgment and from an order denying their motion for a new trial.

[1, 2] The bill of exceptions contains specifications of insufficiency of the evidence assailing, among other things, those regarding the sale, assignment, and transfer of the note by Bullard to the United States National Bank, and the indorsement, transfer, and delivery by the bank to the plaintiff. We think the attack upon these findings well founded. The only evidence of the transaction between Bullard and the United States National Bank was that of O. M. Souden, vice president of said bank. His testimony was, in effect, that Bullard came to him and asked if the bank would discount the note. Souden refused to do so. Bullard thereupon offering to guarantee the note, Souden told him that the bank would loan him money upon it if he would guarantee it. Bullard indorsed the note to the bank without recourse, and was immediately handed a check for $15,000. Bullard at the same time handed the bank his check for $15,000, which was the form agreed upon for his guaranty of the note. Bullard's check, which apparently was drawn on the United States National Bank, was passed through the bank's books the following day and charged to Bullard's account. The amount was applied to the payment of the loan which had been made to him.

> "As soon as the transaction was over," Mr. Souden testified, "the note was filed away for the account of Dr. Bullard. * * * We considered it as Dr. Bullard's property. When we cashed Dr. Bullard's check and marked this loan card paid, the loan which we had made to Dr. Bullard on that day was then and there paid."

While in the earlier part of his testimony Mr. Souden had said that the bank "bought the note," his later and more detailed explanation, of which we have given the substance, shows plainly that the real nature of the transaction was that Dr. Bullard borrowed $15,000 from the bank on the security of the note, accompanied by his own guaranty in the form of his personal check. Until this loan was paid, the note remained in the hands of the bank as a pledge. When, on the following day, Dr. Bullard paid the loan, the lien was extinguished, and the note was thereafter held by the bank as a mere depository for Dr. Bullard, the true owner. The indorsement to the plaintiff was concededly without consideration, and for purposes of collection only. There is no evidence that the bank, which was thus holding the note for Dr. Bullard, the true owner, had any authority to make a transfer of it for purposes of collection, or otherwise.

[3] But, if it could be inferred on the entire record that the transfer to plaintiff was made with the sanction and approval of Dr. Bullard, it still remains that the plaintiff, in suing the defendants on their guaranty, was acting as agent for Dr. Bullard, rather than for the bank. In this aspect it becomes important to consider the ruling of the court excluding evidence on an offer by the defendants to prove that $5,000 had been paid on the note by means of money collected by Dr. Bullard, which, as defendants claimed he had agreed with the maker of the note to apply upon this indebtedness. If, as we have endeavored to show, Dr. Bullard was the real owner of the note, and of the guaranty indorsed upon it, no question of bona fide holder can arise. He was certainly bound by his own act, and the defendants were entitled to credit for any payments actually received by him. It was manifest error to reject the proffered testimony.

Various other questions of interest are suggested, or suggest themselves. They are, however, not presented in the briefs with the care and thoroughness which their importance deserves. We shall not, therefore, at this time undertake to express any opinion regarding their merits. In preparation for a new trial it would be well for counsel on both sides to more fully investigate these points, among which we may mention: (1) The question of the right of the guarantors to attack the binding force of the note as against its maker; (2) whether the doctrine protecting a bona fide holder of negotiable paper taking for value before maturity has any application to a contract of guaranty like the one in suit; (3) whether a note payable to J. H. Bullard, trustee, is to be regarded in law as a note payable to the person named, as an individual, or may be shown to have been given to him in a representative capacity; (4) whether the fact (assuming that it could be shown) that Bullard was acting as trustee for another has any bearing on the validity of the corporate action authorizing the note, when it appears that Bullard's own vote as director was necessary to the passage of the resolution under which the note was made; (5) in what respects the liabilities of a guarantor whose contract has been written on a negotiable instrument differ from those of an indorser.

Some or all of these questions may become important on a new trial, and it is due to the trial court that they should be more adequately presented than they have been on this appeal.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; LAWLOR, J.

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177 Cal. 587

LEWIS v. HAYES et al. (S. F. 7561.)

(Supreme Court of California. Feb. 21, 1918. Rehearing Denied March 21, 1918.)

1. PARTNERSHIP 🔑199—ACTIONS—PARTIES.
   Plaintiff, in an action for damages for a libel published concerning her, could not recover for business losses sustained by a partnership of which she was a member, without joining the other members as plaintiffs, in view of Code Civ. Proc. § 382, requiring parties united in interest to join as plaintiffs.
2. APPEAL AND ERROR 🔑1066 — HARMLESS ERROR—INSTRUCTION.
   In a libel suit for publishing an article that plaintiff had leprosy, where there was no evidence from which the jury could have found that the article was privileged, an instruction that the article was not privileged could in no event be prejudicial to defendant.
3. LIBEL AND SLANDER 🔑124(8)—DAMAGES—INSTRUCTIONS.
   As in suit for publishing an article that plaintiff had leprosy, the amount of damages depended upon the extent of the defamation, the court properly submitted the question of damages without expression other than that implied from the statement that the article was libelous per se.
4. LIBEL AND SLANDER 🔑124(1)—MODIFICATION OF REQUESTED INSTRUCTIONS—"OBLOQUY."
   In suit for publishing an article stating that plaintiff had leprosy, that the court modified defendant's requested instruction that "the word obloquy is defined as blame, reprehension" by adding "a cause of disgrace or reproach" constitutes no cause for complaint.

[Ed. Note.—For other definitions, see Words and Phrases, Obloquy.]

Department 2. Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Carrie L. Lewis against E. A. Hayes and others. From a judgment for plaintiff and an order denying new trial, the Mercury Publishing Company appeals. Judgment modified and affirmed, and order affirmed.

Nicholas Bowden, of San Jose, for appellant. Louis Oneal and Owen D. Richardson, both of San Jose, for respondent.

VICTOR E. SHAW, Judge pro tem. Action to recover both general and special damages for a libel published by defendant and appellant of and concerning plaintiff. Judgment went for plaintiff, from which, and an order denying defendant's motion for a new trial, defendant appeals.

The case was here on a former appeal (Lewis v. Hayes, 165 Cal. 527, 132 Pac. 1022, Ann. Cas. 1914D, 148), to the opinion in which reference is made for a full statement of the facts involved.

The claim for special damages as set out in the complaint was based upon the fact that at the time in question plaintiff was engaged in keeping a rooming house and also conducted a dancing school, the revenues from both of which ventures were impaired. The jury by special verdict fixed plaintiff's damage for loss to the rooming house business at $300, and that for loss to the business of the dancing school at $700. The errors complained of relate chiefly to rulings of the court touching these special damages.

[1] In the course of the trial it was for the first time made to conclusively appear that plaintiff's sister was a partner with her in conducting both the rooming house and dancing school. Appellant insists that, since the loss was sustained by the copartnership, plaintiff alone could not maintain the action for the recovery of special damages suffered by her as a member thereof, and hence it is claimed the court erred in denying defendant's motion, seasonably made at the close of the evidence, to withdraw from the jury the issue as to special damages. This contention must be sustained. Any actual loss to plaintiff measurable in money was the result of damage to the copartnership business in which she and her sister Helen were jointly interested. Her special damage, as appeared from her testimony, was based solely and alone upon the damage to the business of the firm of which she was a member. If its business was damaged by any wrongful act of defendant, then, under section 382 of the Code of Civil Procedure, the partners jointly interested therein should be joined as plaintiffs in an action where recovery may be had for the whole injury to the copartnership business. The law will not tolerate a division of a joint right of action into several actions. Nightingale v. Scannell, 6 Cal. 506, 65 Am. Dec. 525; Hughes v. Boring, 16 Cal. 81. In 18 American and English Encyclopedia of Law, page 1055, the author says:

> "It is not, however, necessary that partners against or concerning whom words actionable per se have been uttered or published should join in seeking their remedy, for one partner may in a separate suit recover whatever damages have been caused to him by the libel or slander, but *he cannot recover for any special damage which has resulted to the firm as such.*" (Italics ours.)

See, also, Robinson v. Merchant, 7 Q. B. 918; Havemeyer v. Fuller, 60 How. Prac. (N. Y.) 316. Respondent, in support of the action of the court, has cited a number of cases, among them Rosenwald v. Hammerstein, 12 Daly (N. Y.) 377; Const. Pub. Co. v. Way, 94 Ga. 120. None of them, however, are applicable to the facts here presented, but are to the effect that, where the libelous article concerns both a partnership and its members individually, such individuals may sue separately for their individual damages, but, as said in Collier v. Postum Cereal Co., Ltd., 150 App. Div. 169, 134 N. Y. Supp. 847:

> "They do not hold that each may recover in separate suits the damages caused to him as a member of the firm"

—which is precisely what plaintiff is seeking to do in this action. It would seem clear that if the recovery sought by the individual partner was for special damage only arising from loss to the business, he could not maintain such action, since he would not be affected as an individual. Neither, where partners sue jointly for damages to the firm business, could they recover general damages sustained by each as individual members of the firm. As said in the case last cited:

> "We think that the converse of that proposition holds good, and that the true rule is that the damages to the copartnership must be recovered by the partners jointly, and that damages to the partners individually must be recovered by the partners separately; otherwise it would be necessary to have a partnership accounting in a libel suit, and we can perceive no reason for making a distinction as far as the point under consideration is concerned, between actions for libel and those for other torts, or even for breach of contract."

Our conclusion is that the court erred in not granting defendant's motion to withdraw from the jury all consideration of the question relating to special damages. Under her own testimony, plaintiff was not entitled to recover such damage, and the jury should have been instructed accordingly. This view renders it unnecessary to discuss other alleged errors touching the subject of such damage.

[2] Appellant complains of instruction numbered 5, wherein the court charged the jury that as a matter of law the publication of the article was not privileged. The evidence touching the character of the article is substantially the same as that offered on the former trial. On appeal from the judgment therein defendant insisted that the publication of the article was privileged within the meaning of subdivision 4, § 47, Civil Code. It was there said:

> "The article nowhere purports to be a report of any public official proceeding, or of anything said in the course thereof, nor was it, in fact, such a report."

There was no evidence upon which the jury could have found the article to be a privileged publication, and hence in no event could the instruction be deemed prejudicial.

[3, 4] The court instructed the jury that the publication complained of was, as a matter of law, libelous per se, and that upon proof of the falsity plaintiff was entitled to recover at least nominal damages, but that "you, however, are the sole judges as to the degree or extent to which the publication complained of was, and is, defamatory, or to which it exposed plaintiff to obloquy or caused her to be shunned or avoided." Objection is made to that part of the instruction inclosed in quotation marks, the ground therefor being that the jury was charged upon matters of fact. The article was, as stated, actionable per se. Simpson v. Press Pub. Co., 33 Misc. Rep. 228, 67 N. Y. Supp. 401. Plaintiff was entitled to at least nominal damages. The amount of damage, however, which she was entitled to depended upon the extent of the defamation and exposure to obloquy. Very properly this question was submitted to the jury without expression other than that as implied by the statement that it was libelous per se. Defendant's requested instruction that "the word obloquy is defined as blame, reprehension" was by the court modified by adding thereto the words "a cause of disgrace or reproach." The definition in substantial form so given by the court was approved in Bettner v. Holt, 70 Cal. 270, 11 Pac. 713, and finds support in the standard dictionaries, and hence constitutes no cause for complaint.

In so far as the trial and proceedings relate to the subject of plaintiff's general damage, which, as found by the jury, was $2,750, the record discloses no prejudicial error. As heretofore stated, however, the court erred in not granting defendant's motion to withdraw from the jury all consideration of the question of special damage arising out of the injury to the partnership business of plaintiff and her sister and on account of which claim for special damage the jury awarded her $1,000. To this extent the judgment is erroneous.

Therefore it is ordered that the judgment herein be modified by deducting therefrom as of the date of the entry thereof the sum of $1,000, and, as thus modified, the same, and the order appealed from, are affirmed.

We concur: MELVIN, J.; WILBUR, J.

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177 Cal. 555

PEOPLE ex rel. Board of State Harbor Com'rs v. SOUTHERN PAC. CO. (S. F. 7385.)

(Supreme Court of California. Feb. 18, 1918.)

1. PLEADING ⚷120(1)—SUFFICIENCY OF DENIALS—INCONSISTENT ALLEGATIONS.

In an action by the board of state harbor commissioners to recover possession of parcels of land alleged to constitute portions of Channel street in the city of San Francisco, an answer not expressly denying that the lands were portions of Channel street, but alleging that they constituted parts of block 22, as delineated upon a map of the beach and water lots of such city, put in issue the question whether the parcels were situated in Channel street or in block 22.

2. EVIDENCE ⚷383(9) — DOCUMENTARY EVIDENCE—WEIGHT AND EFFECT.

Such map showing that block 22 lay immediately northerly of and abutted upon Channel street and formed no part of such street, but giving no figures showing the width of the streets or the size of the blocks, constituted no evidence that the parcels described in the complaint were portions of Channel street.

3. MUNICIPAL CORPORATIONS 🔑695—STREETS — RECOVERY OF POSSESSION — BURDEN OF PROOF.

Conceding that the court would take judicial notice that the state was the owner of Channel street, the burden was on plaintiff to introduce evidence sufficient to establish the fact that the possession of the defendant complained of encroached upon Channel street, and, having failed to do this, a nonsuit was properly granted.

4. EVIDENCE 🔑23(2)—JUDICIAL NOTICE—OFFICIAL MAPS.

The court takes judicial notice of the Red Line Map of the beach and water lots of the city of San Francisco, but cannot take judicial notice of the extent of the possessions of the various persons occupying lands within the red lines.

5. NAVIGABLE WATERS 🔑1(7)—PRESUMPTION AS TO NAVIGABILITY.

Under Act March 26, 1868 (St. 1867–68, p. 355), providing that there should be a navigable canal in the middle of Channel street in San Francisco 140 feet wide, strips outside of the 140-foot channel are presumptively not in navigable water.

6. EVIDENCE 🔑10(1) — JUDICIAL NOTICE — GEOGRAPHICAL FACTS.

By Act March 26, 1851 (St. 1851, p. 307), the state granted to the city of San Francisco for 99 years the lots and blocks shown on a map of the beach and water lots of that city. Act March 26, 1868 (St. 1867–68, p. 355), provided for a navigable canal in the middle of Channel street 140 feet wide. St. 1877–78, p. 263, § 2, gave the board of state harbor commissioners jurisdiction over Channel street as far as the ebb and flow of tide water. *Held* that, assuming that some of the blocks granted to the city may not have been reclaimed, and that the tide still ebbs and flows over them, the court cannot take judicial notice that any particular block granted by the state to the city is still subject to the ebb and flow of the tide.

7. NAVIGABLE WATERS 🔑37(8)—LANDS UNDER WATER—GRANTS BY STATE—PRESUMPTIONS.

The presumption is that blocks granted by the state to the city of San Francisco for 99 years by the Act of March 26, 1851 (St. 1851, p. 307), even if within the ebb and flow of the tide, were not navigable, or that the public easement for navigation was intended to be abandoned as to them, and that consequently they are not now within the jurisdiction of the state harbor commission.

In Bank. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Three actions by the People, on relation of the Board of State Harbor Commissioners, against the Southern Pacific Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Daniel A. Ryan, of San Francisco, for appellant. Frank McGowan, of San Francisco, for respondent.

SHAW, J. Three cases pending in the superior court between the parties hereto, numbered respectively in that court 13097, 13099, and 13555, were, by stipulation of the parties, tried together upon the same evidence. They each involve the same questions of law and fact, but differ in regard to the description of property involved. The complaints state causes of action for the recovery of possession of parcels of land alleged to be portions of Channel street, in the city and county of San Francisco, and to be the property of the state of California. They are strips of land 30 feet wide, occupying spaces aggregating about 500 feet, running east and west, between Fifth and Sixth streets. The complaint alleges that Channel street is an arm of the bay of San Francisco, and has a width of 200 feet; that the tidewaters of the bay regularly ebb and flow over and upon the same, and that said street is dedicated to public use for navigation and commerce as a part of the navigable waters of the state; that the state is, and always has been, seised in fee and entitled to the possession thereof; that the relator is entitled to its possession and control as an agency of the state; and that the defendant is in possession of the said parcels, holding without right. The prayer was for the recovery of possession only.

The answer denies that Channel street is an arm of San Francisco Bay, or that tidewaters of the bay ebb and flow thereon, or that the state is the owner thereof. It also denies the dedication to public use, and denies that the state or any of its agents has the right to the possession or control thereof. It does not expressly deny the allegation that the lands described in the complaint are portions of Channel street. It avers that the defendant has acquired title to said parcels by adverse possession, and is now the owner thereof. It further alleges that said parcels of land constitute parts of block 22, as delineated upon a map of the beach and water lots of the city of San Francisco, known as the "Red Line Map," surveyed by William M. Eddy in 1851, which said lots and blocks were granted by the state of California to the city of San Francisco for the period of 99 years by the act of March 26, 1851 (Stats. 1851, p. 307, G. & S. p. 764), and that by mesne conveyances from the city of San Francisco the defendant has become the owner of all the right, title, and interest of said city therein, and is now lawfully entitled to the possession, and is in possession thereof, as successor in interest of said city.

Upon the trial plaintiff introduced in evidence the aforesaid Red Line Map, showing the relative positions of block 22 and Channel street. A witness then testified on behalf of the plaintiff that he was the engineer of the state harbor commission, and that he had examined the said Red Line Map, and was unable from the scale noted thereon to determine the length or width of the blocks thereon delineated. Upon this evidence the plaintiff rested its case. Thereupon the defendant moved the court for a judgment of nonsuit, on the ground that the plaintiff had not shown either the title, possession, or right of possession to the land described in the complaint. The motion was granted, and there-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

upon judgment was given in favor of the defendant for its costs. From this judgment the plaintiff prosecutes these appeals.

[1] The pleadings put in issue the question whether the parcels of land were situated in Channel street or in block 22. Burris v. People's Ditch Co., 104 Cal. 253, 37 Pac. 922. In order to make out its case it was necessary for the plaintiff to prove that they were in Channel street. The case was tried and submitted upon that theory. The act of 1851 under which the aforesaid Red Line Map was prepared purports to grant to the city of San Francisco, for the term of 99 years from March 26, 1851, the use and occupation of all the lots of land delineated on said Red Line Map. The right of possession of the said lots, block 22 being one of them, thereupon passed from the state to the city of San Francisco, except as modified by section 6 of the act, which declares that nothing therein shall be construed "as a surrender by the state of its right to regulate the construction of wharves or other improvements, so that they shall not interfere with the shipping and commercial interests of the bay and harbor of San Francisco."

[2, 3] The Red Line Map showed that block 22 lies immediately northerly of and abutting upon Channel street, and that it forms no part of that street. It constituted no evidence of the fact in issue that the parcels described in the complaint were portions of Channel street, unless supplemented by additional evidence showing the width of Channel street, and that the boundaries as set forth in the complaint, if extended thereon, would include portions of Channel street instead of portions of said block 22. The map gives no figures showing the width of the streets or the length and width of the blocks. The appellant in its brief admits that it does not show the width of Channel street, or of block 22. No other proof on the subject was offered. Conceding, as claimed, that the court will take judicial notice of the fact that the state is the owner of Channel street, the burden remained upon the plaintiff to introduce evidence sufficient to establish the fact that the possession of the defendant complained of encroached upon the legal boundaries of Channel street. Having failed to do this, the court properly granted the nonsuit.

[4-7] The appellant argues that all of the land inclosed within the Red Line Map was originally tideland belonging to the state; that the effect of the grant by the act of 1851 was to convey to San Francisco a 99-year estate in all the lots delineated on the map, but that those of the streets which were arms of the bay and constituted navigable waters remained in the control and possession of the state, notwithstanding that grant (People v. Williams, 64 Cal. 498, 2 Pac. 393); that one who asserts a change of the character of the land from tideland to upland must show the facts; and hence that the defendant has the burden of proving that its possessions were not a part of Channel street, but consisted of portions of block 22, and that, as the court had no judicial knowledge that the property in possession of the defendant was not within the boundaries of Channel street, it must presume that they were within that street, and that the plaintiff was entitled to possession thereof. We cannot see the force of this reasoning. The court takes judicial notice of the Red Line Map (Merritt v. Barta, 158 Cal. 381, 111 Pac. 259), but it cannot take judicial notice of the extent of the possessions of the various persons who occupy lands within the red lines. The act of March 26, 1868 (Stats. 1867–68, p. 355), declared that there should be a navigable canal in the middle of Channel street which was to be 140 feet wide. If Channel street was laid off to be 200 feet in width, which plaintiff alleged, but did not prove, the courses and distances given in the plaintiff's descriptions would bring the strips in controversy outside and northerly of this 140-foot channel, and presumptively they would not be in navigable water. Section 2 of the act of 1878 (Stats. 1877–78, p. 263) declares that the jurisdiction of the board of state harbor commissioners over Channel street shall extend as far as the ebb and flow of tidewater. The appellants argue that, as all of the land was originally under the ebb and flow of tidewater, any one who claims possession under the grant of 1851 must show that his land is above high tide, and that, in the absence of such showing, the court should have found that the parcels possessed by the defendant were under the ebb and flow of the tide, and consequently within the jurisdiction of the harbor commission. We need not determine here whether or not the grant of 1851 transferred to the city of San Francisco the power to exclude from navigation the blocks delineated upon the map, as distinguished from the streets, notwithstanding provisions of the act of 1878. Assuming that some of the blocks may not have been reclaimed, and that the tide still ebbs and flows over them, there is no law which requires the court to take judicial knowledge of the extent of such flow. The court cannot know that any particular block is still subject to the ebb and flow of the tide. The presumption from the grant of 1851 would be that the blocks, even if within the ebb and flow of the tide, were not navigable, or that the public easement for navigation was intended to be abandoned as to them, and consequently that they are not now within the jurisdiction of the state harbor commission. The evident purpose of the grant of 1851 was to enable the city of San Francisco to cause the said blocks to be put in possession of private individuals, who might possess and improve the same, and, during the term of the estate given to the city at least, exclude them from use for navigation. If the plaintiff claims otherwise with respect to the particular property in controversy, it was incumbent upon it to offer evidence to prove

that it constituted a part of the navigable channel.

The principles which control the rights of the state in tide lands, its powers to make dispositions of such lands, and the rights of municipalities to whom it has delegated the disposition, supervision, and control of such lands, have been the subject of extended consideration by this court in cases decided since the present action was begun. People v. California Fish Company, 166 Cal. 576, 138 Pac. 79; People v. S. P. Co., 166 Cal. 614, 138 Pac. 94; People v. S. P. Co., 166 Cal. 627, 138 Pac. 103; People v. Banning Co., 166 Cal. 630, 138 Pac. 100; People v. Banning Co., 166 Cal. 635, 138 Pac. 101; People v. Banning Co., 167 Cal. 643, 140 Pac. 587; People v. Banning Co., 167 Cal. 652, 140 Pac. 591; Patton v. L. A., 169 Cal. 521, 147 Pac. 141; Knudson v. Kearney, 171 Cal. 250, 152 Pac. 541. The last case cited deals particularly with the subject of dispositions of tidelands to the city of San Francisco in furtherance of navigation. The briefs in the present case discuss these questions extensively, and endeavor to apply the principles there laid down to the facts existing in this case. In view of the lack of evidence to prove possession, we do not think the questions arise, and therefore we decline to consider them.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; WILBUR, J.; RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

177 Cal. 598

In re RYAN'S ESTATE. (S. F. 8448.)

(Supreme Court of California. Feb. 23, 1918.)

1. WILLS 🔑421—JUDGMENT ADMITTING TO PROBATE—COLLATERAL ATTACK.

A judgment admitting a will to probate, from which an appeal was taken, and which had become final, could not be collaterally attacked by motion to strike on the ground that it was not a will.

2. JUDGMENT 🔑486(1) — COLLATERAL ATTACK.

A decree in a proceeding in rem pronounced by a court competently jurisdictioned is not absolutely void because it plainly disobeys the law.

Department 2. Appeal from Superior Court, Alameda County; Wm. H. Wells, Judge.

In the matter of the estate of John G. Ryan, deceased. Motion by James Reid and Mary Fitzgerald to strike from the records of the probate court the purported will of the deceased of which H. B. Mehrmann was proponent. From an order denying the motion, the contestants appeal. Affirmed.

George Ingraham, of Oakland, for appellants. Abe P. Leach and Harry E. Leach, both of Oakland, for respondent.

MELVIN, J. This is an appeal from an order denying the motion of appellants to strike from the records of the probate court the alleged and purported last will and testament of the deceased. It appears that in 1910 appellants filed in the superior court a contest of the will of John G. Ryan, deceased, and a petition for the revocation of the probate thereof. Respondent, Mehrmann, answered, a trial was had upon issue joined, and a judgment and decree was entered in favor of the said Mehrmann finding, among other things, "that said instrument contains the matters and things required by law to be contained and set forth in a last will." Subsequently an appeal was taken by these appellants to this court, and the judgment of the superior court had become final before the present motion was made.

[1] The sole contention of appellants is that the purported will is not in reality a will at all and disposes of no property. But this is a question which we need not discuss, because, in our opinion, the judgment and decree is invulnerable to collateral attack such as that which appellants seek to make in this proceeding. The superior court at the time it made the order admitting the will to probate not only had the instrument before it, but also had the advantage of parol evidence as to the attending circumstances connected with its execution. Mitchell v. Donohue, 100 Cal. 202, 34 Pac. 614, 38 Am. St. Rep. 279. But, aside from this fact, it is the rule in California that a judgment admitting a will to probate is a judgment in rem, and may not be thus collaterally attacked. Matter of the Will of Warfield, 22 Cal. 51; Rogers v. King, 22 Cal. 72; Estate of Twombley, 120 Cal. 350, 52 Pac. 815.

[2] Counsel for appellants seems to pin his faith upon the case of Blacksher Co. v. Northrop, 176 Ala. 190, 57 South. 743, 42 L. R. A. (N. S.) 454, in which the Supreme Court of Alabama held that a decree showing on its face that a will admitted to probate was not attested as required by statute is subject to collateral attack. Even if we were to follow the reasoning of that case, it would hardly be authority in California, particularly in view of the fact that in the opinion great stress is laid upon the point that the invalidity of the will appears upon the face of the decree, while in the matter at bar appellants sought to show the invalidity of the will by proof aliunde. In that case Mr. Justice McClellan filed a very powerful dissenting opinion in which, among other things, he said:

> "The idea that a decree in a proceeding in rem pronounced by a court competently jurisdictioned to so pronounce is absolutely void because it plainly disobeys the law is, it seems to me, a startling proposition, the consequences of which will be, if applied, profound, widespread, and recurrently surprising. Res judicata, as referred to collateral assailment, becomes a shadow merely, instead of a wholesome and im-

peratively necessary doctrine, if such an idea finally and fully prevails."

With these sentiments we thoroughly agree, but, even if we were inclined to follow the reasoning of the majority of the court in that case, we would find ourselves confronted by a different doctrine established for many years in California.

It follows that the order appealed from must be affirmed; and it is so ordered.

We concur: VICTOR E. SHAW, Judge pro tem; WILBUR, J.

(176 Cal. 711)

MAHAFFEY et al. v. INDUSTRIAL ACCIDENT COMMISSION. (S. F. 8362.)

(Supreme Court of California. Dec. 14, 1917.)

MASTER AND SERVANT 🔑385(1)—WORKMEN'S COMPENSATION ACT—FIXING ANNUAL EARNINGS.

Employment in the work of cleaning roofs, preliminary to painting them, in which an employé was injured, being irregular and only occasional, his average annual earnings are to be fixed, not according to the method provided by Workmen's Compensation Act (St. 1913, p. 279) § 17, subds. 1, 2, as amended by St. 1915, pp. 1086, 1087, both of which contemplate a kind of employment that is permanent and steady, but according to subdivision 3, as amended by St. 1915, p. 1087, providing that, where the foregoing methods cannot reasonably and fairly be applied, such earnings shall be taken at such sum as shall reasonably represent his average annual earning capacity in the kind of employment in which he was injured, or in any employment comparable therewith, but not of a higher class, which sum must be arrived at by ascertaining from evidence what his earning capacity in fact was.

In Bank. Certiorari by N. W. Mahaffey and another against the Industrial Accident Commission. Award annulled, and proceedings remanded.

Redman & Alexander, of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondent.

SLOSS, J. Certiorari to review an award of the Industrial Accident Commission. Mahaffey, one of the petitioners, was a contractor. In the performance of contracts for repairing and painting roofs, he sometimes found it necessary, before painting a roof, to have the moss and dirt scraped from the shingles. Rees was employed by Mahaffey to do work of this character, and while so employed fell from a roof and was injured. The commission found he had sustained a permanent partial disability equal to 25¼ per cent. of total disability, entitling him to a disability indemnity of 65 per cent. of his average weekly earnings for a period of 101 weeks. Workmen's Comp. Act, § 15. The average annual earnings were found to be $900, and the average weekly earnings $17.31. Certain payments having already been made before the institution of the proceedings, the commission found the balance due to be $209.50. The petitioners, who are the employer and his insurance carrier, attack the award upon the ground principally, that the evidence does not sustain the finding with respect to Rees' average weekly earnings.

Rees was 68 years of age, and not engaged in any fixed or steady employment. He owned some improved real property, and devoted part of his time to its care and repair, and to looking after some property belonging to his wife. He also took occasional jobs from Mahaffey in cleaning roofs, and was sometimes employed casually by others in different kinds of work. He was paid by Mahaffey at the rate of $3 a day. The work of cleaning roofs was, however, intermittent in character, and it is clear from all the testimony that Rees was not engaged in it for more than 15 to 20 days a year. Mahaffey had hired other men to do work of the same kind; but, as he testified, it was a special kind of work, and he could not readily "pick up" men to do it. The evidence in the record, and every inference that may fairly be drawn, indicate that employment of this kind was occasional and irregular, and that neither Rees nor any one else was employed steadily at it.

The commission fixed the employé's annual earnings at 300 times his daily wage. This, we think, was not in accord with the statutory provision applicable to the case shown by the evidence. Under section 17 of the Workmen's Compensation Act, weekly earnings shall be one fifty-second of the average annual earnings, and average annual earnings are to be arrived at as follows:

> "(1) If the injured employé has worked in the same employment, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily earnings, wage or salary which he earned as such employé during the days when so employed.
>
> "(2) If the injured employé has not so worked in such employment during substantially the whole of such immediately preceding year, his average annual earnings shall consist of three hundred times the average daily earnings, wage or salary which an employé of the same class, working substantially the whole of such immediately preceding year, in the same or a similar kind of employment, in the same or a neighboring place, earned during the days when so employed.
>
> "(3) In every case where for any reason the foregoing methods of arriving at the average annual earnings of the injured employé cannot reasonably and fairly be applied, such annual earnings shall be taken at such sum as shall reasonably represent the average annual earning capacity of the injured employé at the time of the injury in the kind of employment in which he was then working, or in any employment comparable therewith, but not of a higher class."

Subdivision 1 obviously cannot be looked to in the present case, because Rees had not worked in this employment during substantially the whole of the preceding year. The commission seems to have gone on the view that subdivision 2 was the governing provision. But we think this subdivision equally inapplicable. Under its terms the annual earnings are measured by 300 times the daily earnings of an employé of the same class working substantially the whole of the preceding year in the same or a similar employment. As we have indicated, there is no evidence that any one else engaged in this employment or a similar one did or could work during substantially the whole of the year. Both subdivisions 1 and 2 contemplate a kind of employment which is permanent and steady, and which, for that reason, affords to an employé the possibility, at least, of earning annually an amount measured by the number of working days in a year, estimated and fixed by the act at 300. Where this kind of employment is not shown to exist, the case falls within subdivision 3, under which the annual earnings are to be taken as the sum which will "reasonably represent the average annual earning capacity" of the employé "in the kind of employment in which he was then working, or in any employment comparable therewith, but not of a higher class." Under this subdivision, the amount of annual earnings is not reached by multiplying the employé's daily earnings by any arbitrary figure, but by ascertaining from the evidence what his earning capacity in fact was. The evidence before the commission did not show that Rees could have earned in the employment in question, or in any employment comparable to it, anything more than the amount which he had actually earned in the past, which was but a fraction of the amount fixed by the commission as his average annual earnings. The award must therefore fall, inasmuch as the commission's authority to make an award depends upon evidence tending to show the existence of the conditions justifying the award.

The award is attacked upon a further ground, but this, we think, involves merely a question of fact, upon which the commission's finding is conclusive if it have any support in the record. The finding is not without such support.

The award is annulled, and the proceeding remanded to the commission for further proceedings not inconsistent with the views herein expressed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

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177 Cal. 570

TURNER et al. v. EAST SIDE CANAL & IRRIGATION CO. (Sac. 2742.)

(Supreme Court of California. Feb. 20, 1918.)

1. COSTS 🔑222 — ALLOWANCE — STATUTES —CHANGE OF RULES.

Although, when a brief was printed, recovery of expense therefor as costs was not lawful, such may be so allowed under provisions of Code Civ. Proc. § 1027, which later, but before decision on appeal, went into effect; costs being but an incident to a judgment.

2. COSTS 🔑254(1) — APPEAL — EXPENSE OF TRANSCRIPT—"ACTUALLY PAID OUT IN CONNECTION WITH APPEAL."

In view of Code Civ. Proc. § 1027, specifying "amounts actually paid out," where appellant used a transcript of the evidence, which she secured and paid for prior to the judgment appealed from, and was at no expense therefor thereafter, the expense of such transcript cannot be taxed as costs on appeal.

In Bank. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Elizabeth Turner, administratrix of William C. Turner, deceased, and others, against the East Side Canal & Irrigation Company, a corporation. After judgment, appeal, and reversal (169 Cal. 652, 147 Pac. 579), order was made denying defendant's motion to tax costs, from which it appeals. Reversed, with directions.

James F. Peck, of San Francisco (Charles W. Byrnes, of San Francisco, of counsel), for appellant. Edward F. Treadwell, of San Francisco, Frank H. Short, of Fresno, and George F. Buck, of Stockton, for respondents.

ANGELLOTTI, C. J. On an appeal by the plaintiffs in this action the part of the judgment appealed from was reversed. 168 Cal. 103, 142 Pac. 69. Upon the going down of the remittitur the plaintiffs filed a memorandum of their costs on appeal. A motion to have costs taxed by the court was made by defendant, and this motion was denied. We have here an appeal by defendant from the order denying this motion.

[1] The appeal presents the question of the right of plaintiffs to recover as costs of the appeal the amounts shown by two items of the memorandum of costs. The statute in force at the time the decision of reversal by this court was rendered (June 29, 1914) was, so far as material, as follows:

> "The party entitled to costs, or to whom costs are awarded, may recover all amounts actually paid out by him in connection with said appeal and the preparation of the record for the appeal, including the costs of printing briefs; provided, however, that no amount shall be allowed as costs of printing briefs in excess of fifty dollars to any one party." Section 1027, Code Civ. Proc.

The memorandum of costs included an item of $50, being part of the cost of printing plaintiffs' brief on their appeal. The objection to this item is that at the time the brief was printed and filed there was no law authorizing the recovery of any part of the expense thereof as costs. After such filing and prior to our decision of reversal the statute was amended to read as hereinbefore set forth. Defendant's claim is that the statute may not be read as applicable to briefs printed and filed prior to the taking effect of the amendment. Precisely the situation here presented was presented in Cain v. French, 29 Cal. App. 725, 156 Pac. 518. On the theory that costs are but an incident of a judgment, and that the rule pertaining to their allowance may be changed or modified by statute during the pendency of the proceeding, it was held by the District Court of Appeal of the First District that the statute in force at the time the judgment on the appeal is given controls, and that the party was therefore entitled to recover the cost of printing the brief, not exceeding $50. A petition for a hearing in this court, was denied. That costs are but an incident to the judgment has many times been declared, as it was in Begbie v. Begbie, 128 Cal. 154, 60 Pac. 667, 49 L. R. A. 141, where it was also said that their recovery is governed by the statute in force at the time the right to have them taxed accrued. This appears to be the general rule. In so far as costs on appeal are concerned, this time, as was held in Eaton v. Southern Pacific Co., 31 Cal. App. 379, 160 Pac. 687, is the time of the rendition of the judgment on appeal. We think the question presented was correctly decided in Cain v. French, supra. It follows that the lower court did not err in allowing this item.

[2] The other item was one of $882.60, being for "Preparing record on appeal, transcript of testimony, 8,826 folios, at 10cts., $882.60." It sufficiently appears from the affidavit of one of the plaintiffs' attorneys that no amount whatever was actually paid out, or, indeed, any pecuniary liability incurred, in the matter of this transcript of testimony at any time after the judgment appealed from was given, or, so far as appears, with any view to taking any appeal. At the time of the trial, which, according to the affidavit, commenced in the year 1906, the trial court ordered the testimony written up at the expense of the parties for the purposes of the trial, and plaintiffs at the same time ordered an extra copy for their own use, thereby obtaining the same at one-half the rate charged for a single copy. The amount charged and then paid by plaintiffs to the shorthand reporter for this extra copy was $882.60, and it is this payment that plaintiff seeks to recover as costs of appeal. Subsequently the judgment was given against plaintiffs, and they, in due time, took their appeal. On that appeal plaintiffs presented the record provided by section 953a et seq. of the Code of Civil Procedure (enacted in 1907), which includes a transcription of the notes of the shorthand reporter of the proceedings at the trial, certified by him and settled by the judge. To procure such a record, which will be available for use on an appeal, it is essential that the party preparing to appeal shall, within a specified time after judgment, file a demand for the preparation of the same, in pursuance of which the reporter transcribes his notes and certifies the same, being paid by such party the charge allowed by law therefor. Such a payment, of course, can be recovered as a cost of appeal, being an amount actually paid out in the preparation of the record on appeal. In the case at bar the plaintiffs, having made the demand, arranged with the reporter to use, in making up his transcript, their copy which they had obtained and paid for during the trial. This was done, and, as we have said, it sufficiently appears that nothing whatever was paid out by plaintiffs on account thereof. It would have cost double the amount to have had the reporter prepare a new transcript in the usual way for the purposes of the appeal, and the whole thereof would have been recoverable as costs. Defendant has not waived, by stipulation or otherwise, the right to object to this item of alleged costs. The question is whether, under these circumstances, the original cost of the transcript to the plaintiffs can be recovered by them as costs of appeal.

We are satisfied that, in view of the language of our statute (section 1027, Code Civ. Proc.), and notwithstanding much apparent reasonableness in plaintiffs' claim, this question must be answered in the negative. The right to recover costs exists solely by virtue of statute (Begbie v. Begbie, 128 Cal. 154, 60 Pac. 667, 49 L. R. A. 141), and warrant for their recovery must be found in some statute. In the absence of statutory authorization, it cannot avail that under the circumstances of a particular case it appears to a court that a charge is, as matter of fact, fair and reasonable. Our statute regarding this matter is plain and unambiguous, and clearly confines the recovery of costs of appeal to "amounts actually paid out * * * in connection with said appeal and the preparation of the record for the appeal, including the costs of printing briefs," etc. We are utterly at a loss to see how, upon the facts here shown, it can reasonably be held that, in so far as this transcript is concerned, any amount was "actually paid out," either "in connection with said appeal" or in "the preparation of the record for the appeal." By reason of the fact that plaintiffs, at the time the judgment against them was given, already had a transcript of the proceedings of the trial and were able to arrange with the reporter without cost to them to certify that transcript, they were put to no cost whatever by reason of the appeal, in so far as the preparation of a record for the appeal was concerned. The record for the appeal under section 953a, in so far as the reporter's transcript is concerned, is the transcript furnished by him in response to the legal demand therefor, made after judgment and within the time and in the manner specified in the section. When the record is prepared under this section, it is the money that the appellant is actually compelled to pay out to obtain this record that he is entitled to recover. If perchance he is able, by arrangement with the reporter, to so utilize in the preparation of the reporter's transcript material that he had acquired before judgment and then owns, that the reporter's charge will be lessened, or, as here, entirely obviated, so much the better for all parties, for him in the event that he loses on appeal, and for the adverse party in the event that he wins. But the original cost of that material is not an expense to which he was put by reason of the appeal (Bank of Woodland v. Hiatt, 59 Cal. 580), and was not money actually paid out in connection with the appeal or in the preparation of the record for the appeal. While the facts are somewhat different, the expense of this transcript was just as must "purely an expense in the conduct of the case in the superior court and * * * not a part of the preparation of the record for the appeal," as was the transcript in Eaton v. Southern Pacific Co., 31 Cal. App. 379, 160 Pac. 687, and this, altogether regardless of whether it was a legitimate item of costs in that court. It was not a cost of appeal. In view of the plain language of our statute, we cannot adopt the view enunciated in Akerly v. Vilas, 23 Wis. 628. It follows, from what we have said, that the item in question should not have been allowed.

There is no force in the claim that the cost bill was not properly verified.

The order appealed from is reversed, with directions to the court below to disallow the item of $882.60 for transcript of testimony, and to tax plaintiffs' costs on said appeal at the sum of $80.75.

We concur: WILBUR, J.; MELVIN, J.; SLOSS, J.; SHAW, J.; VICTOR E. SHAW, Judge pro tem.; RICHARDS, Judge pro tem.

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177 Cal. 550

THOMAS v. FURSMAN et al. (S. F. 7569.)

(Supreme Court of California. Feb. 18, 1918.)

1. ACKNOWLEDGMENT ⚿54—EFFECT—"EXECUTION."

Under Code Civ. Proc. § 1933, providing that the execution of an instrument is the subscribing and delivering of it, with or without affixing a seal, section 1948, providing that every private writing, except last wills and testaments, may be acknowledged, or proved and certified, in the manner provided for the acknowledgment of conveyances of real property, and section 1951, declaring that every instrument conveying or affecting real property, acknowledged and proved, or certified as provided, may, together with the certificate of acknowledgment or proof, be read in evidence without further proof, an assignment of a cause of action, duly acknowledged in the same manner as a conveyance of real property, where uncontradicted and produced by the assignee, requires a finding of due execution and delivery.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Execute.]

2. NEW TRIAL ⚿108(3)—NEWLY DISCOVERED EVIDENCE—RIGHT TO NEW TRIAL.

Where, on defendant's testimony, the court found that a person to whom plaintiff's assignor furnished supplies and materials was not defendant's agent, newly discovered evidence that after such finding defendant commenced an action, filing a verified complaint alleging that such person was his agent, necessitates a new trial, for it is obvious that defendant must either have falsely testified, or made a false affidavit.

In Bank. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by Floyd C. Thomas, substituted for M. A. Varney, against H. C. Fursman and others. From a judgment for defendant Waymire, and an order denying new trial, plaintiff appeals. Reversed, and cause remanded for new trial.

Joseph K. Hutchinson and Walter Slack, both of San Francisco, for appellant. H. L. Clayberg and Clayberg & Whitmore, all of San Francisco, for respondents.

RICHARDS, Judge pro tem. This is an appeal from a judgment in favor of the defendant R. Waymire, and from an order denying the plaintiff's motion for a new trial. The action was brought to recover for services rendered and for machines, materials, and supplies furnished by one M. A. Varney to the defendants in connection with the performance of certain annual assessment work upon certain placer mining claims at Searles Lake in San Bernardino county; said claims having each been located in the name of one or other of the several defendants herein. These several locations appear to have been made by one Henry E. Lee, acting on behalf of each of the defendants in the making thereof, and the plaintiff alleged that he had been employed by said Henry E. Lee as the agent of each of said defendants to furnish, equip, and operate two automobiles, which were to be used in transporting the necessary men, material, and supplies required in doing the annual assessment work of each of the defendants upon these claims. The defendant Waymire in his verified answer denied the authority of said Lee to act as his agent in the employment of the plaintiff, or to use the machines, materials, or supplies alleged to have been furnished by him. The cause came on for trial in the early part of the year 1914, and on April 13th of that year the trial court made a minute order directing judgment in favor of the plaintiff and against the defendant Waymire. The action had originally been begun in the name of said Varney, but in the meantime and prior to said order for judgment the plaintiff had made an assignment of his claim to Floyd C. Thomas, who, after said order for judgment, moved the court for permission to have himself substituted as plaintiff in the action, and also for leave to file an amended complaint setting up such assignment, and also correcting certain other discrepancies in the original complaint. The court granted said motion, and after such amendment had been made and on June 14th filed its findings and judgment in favor of the substituted plaintiff in the action.

On the same day the defendant Waymire served and filed a notice of motion to set aside the judgment just entered against him, upon the ground, among others, that no copy of the complaint as amended had been served upon him. The court granted said motion and permitted the defendant Waymire to answer the amended complaint. This he did, at first by way of demurrer, which the court overruled; whereupon he filed an answer, repeating his former denials and further denying the sufficiency of the assignment of the cause of action. The court thereupon proceeded to hear evidence upon the issue presented as to the genuineness and due execution of said assignment and as to the delivery thereof, with the result that judgment was ordered in favor of the defendant Waymire, the court making general findings in his favor upon the issue of the alleged want of authority in Lee to act as his agent in the employment of the plaintiff's assignor, or in the use of the machines, material, and supplies alleged to have been furnished by the latter. The court also particularly made its finding in favor of Waymire upon the issue as to the due execution and delivery of the assignment, holding that due execution or delivery of such assignment had not been proven.

The plaintiff in due time moved for a new trial upon a number of grounds, among which was the insufficiency of the evidence to justify the finding of the court that no proper delivery of the assignment in question had been shown, and upon the further ground of newly discovered evidence. In support of this latter ground the plaintiff filed an affidavit setting forth the fact that after the trial of the cause, wherein the defendant Waymire had testified that Henry E. Lee was not his authorized agent in making the arrangements with the plaintiff's assignor upon which this suit was predicated, he (Waymire) had commenced an action against several of his former associates in the matter of making the locations at Searles Lake and of doing the assessment work thereon, and that in his verified complaint in said action, which was made a part of said affidavit, said Waymire had averred explicitly that the said Henry E. Lee was his duly authorized agent in relation to all such matters. The plaintiff's motion for a new trial having been denied upon all the grounds stated, he prosecutes this appeal from the judgment and order so made.

[1] In support of the appellant's contention that the trial court was in error in its finding to the effect that the due execution and delivery of the assignment of the original plaintiff's cause of action to the substituted plaintiff and present appellant herein had not been proven, appellant called attention in his opening brief herein to the fact that the written assignment in question had been produced in court by the attorney of record originally for the assignor, but at the time of trial for the assignee, who knew nothing of his own knowledge as to the signature of the assignor or as to the delivery of the assignment, his only knowledge upon the subject being derived through correspondence with certain other attorneys who had retained him to represent the original plaintiff, and from whom he had received the assignment in question. It is, to say the least, very doubtful, whether this evidence standing alone in the record would have been sufficient to have supported a finding as to the due execution and delivery of the assignment in question; but upon petition for rehearing the appellant for the first time directs our attention to the fact, as shown in the record, that the assignment in question was acknowledged before a notary public, who had duly certified to the execution thereof by the assignor.

This additional showing being entirely uncontradicted puts a new phase upon the situation, and furnishes sufficient prima facie proof of the due execution and delivery of the assignment in the absence of evidence to the contrary. Section 1933 of the Code of Civil Procedure provides that:

> "The execution of an instrument is the subscribing and delivery of it, with or without affixing a seal."

Section 1948 of the Code of Civil Procedure provides that:

> "Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment or proof of conveyances of real property, and the certificate of such acknowledgment or proof is prima facie evidence of the execution of the writing in the same manner as if it were a conveyance of real property."

Section 1951 of the Code of Civil Procedure provides that:

> "Every instrument conveying or affecting real property, acknowledged or proved and certified, as provided in the Civil Code, may, together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding without further proof."

The assignment in question having been thus duly acknowledged and attested and having been produced in court from the possession of the assignee, and there having been introduced no evidence whatsoever to controvert the prima facie showing of the due execution and delivery of said assignment thus made, the trial court was in error in making its finding contrary to the facts thus proven.

[2] The other points urged by the appellant as grounds for a reversal relate, with one exception, to matters of procedure during the trial of the cause and are not of sufficient merit to require consideration here. The appellant, however, contends that the court improperly denied his motion for a new trial upon the ground of newly discovered evidence, and since this point relates directly to

the credibility of the defendant Waymire, upon whose testimony as a witness at the trial the court made its finding to the effect that Henry E. Lee was not the authorized agent of said Waymire in making the engagements with the plaintiff's assignor out of which this action arose, the appellant's contention in this regard merits consideration here. Upon the trial of the cause the defendant Waymire testified in positive terms that said Henry E. Lee was not his agent, and had no authority as such to engage the services or use the machines, material, or supplies of the plaintiff's assignor as set forth in the complaint. Upon his testimony as thus given the court found in his favor upon this issue. Upon motion for a new trial the plaintiff produced the verified complaint of said Waymire in an action commenced by him subsequently to his testimony as thus given, wherein said Waymire explicitly averred that said Henry E. Lee was his duly authorized agent at all of the times and in relation to all of the matters wherein the services of the plaintiff's assignor had been enlisted. This showing was undisputed by the said defendant Waymire, and in our opinion it furnished, in view of the circumstances of this case, a compelling answer why the plaintiff's motion for a new trial should have been granted, since it showed that the defendant Waymire had certified falsely either as a witness at the trial of the instant case or as a complainant in the subsequent one.

Upon both of the foregoing grounds, therefore, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; WILBUR, J.

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177 Cal. 537

In re BRADY'S ESTATE.

BRADY et al. v. BROPHY et al.

(S. F. 8431.)

(Supreme Court of California. Feb. 18, 1918. Rehearing Denied March 18, 1918.)

1. EXECUTORS AND ADMINISTRATORS ⚷10 — JURISDICTION TO APPOINT — RESIDENCE — EVIDENCE.

Evidence *held* to show that deceased's residence was in Marin county and not in San Francisco, so that the court was without jurisdiction to appoint administratrices in the county of San Francisco.

2. EXECUTORS AND ADMINISTRATORS ⚷10 — JURISDICTION TO APPOINT—RESIDENCE—EVIDENCE.

Where deceased deliberately changed his residence from San Francisco to Marin county, indicating such change by having his registration as a voter in San Francisco county canceled and by registering in Marin county, the entry of his name in telephone books by his daughter as a resident of San Francisco was entitled to no weight in determining his residence.

Department 1. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Proceedings in the estate of William J. Brady, deceased. From an order appointing Elizabeth F. Brophy and another as administratrices of the estate, Edward R. Brady and another appeal. Reversed.

Metson, Drew & Mackenzie, of San Francisco (E. H. Ryan, of San Francisco, of counsel), for appellants. Walter H. Linforth and Charles F. Hanlon, both of San Francisco, for respondents.

SHAW, J. This is an appeal from an order appointing the respondents administratrices of the estate of William J. Brady, deceased.

Brady died in the city and county of San Francisco, on April 11, 1917. The respondants Elizabeth F. Brophy and Gabrielle G. Traynor, daughters of said decedent, filed a petition in the San Francisco superior court, asking that they be appointed administratrices of said estate. The appellants Edward R. Brady, a son, and Mary L. Hyde, a daughter of said decedent, appeared in opposition to the application, and alleged that at the time of the death of said decedent he was not a resident of the city and county of San Francisco, but was a resident of the county of Marin, and that in consequence thereof the superior court of the city and county of San Francisco had no jurisdiction of the estate. The only question presented upon this appeal is whether or not the said decedent was a resident of San Francisco or a resident of the city of Ross in the county of Marin. The finding of the court was that he was a resident of San Francisco, and thereupon letters were issued to the respondents as prayed for. The substance of the evidence may be briefly stated.

For some 20 years prior to his death Brady had owned a house which he occupied as a home, at 182 Devisadero street, in San Francisco, and another house situated in the city of Ross, in the county of Marin, which he also occupied as a home, spending five or six months of each year during the winter in San Francisco, and five or six months during the summer in Ross. Until the year 1914 he claimed the city of San Francisco as his residence, and registered as a voter and voted there. His habit of life during all these years was, as above stated, to live about half of each year in San Francisco, and the other half in Ross. During the time he lived in San Francisco he frequently went to Ross at week-ends, and remained there a day or two, returning then to San Francisco. It was also his habit while he stayed in San Francisco to go to Ross each day and return to San Francisco in the evening. He kept a large part of his clothing in Ross while sleep-ing in San Francisco. In July, 1914, he had his registration in San Francisco canceled, and registered as a voter in Marin county, stating in his affidavit for that purpose that his residence was at the city of Ross. He had nine children, including the two respondents, seven of whom resided in and about San Francisco. The two respondents did not testify. The other five children living near San Francisco testified as witnesses, declaring that at the time of changing his registration, and afterwards, the decedent repeatedly said to them that he had changed his residence from San Francisco to Ross with the purpose of becoming a citizen of Ross. In pursuance of this intent and under this registration he voted at Ross in that year at the primary election, and also at the general election. Thereafter, in February, 1916, he again registered as a voter in the county of Marin, declaring that his residence was in precinct No. 2, in the city of Ross. In pursuance of this registration he again voted in that city at the primary election in August. He also told Mr. Metson and Mr. Drew, the only other persons who testified, that he was a resident of Ross, and that he voted there. This was all the evidence on the subject of his residence, except the telephone books and the San Francisco City Directories for 1914, 1915, and 1916, each of which showed an entry of his name, and gave his residence at 182 Devisadero street, San Francisco. There was no proof, however, that either of these entries was authorized by him, but his daughter, Mrs. Hyde, who lived with him and kept house for him, testified that she had his name put in the telephone book because nobody knew where to find him, and that her father never used the telephone. There was also admitted in evidence a notice of his death, published thereafter in a newspaper, and a certificate from the California state board of health, showing the report of his death made by his son, Edward R. Brady. Each of these documents stated that his residence was 182 Devisadero street. Each of course was prepared after his death.

[1] We do not think that the court below was justified from this evidence in finding that the deceased, at the time of his death, was a resident of San Francisco. His habit of living a part of the time in San Francisco, and a part of the time in Ross, and of maintaining substantially the same sort of an establishment at each place, made the place of his residence depend upon his intention as manifested by his acts and declarations on the subject. The outward evidences as to his residence were the same with respect to each place. He had the absolute right to fix the place of his residence at either place as he chose.

[2] The evidence that he did change the place of his residence from San Francisco to Ross is positive, clear, and convincing, and it comprises all the substantial evidence on the subject. A court is not at liberty to overrule the determination of the decedent, or to disregard such evidence, in the absence of any substantial evidence to the contrary. The entries in the telephone books were first inserted in 1914, and they were explained by the testimony of Mrs. Hyde that she had them inserted so that people would know where to find him in San Francisco. The entries in the directories were not shown to have emanated from Brady, and, in the face of his conduct and declarations as to his residence in Ross, they are entitled to no weight as evidence of legal residence. The presumption that a person is innocent of crime is very strong, and it is not to be assumed, in the absence of substantial evidence of the fact, that Brady committed perjury in making his affidavits of registration. The fact that his original place of residence was San Francisco is of no force to raise the presumption that it continued to be there after the year 1914, as against the positive evidence that in that year he deliberately changed it to the city of Ross. The evidence does not support a finding that at the time of his death he was a resident of San Francisco.

The order is reversed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

177 Cal. 560

RANSOME-CRUMMEY CO. v. BENNETT et al. (S. F. 6859.)

(Supreme Court of California. Feb. 20, 1918.)

1. MUNICIPAL CORPORATIONS ⚷567(2)—COMPLAINT—CONSTRUCTION.

Complaint in action to foreclose lien of assessment for street improvement must be held sufficient as against objection that it shows that the resolution of intention for the work was fatally defective in its description of the location of the proposed work; it being impossible to say from the face of the description that it is either void or uncertain.

2. MUNICIPAL CORPORATIONS ⚷567(2) — STREET IMPROVEMENT — ASSESSMENT — COMPLAINT.

Complaint in action to foreclose lien of assessment for street improvement should show compliance with the requirement of the charter that the bid be accompanied by "noncollusion" and "nonprivate agreement" affidavits.

3. APPEAL AND ERROR ⚷1169(3)—AFFIRMANCE FOR DEFECT IN COMPLAINT—JUDGMENT FOR DEFENDANT ON MERITS.

Though by omission of an allegation, a complaint does not state facts sufficient to constitute a cause of action, and general demurrer thereto was improperly overruled, yet the record making it manifest judgment for defendant, after a trial on the merits, was in no way based on or due to any defect in the complaint, it will not be sustained on the ground of insufficiency of the complaint; it not appearing it cannot be amended to obviate the defect.

4. Municipal Corporations 🔑46 — Freehold Charter—"Amendment."

A city's freehold charter adopting as part thereof the general street law as amended "and as hereafter amended," a subsequent repeal of part of such law, while taking away the power thereby conferred, is not an amendment of the charter within Const. art. 11, § 8, limiting method of amendment to election.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Amendment.]

5. Municipal Corporations 🔑408(2)—Improvements—Exemption—Agreement—Repeal of Statute.

Where after a city, under power of Vrooman Act (St. 1885, p. 160) § 20, accepted a street with exemption of abutting property from assessment for subsequent repairs, such section was repealed (St. 1911, p. 626), such property ceased to be so exempt as to subsequent repairs; the exemption being only a gratuity, and containing no element of contract.

6. Municipal Corporations 🔑562(1) — Street Improvements — Validity of Assessment—Surety on Bond.

That the surety on the various bonds required of bidder and contractor for street improvement was not of the character required by the city's charter, a resident freeholder or a domestic corporation, the bonds being otherwise good and sufficient, and accepted and approved by the proper officers, is not available as a defense in an action to foreclose the lien of the assessment for the improvement.

In Bank. Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by the Ransome-Crummey Company against S. F. Bennett and others. From an adverse judgment, plaintiff appeals. Reversed and remanded.

R. M. F. Soto, of San Francisco (Morrison, Dunne & Brobeck, of San Francisco, of counsel, and Fabius T. Finch and Paul F. Fratessa, both of San Francisco, amici curiæ), for appellant. Will M. Beggs, R. C. McComish, and Beggs & McComish, all of San Jose, for respondents. Morrison, Dunne & Brobeck, J. A. Cooper, L. M. Hoefler, and George F. Snyder, all of San Francisco, amici curiæ.

ANGELLOTTI, C. J. This is an action by a street contractor to foreclose the lien of a street assessment on account of street improvements in the city of San Jose. Defendant Bennett was sued as the owner of the property; the other defendants being alleged to have or claim some interest or lien which, if it exists, is subject to plaintiff's alleged lien. Defendants had judgment and plaintiff appeals therefrom on the judgment roll alone. By a decision heretofore rendered by this court the judgment was affirmed, but that decision was vacated and a rehearing granted for the purpose of giving further consideration to some of the questions involved.

In the superior court a demurrer was interposed to the complaint by defendant Bennett and it was overruled. All the defendants answered, and the case was tried upon the merits. Findings were filed which, while in the main in favor of the plaintiff as against Bennett, were in two respects (hereinafter to be considered) in accord with affirmative allegations of his answer. It was upon these two matters that the court below based its judgment for defendant Bennett, notwithstanding that it found all of the material allegations of the complaint to be true. On this appeal, the defendants (respondents) insist, in support of the judgment, that the complaint did not state facts sufficient to constitute a cause of action, and that for this reason, regardless of any other, the judgment must be affirmed. Appellant, while claiming that the complaint sufficiently states a cause of action, insists that under the circumstances, respondents cannot be heard to make this objection on this appeal.

[1] It was urged in respondents' brief that the complaint was insufficient in two respects. One objection was that it showed that the resolution of intention for the work was fatally defective in its description of the location of the proposed work. As to this objection, the district court of appeal of the First district, in deciding this case, substantially said that it could not be determined from the face of the description that it is either void or uncertain, and that in considering the question of the sufficiency of the pleading it must be regarded as sufficient. In this view we concur.

[2, 3] The other objection to the complaint in this behalf is based upon the failure of the complaint to specifically allege the making and filing of the "noncollusion affidavit" and the "nonprivate agreement affidavit." To a proper understanding of this claim, as well as the other objections urged against the assessment, it is necessary to make a brief statement. The freeholders' charter of the city of San Jose, adopted in the year 1897 and in force at the time of these proceedings, adopts and makes part of itself, where not inconsistent with its express provisions, the general street law, commonly known as the Vrooman Act (St. 1885, p. 147), as the said law was at the time of the adoption of the charter, and as such law "hereafter shall be amended." In view of the express provision of the charter to that effect, its provisions prevail over those of the Vrooman Act wherever a conflict exists. Barber Asphalt Paving Co. v. Costa, 171 Cal. 138, 152 Pac. 296. A charter provision requires that each bid for street work shall be accompanied by the affidavit of the bidder to the effect that his bid is genuine and not collusive or sham, and that he has not connived or agreed, directly or indirectly, with any other bidder or person to put in a sham bid, etc. Another provision requires that before any assessment is made, the contractor must file another affidavit "to the effect that he has not entered into any private agreement, verbal or written, with any person liable to be assessed for said work, or with any one in his

behalf, to accept a price from him less than the price named in said contract, nor to make any rebate or deduction to him from such price." The filing of these affidavits is essential to a valid assessment, and a complaint in an action to foreclose such an assessment which fails to show such filing does not state facts sufficient to constitute a cause of action. Barber Asphalt, etc., Co. v. Costa, supra. The complaint here does not specifically allege the filing of these affidavits, and on this ground respondent claims it is fatally defective. Appellant claims that, by necessary inference from the matters specified in the complaint, such filing is sufficiently shown. For the purposes of this decision we shall assume that there was no sufficient allegation in this behalf. The question then is whether respondents should be heard, under the circumstances shown by the record, to use the language of our former opinion in this case, to urge the point, not in reversal, but in support of the judgment which they recovered upon wholly different grounds. The record demonstrates that the court adhered to its order overruling the demurrer throughout the case. The action was tried upon the merits. The findings recite that "witnesses were sworn and examined, and evidence introduced on behalf of the respective parties and the cause submitted to the court for decision." It is obvious that appellant was permitted to introduce evidence in support of all the allegations of its complaint, for the court found that all of the allegations of the complaint except that as to the inferiority of the lien of the defendants other than Bennett are true. There were two findings in favor of Bennett, based upon affirmative allegations of his answer, one to the effect that the roadway of the street had previously been accepted by the city with an agreement to keep the same in repair thenceforth, and the other to the effect that the bonds furnished by the contractor were not in accord with the requirements of the charter of San Jose. In its conclusions of law the court said "as conclusions of law from the foregoing facts, the court finds," etc. The judgment given for defendants (respondents) was not one of nonsuit, nor was it a judgment on the pleadings. By its very terms it was based on the findings of fact, and in so far as Bennett was concerned was manifestly based on the conclusion of the court as to the legal effect of the findings on the affirmative allegations of the answer to which we have referred. It does not appear that the facts were such that the complaint could not have been so amended as to obviate the objection made.

We are satisfied that under the circumstances this court should not affirm the judgment on account of this defect in the complaint, and that to do so would manifestly be most unjust. It is true that a defendant does not waive such an objection by answering and proceeding to trial, and that he will be heard to urge it on his appeal from any judgment based thereon by which he is aggrieved. But he will not always be heard to invoke such an objection to sustain a judgment or order in his own favor based on other grounds. It has been held by this court that on an appeal by a plaintiff from an order dismissing an action made under subdivision 7, § 581, Code of Civil Procedure, the defendant will not be heard to urge the insufficiency of the complaint to state a cause of action as a ground for affirmance, if the court cannot see that the objection cannot be obviated by amendment (Pacific Pav. Co. v. Vizelich, 141 Cal. 4, 74 Pac. 352), and that the same thing is true on an appeal by a plaintiff from an order denying his motion for a new trial, the court saying, among other things:

> "At all events, this is true in cases like the present, where the alleged defect is merely technical, and can be remedied by an amendment." County Bank v. Jack, 148 Cal. 437, 83 Pac. 705, 113 Am. St. Rep. 285.

In our former opinion (superseded by this opinion) it was said, through Mr. Justice Henshaw:

> "It will not be held in such a case as this, for the reasons briefly to be given, that a defendant whose general demurrer has been overruled and who has thereafter gone to trial and secured a judgment upon some wholly foreign ground to that presented by the general demurrer, can have that judgment sustained because of the defect in the complaint. The reason is that the law strongly favors the determination of litigation upon the merits, and that uniformity in the administration of justice is a fundamental right. San Jose Ranch Co. v. San Jose Land & Water Co., 126 Cal. 322 [58 Pac. 824]. Conceding respondent's contention that his grounds of general demurrer were well taken, the court in overruling that demurrer thereby declared to the litigants its conviction that the complaint was sufficient. Had it sustained the demurrer, plaintiff as matter of right would have been entitled to amend and by this amendment these issues would perhaps have been eliminated from the case. * * * Thus by the method here invoked a litigant with whom the court rules as to the sufficiency of his complaint will, because of the error of the trial court, be forever debarred from the right to a trial of his cause of action upon the merits. The true principle we conceive to be this: That if after general demurrer to the complaint has been overruled, it shall be made to appear upon an appeal such as this that the complaint is not amendable in the particular complained of, then the respondent on appeal will be heard to urge this fact in support of the judgment. Such was the case presented in Bell v. Thompson, 147 Cal. 689 [82 Pac. 327], where the respondent on appeal urged the insufficiency of the complaint to charge a cause of action. This court upheld the contention and said: 'The absence of this necessary averment doubtless arose from the fact that it was impossible for the pleader under the facts, to make such an allegation.' But where as here, it is not made to appear that the complaint was not amendable, it would be manifestly unjust to permit the respondent to support a judgment upon a ground which the trial court refused to recognize as valid when, if it had recognized it as valid, the plaintiff could and would have met the objection by amendment."

To these views we adhere. We are, of course, speaking only of a case in which the record makes it manifest that the judgment given for the defendant was in no way based upon or due to any defect in the complaint.

[4, 5] As to the finding of a previous acceptance by ordinance of August, 1889, of the roadway of the street by the city of San Jose, with the agreement on its part to thereafter keep the same in repair, the material facts, very briefly stated, are as follows: The only legal basis for such an acceptance was to be found in section 20 of the Vrooman Act, as it then existed. This section substantially provided that whenever any street or portion thereof has been or shall be fully constructed to the satisfaction of the superintendent of streets and of the city council, and is in good condition throughout, etc., the same shall be accepted by the city council, by ordinance, and thereafter shall be kept in repair and improved by the city. According to the finding such an ordinance was adopted by the city in August, 1889, as to the roadway here involved. We shall assume that the facts were such as to authorize the enactment of this ordinance under this section, and that it was a valid enactment precluding further repair and improvement of the roadway at the expense of the property fronting thereon for so long as it remained effective. But section 20 of the Vrooman Act was repealed on April 5, 1911 (St. 1911, p. 626), and there was not, when the proceeding for street work here involved was subsequently commenced, any such provision either in the Vrooman Act or the freeholders' charter of the city of San Jose. As to this repeal, and the effect thereof, it was said in our former opinion (superseded by this opinion):

> "Appellant contends that the repeal struck dead the ordinance of acceptance. Respondent makes answer that when the charter of San Jose in 1897 adopted the Vrooman Act as part of itself, that act became a part of the charter, beyond legislative control, and that consequently the repeal by the Legislature of section 20 did not affect the validity and vitality of that section, so made a part of the charter, which continued to be the subsisting law of San Jose. It is true that a freeholders charter adopted as was this, is amendable only in the manner prescribed by section 8, art. 11, of the Constitution, and that in municipal affairs the provisions of such charter are paramount to general laws covering the same subject-matter. But San Jose's freeholders charter in terms declares (article 8, c. I, § 1, charter of San Jose; Stats. 1897, p. 615), that the general street law of 1885 'as since amended and as hereafter shall be amended, is hereby adopted as a part of this charter.' And where such a charter thus makes a part of itself a general legislative enactment pertinent to the administration of its municipal affairs, and expressly provides that that enactment as thereafter it may be modified by the general Legislature shall still be the controlling law of the municipality, such modification by way of amendment of the general law which the Legislature may enact is not within the prohibition of the Constitution, which is designed to prevent the autonomy of the city in its municipal affairs from being limited, affected, or impaired by the general Legislature without consent of the city, and it is therefore held that the legislative repeal of section 20 of the Vrooman Act operated to repeal the power conferred upon the city of San Jose in the matter under consideration. As to the effect of that repeal but little need be added to what has gone before. The exemption from future taxation awarded to property owners who have paid for the improvement of a street fronting on their land is a gratuity—a privilege conferred by the supreme lawmaking power, the Legislature, containing in it no element of contract, conferring upon the property owners no vested right, and therefore subject to repeal by the Legislature at any time, without inflicting upon the property owner any grievance of which he can be heard to complain. It is true that his property is exempt while the law of exemption remains upon the books, but when in its wisdom the Legislature sees fit to withdraw this favor the exemption is at an end. So says Cooley (Const. Lim. [7th Ed.] 396): 'For it is conceded on all sides, that if the exemption is made as a privilege only, it may be revoked at any time. And it is but reasonable that the exemption be construed with strictness.' Upon the subject-matter the decisions are uniform and harmonious. City of Seattle v. Kelleher, 195 U. S. 351 [25 Sup. Ct. 44, 49 L. Ed. 232]; Ettor v. Tacoma, 228 U. S. 148 [33 Sup. Ct. 428, 57 L. Ed. 773]; Carstens v. Fond du Lac [137 Wis. 465] 119 N. W. 117; Bradley v. McAtee, etc., 70 Ky. [7 Bush] 667 [3 Am. Rep. 309]; Broadway Baptist Church v. McAtee, 71 Ky. [8 Bush.] 508 [8 Am. Rep. 480]; Ladd v. City of Portland [32 Or. 271] 51 Pac. 654 [67 Am. St. Rep. 526]; City of Rochester v. Rochester Ry. Co. [182 N. Y. 99] 74 N. E. 953 [70 L. R. A. 773]; Durkee v. City of Barre [81 Vt. 530] 71 Atl. 819; Miller v. Hageman, 114 Iowa, 195 [86 N. W. 281]; People ex rel. Coney Island Jockey Club v. Purdy [152 App. Div. 175] 136 N. Y. Supp. 667."

To these views we adhere. It follows that the facts embraced in this finding constitute no defense to plaintiff's action.

[6] As to the finding in regard to the bonds, which was simply that the various bonds furnished by plaintiff "were not bonds by individual sureties, nor were they given by a corporation organized under the laws of the state of California as provided by the charter of the city of San Jose": The charter contained a provision to the effect that no surety on any bond required in such proceeding shall be taken unless he be a resident freeholder in the state of California, and, further, that a bond of a surety company organized under the laws of the state of California may be taken if approved by the mayor and common council. The first bond here involved was one given by the contractor when tendering his bid for the contract to the common council; the Vrooman Act prohibiting the consideration of any bid unless accompanied by a check or a bond, the penalty being in the nature of liquidated damages to the city, in case the bidder after receiving the award failed to enter into the contract. The second and third were bonds required by such act to be given by the contractor on entering into his contract, one inuring to the benefit of all persons, etc., performing services or furnishing material to the contractor for the work and the other in favor of the city, conditioned for the faithful performance by the contractor of his contract. All of these bonds were given, and they were all, according to the findings, "good and sufficient." The bid of the contrac-

tor, accompanied by the first bond, was considered and the contract awarded to plaintiff. It thereupon entered into the contract. The second and third bonds were accepted and approved by the proper officers. The work contracted to be done was fully done in accord with the contract to the satisfaction of the proper officers and accepted. The question is whether under these circumstances the fact that the surety on these bonds, otherwise good and sufficient, was not of the class designated by the charter, is available as a defense in an action to foreclose the lien of the assessment. We think this question is correctly answered in the negative by what was said and held in Miller v. Mayo, 88 Cal. 568, 26 Pac. 364, and Greenwood v. Morrison, 128 Cal. 350, 60 Pac. 971, and on further consideration we are satisfied that Manning v. Den, 90 Cal. 610, 27 Pac. 435, decided nothing to the contrary. It follows that the facts embraced in this finding constitute no defense to plaintiff's action.

From what we have said it follows that the judgment finds no sufficient support in the findings and must be reversed. Plaintiff should be allowed by the superior court to amend its complaint if so advised.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

We concur: SLOSS, J.; SHAW, J.; MELVIN, J.; WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

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177 Cal. 574

RANSOME-CRUMMEY CO. v. COULTER.

(S. F. 6870.)

(Supreme Court of California. Feb. 20, 1918.)

MUNICIPAL CORPORATIONS ⚷443 — STREET IMPROVEMENTS — ASSESSMENTS — VALIDITY —PRIVATE AGREEMENT.

The provision of a city charter that, when the work of a street improvement under any contract shall have been completed, the contractor shall make and file an affidavit that he has not entered into any private agreement with any person liable to be assessed for the work to accept a price from him less than that named in the contract, and no assessment shall be made till such affidavit is filed, and any such agreement shall, as to all persons liable to be assessed for such work, other than the parties to the agreement, avoid any assessment for the work, refers only to a private agreement with relation to some contemplated street improvement by the city under the street law, and not to a private contract between a contractor and property owners for the doing of street work directly for them, and not under contract with the city, as one long before, and having no reference to, any contemplated improvement by the city.

In Bank. Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by the Ransome-Crummey Company against William A. Coulter. From an adverse judgment, plaintiff appeals. Reversed and remanded.

R. M. F. Soto, of San Francisco (Morrison, Dunne & Brobeck, of San Francisco, of counsel), for appellant. William A. Coulter, of San Jose, in pro. per.

ANGELLOTTI, C. J. This is an appeal by plaintiff from a judgment in favor of defendant in an action to foreclose a street assessment lien. The claims of respondent in support of the judgment, as shown by his brief, with one exception, are substantially the same as those made by the respondents in Ransome-Crummey Co. v. Bennett et al. (S. F. 6859) 171 Pac. 304, this day decided, and there being no material difference in the facts, the decision in that case disposes of such claims.

The one exception is as to the matter of an alleged private agreement by the contractor, with certain of the property owners liable to be assessed for the work.

The proceeding for the street work here involved, the regrading and paving of the roadway of the crossing of Santa Clara and Twelfth streets, etc., was initiated October 9, 1911, by the adoption of a resolution of intention and the contract therefor was awarded to plaintiff February 2, 1912.

The trial court found in regard to this substantially as follows: A private agreement of June 21, 1909, was entered into by plaintiff, with certain owners of lots fronting on East Santa Clara street, defendant not being a party (it appearing from his answer that he did not acquire his property until April, 1912), "for the paving and improving of said street, including the crossing, from Fourth street to the Coyote bridge, for the agreed sum of 16 cents a square foot for asphalt paving, including concrete foundation, and grading, and for catch-basins, each $35." The plaintiff was awarded its city contract on February 2, 1912, which contract included catch-basins at $75 each, and pavement, including concrete foundation and regrading, at 25 cents per square foot, and "was largely in excess of the contract with private citizens for the same material and work." The two contracts, the one private, the other with the city, included the roadway of the crossing of Santa Clara and Twelfth streets.

In this connection defendant's reliance is on a provision of the charter of San Jose, which is as follows:

> "When the work under any contract shall have been completed, the contractor shall make out and file in the office of the superintendent of streets an affidavit to the effect that he has not entered into any private agreement, verbal or written, with any person liable to be assessed for said work, or with any one in his behalf *to accept a price from him less than the price named in said contract, nor to make any rebate or deduction to him from such price*, and no assessment shall be made until this affidavit is

filed. *Any such agreement shall be deemed a fraud upon all persons liable to be assessed for such work*, other than the property owners who were parties to the agreement, and shall operate to void as to such persons so defrauded, any assessment made for the work done under said contract." (Italics are ours.)

We think it manifest that this charter provision has no application to the situation shown by the finding referred to.

The whole purpose of such a provision is perfectly clear. It was to meet by express provision of law such a sitation as was presented in Brady v. Bartlett, 56 Cal. 350, with a view to preventing any collusion or private agreement between the street contractor and some of the property owners with reference to a proceeding by the city under the street law for street improvement, which might tend to the pecuniary disadvantage of the other property owners. Reasonably construed the language used has reference only to a private agreement with relation to some contemplated street improvement by the city under the street law, and simply forbids any private arrangement between the contractor and some of the property owners with relation to that improvement when made by the city by which he agrees to accept from them less than the amount to which he would be entitled under his contract with the city and the assessment based thereon. It has no reference whatever to such a contract as the finding here shows—a private contract between a contractor and property owners for the doing of street work directly for them, and not under contract with the city. The finding makes it perfectly clear that the private contract in this case, made over 15 months before the initiation of the proceedings here involved, was simply a contract for the doing of work by the contractor directly for the property owners, who were to pay him a stipulated price therefor, and that it had no reference to any contemplated street improvement by the city. It is unnecessary to consider other claims of appellant in regard to this finding. In view of our conclusion as to the proper construction of the charter provision, the facts found do not constitute a defense to plaintiff's claim. The conclusion of the trial court, based thereon, that the "nonprivate agreement affidavit" filed by plaintiff was false, was erroneous.

For the reasons we have given the judgment must be reversed. Plaintiff should be allowed by the lower court to amend its complaint it it be so advised.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

We concur: SLOSS, J.; SHAW, J.; MELVIN, J.; WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

177 Cal. 525

WALKER v. SELMA FRUIT CO., Inc.

(S. F. 7523.)

(Supreme Court of California. Feb. 18, 1918.)

CORPORATIONS 🔑579(1)—TRANSFER OF CORPORATE PROPERTY—CONSTRUCTION.

The debtor corporation's charter having been forfeited, the contract of a new corporation by which it agreed to purchase lands, patent applications, machinery, brands, all packing material and supplies on hand, and all contracts for supplies of the debtor corporation, and agreed to carry out all contracts for fruit for delivery after August 1, 1908, and to pay for all expenses previous to such date in developing markets, did not bind the new corporation to pay for fruit previously acquired by the debtor corporation for which there had been an account stated on August 1, 1908.

In Bank. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by Nellie M. Walker, as administratrix of the estate of William E. Walker, deceased, against the Selma Fruit Company, Incorporated. Judgment for plaintiff, and defendant appeals. Reversed.

Harris & Hayhurst and L. L. Cory, all of Fresno, for appellant. Everts & Ewing, of Fresno, and Charles R. Holton, of Whittier, for respondent.

ANGELLOTTI, C. J. In May, 1907, plaintiff's intestate entered into a contract of sale with the Selma Fruit Company, a corporation, covering his raisin crop for that year on 20 acres in Fresno county, the same to be delivered to the company not later than December 1, 1907. The raisins were delivered to said company during that year. On August 1, 1908, there was a balance of $3,005.51 due Mr. Walker from the Selma Fruit Company for these raisins; an account being then stated between them. In 1911 plaintiff brought and maintained to judgment an action for this balance against the Selma Fruit Company and its directors as trustees; the charter of the corporation having been forfeited for failure to pay its license tax. The judgment being entirely unsatisfied, plaintiff subsequently brought this action thereon against the Selma Fruit Company, Inc., a new corporation organized subsequent to August 1, 1908, to which had been transferred the business of the Selma Fruit Company. Judgment was given in her favor against this new corporation for the full amount of the claim with interest. The defendant appeals from such judgment.

This judgment can be sustained only on the theory that by a written agreement of August 1, 1908, between the Selma Fruit Company and T. H. Elliott, on the one hand, and a committee of subscribers of the capital stock of a corporation then proposed to be organized (which it may be conceded was this defendant), on the other, the new corporation, through this committee, assumed the obligation of satisfying all the obligations of the Selma Fruit Company existing on that date. The complaint was framed and the action was tried solely on this theory, and there is nothing in the evidence adduced on the trial that would support the judgment on any other theory. Passing then all other points made by appellant, we take up the question of the proper construction of this agreement.

From its recitals this agreement appears to be supplemental to a previous agreement dated June 17, 1908, for the sale by the Selma Fruit Company and T. H. Elliott of certain patent applications of Elliott, and "fourteen lots with the packing houses, machinery, brands, etc., of the Selma Fruit Company, all packing material and supplies on hand and all contracts for supplies in connection with said business, and contracts for the purchase of about one hundred tons of raisins." It further recites the appointment of the committee by the subscribers of the proposed new corporation to make arrangements to immediately take over the business of the Selma Fruit Company and the use of the machinery covered by the patent applications. It then provides substantially as follows:

> The business of the Selma Fruit Company and the use of the premises and machinery shall be continued by the Selma Fruit Company, commencing August 1, 1908, "for and on behalf of said corporation so to be formed by said committee * * * until said new corporation shall be formally organized and shall by formal resolution take over the operating of said business for its own account."
>
> "All the contracts made by said Selma Fruit Company for the delivery of dried fruit and raisins by growers on and after August 1, 1908, and all contracts made by said company for the sale of dried fruits or raisins, for delivery after August 1, 1908, shall be carried out by said Selma Fruit Company for and on behalf of said new corporation."
>
> "All expenses accrued and accruing on business maturing after August 1, 1908, in connection with said business and all obligations and profits in connection with said business after said date shall be accounted for to said new corporation."
>
> "Any expenses incurred by said Selma Fruit Company previous to August 1, 1908, in developing the markets and corresponding with brokers and dealers in regard to contracts for business maturing subsequent to August 1, 1908, and unearned insurance premiums subsequent to said date, shall be paid for by said new corporation, subject to an accounting to be had later on."
>
> "All business contracted on or after August 1, 1908, shall be subject to the consideration and approval of the parties of the second part hereto."
>
> "It is understood that said Selma Fruit Company shall have the privilege of using the facilities of the house to finish the processing, seeding, packing, and shipping of the raisins heretofore bought by them and now on hand, subject to cost of labor and materials used to be paid by them."

Provision is then made for an accounting to the new corporation of all expenses and profits of the operation of the business under the agreement, and it is also provided that, if the new corporation is not formed, or if it fails to provide within a reasonable time for the taking over of the property transferred "according to this agreement and the agreement of June 17, 1908, and its modifications and extensions," all such property "shall revert" to the Selma Fruit Company and Elliott. It is declared that an inventory "of the packing material and supplies on hand" which are to be transferred under the terms of said agreement is attached, but this inventory was not shown by the evidence.

We are unable to see in this anything importing an assumption on the part of the purchaser, the proposed new corporation, of any liability of the Selma Fruit Company on account of raisins actually purchased by and delivered to said company prior to August 1, 1908. Of course, it is apparent from this instrument that the new company was purchasing from the vendors the plant, machinery, good will, trade-marks, patent rights, "packing material and supplies on hand, and all contracts for supplies in connection with such business," together with some contracts for the purchase of about 100 tons of raisins, all with a view to taking over and thenceforth carrying on the business theretofore carried on by the Selma Fruit Company, but this implies no transfer of debts due the company on business already done, or the assumption of debts due from the company on account of such business. It does not even appear that any transfer of raisins or dried fruit already bought by and delivered to the company was contemplated. In this connection respondent relies on the words in the recitals "all packing material and supplies on hand and all contracts for supplies in connection with said business," but manifestly the word "supplies," as here used (unless the inventory referred to shows otherwise), should not be held to include raisins and dried fruit bought and on hand. Raisins and contracts for the purchase and delivery of raisins are so specifically provided for as to make such a construction unreasonable, in the present condition of the record at least. The specific provision that the Selma Fruit Company shall have the privilege of using the facilities of the house to finish the processing, seeding, packing, and shipping "of the raisins heretofore bought by them and now on hand," paying the cost of labor and materials used therein, indicates clearly enough that there was no transfer of the stock of raisins actually owned and possessed by the company. The provision that the new company will pay expenses incurred by the Selma Fruit Company previous to August 1, 1908, "in developing the markets and corresponding with brokers and dealers in regard to contracts for business maturing subsequent to August 1, 1908, and unearned insurance premiums subsequent to said date," clearly indicates absence of any intent that debts accrued prior to August 1st, and not specially provided for by the agreement, were to be assumed by the purchaser.

The agreement shows very clearly the intention that the contracts for the delivery of fruit or raisins by growers in which the new company was to have any concern were those only in which the delivery was undertaken for or after August 1, 1908. The plain idea was that the transfer of the business was to be practically as of that date, and that, inasmuch as the new corporation had not then been created, the Selma Fruit Company was to continue to operate the business for the new corporation until its organization, accounting to the new corporation for "all expenses accrued and accruing on business maturing after August 1, 1908, in connection with said business and all obligations and profits in connection with said business after said date." As to "business maturing" prior to August 1, 1908, as was the situation with reference to the transaction here involved, it is plain that there was no intent that the purchaser should acquire any right or assume any obligation.

Certain expressions in the opinion of the District Court of Appeal of the Third Appellate District in Stevens v. Selma Fruit Co., Inc., 18 Cal. App. 242, 123 Pac. 212, are not in accord with our conclusion. That case differed very materially in its facts from the case at bar, and, in so far as the opinion states that by the language of the agreement (which was the very agreement here involved) the intention was that the purchaser should take over all the properties of the Selma Fruit Company and assume all its obligations, we think the views expressed were entirely unnecessary to a decision of the case. We have no disposition to question the correctness of the decision in that case, but we cannot concur in the expressions in the opinion to which we have specially referred.

The judgment is reversed.

We concur: SLOSS, J.; VICTOR E. SHAW, Judge pro tem.; SHAW, J; MELVIN, J.; WILBUR, J.

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177 Cal. 605

WRIGHT v. LOAIZA et al. (S. F. 8413.)

(Supreme Court of California. Feb. 23, 1918.)

LIMITATION OF ACTIONS 🔑29(2) — "BOOK ACCOUNT."

An undertaker's book entries against a defendant do not constitute a "book account" against his codefendant and sister, who had agreed to pay part of such charges, within Code Civ. Proc. § 337, subd. 2, which, prior to its amendment by St. 1917, p. 299, provided a four-year limitation period upon open book account actions, but an action thereon was outlawed as to the sister after the two-year period prescribed for oral contracts by section 339, subd. 1.

[Ed. Note.—For other definitions, see Words and Phrases, Book Account.]

Richards and Victor E. Shaw, Judges pro tem., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; W. R. Guy, Judge.

Action by Harold L. Wright against W. Y. Loaiza and Dolores Loaiza. A judgment for plaintiff was affirmed, as to Dolores Loaiza, by the District Court of Appeal, First District (166 Pac. 369), and she appeals. Judgment reversed.

Leon E. Morris, of San Francisco, for appellant. T. A. Perkins and McCutchen, Olney & Willard, all of San Francisco, for respondent.

SLOSS, J. This action was brought against W. Y. Loaiza and Dolores Loaiza, brother and sister, to recover a balance of $465.30 claimed to be due to N. Gray & Co., a corporation, plaintiff's assignor, for materials furnished and services rendered in connection with the funeral of a deceased brother of the defendants. The total amount of the bill was $615.30. The arrangements for the funeral were made by W. Y. Loaiza, who acted for himself and his sister, Dolores. The sister had authorized him so to do, stating that she would pay all of the charge over $150. These facts were communicated to N. Gray & Co. at the time the order was given. Subsequently W. Y. Loaiza paid $150 on account of the charge. The court gave judgment against the defendant Dolores for the balance of $465.30, and she takes this appeal.

By her answer the appellant pleaded the bar of section 339, subd. 1, of the Code of Civil Procedure. The only question is whether the court's finding against this plea is sustained by the evidence.

More than two years elapsed between the accrual of the liability and the commencement of the action. The contract was not in writing, and the action was therefore barred unless it may be viewed as governed by subdivision 2 of section 337. Before its recent amendment (Stats. 1917, p. 299), that subdivision fixed a four-year period of limitation for actions "to recover a balance due upon a mutual, open, and current account or upon an open book account." The view of the court below was that the action was one upon an open book account.

[1] About the time of the rendition of the services, N. Gray & Co. made an entry of the agreed amount in a book designated as "Funeral Record." The charge was made against W. Y. Loaiza, and the subsequent payments made by him were credited on this account. Appellant's name did not appear in any form on the books of plaintiff's assignor. The briefs discuss at some length the question whether entries so made constitute an open book account. We need not go into this, since we are satisfied that, so far as the appellant is concerned, the action cannot be regarded as one upon a book account at

all. A book account is defined as a "detailed statement, kept in a book, in the nature of debit and credit, arising out of contract or some fiduciary relation." 1 C. J. 597. A necessary element is that the book shall show against whom and in whose favor the charges are made. 1 C. J. 598. We do not see how book entries of charges against, and credits in favor of, A. alone can be said to constitute a book account against B. within the meaning, at least, of section 337. It may fairly be assumed that the idea underlying the enactment of both subdivisions of this section was that a longer period of limitation might well be allowed where the existence of the claim sued upon was supported by some kind of written evidence. Where, on the other hand, the establishment of the contract rests on oral testimony only, the law requires the action to be brought before the lapse of time may prevent the production of witnesses, or impair their memories. If this view be correct, the action against Dolores must be regarded as one upon an oral contract, and not one upon a book account. There is no account or other writing which in any way indicates her liability. To connect her with the transactions at all, resort must be had to parol testimony. Decisions from other jurisdictions are cited in the briefs on both sides. But these cases deal with an entirely different subject-matter, and they throw no light on the question before us.

We conclude, therefore, that the evidence does not support the finding against the defendant's plea that the action was barred.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; WILBUR, J.

RICHARDS, Judge pro tem. I dissent: The facts of the case are correctly set forth in the main opinion. In our view, however, the only question in the case is as to whether the entries made in the books of the plaintiff's assignor constitute an open book account as to the defendant Dolores Loaiza.

The account sued upon has all the elements of a book account according to the definition of that term. It was entered in a book. It was a detailed statement in the nature of debit and credit, arising out of a contract. It contained the names of a creditor and debtor. So far as the defendant W. Y. Loaiza is concerned, it is undeniable that it was a book account; and, since W. Y. Loaiza made payments which from time to time were credited upon it, it was as to him an open book account. Mercantile Trust Co. v. Doe, 26 Cal. App. 246, 146 Pac. 692. Was it also a book account as to his sister Dolores Loaiza? The evidence showing the authorization of W. Y. Loaiza as the agent of Dolores Loaiza to incur the indebtedness and hence, of necessity, to create the account, is undisputed. In ordering the goods in question W. Y. Loaiza acted in the dual capacity of a principal and of agent for his sister, Dolores Loaiza and was so understood to be acting by the creditor at the time of the creation of the account. This being so, his name upon the creditor's books represents both his principalship and his agency, as fully as though the name of his principal had been inserted. The authorities are in practical uniformity upon the proposition that an action may be brought against the principal upon an account for goods charged upon the books of a creditor to the agent, and that in this respect book accounts and simple contracts in writing, made in the name of an agent, stand upon the same footing. 1 Mechem on Agency, § 1424; 2 Mechem on Agency, § 2055; Clark & Skyles on Agency, § 458. In Mechem on Agency, § 2055, supra, it is stated that:

> "The cases are very numerous in which orders, proposals and informal contracts of all kinds, though nominally in the name of the agent, are really an account of the principal. In such cases the principal is liable, and he may also sue."

In Clark & Skyles on Agency, § 458, it is stated to be the rule that a principal may be sued on a contract made in the name of his agent, and that this rule applies not only to oral contracts, but to all simple contracts in writing, and parol evidence is admissible to show that a person, executing a written contract in his own name, did so in fact as the agent of an undisclosed principal. The text of the foregoing authorities is founded in part upon the following cases, in each of which the action was against the principal upon an account standing in the name of the agent: Meeker v. Claghorn, 44 N. Y. 349; Foster v. Persch, 68 N. Y. 400; Dyer v. Swift, 154 Mass. 159, 28 N. E. 8; Gardner v. Bean, 124 Mass. 347; Lyon v. Chamberlain, 41 Mich. 119, 1 N. W. 983; Byington v. Simpson, 134 Mass. 169, 45 Am. Rep. 314. In the case last above cited, which was an action to recover a balance due upon a building contract, in the name of an agent, the court says:

> "That a party not mentioned in a simple contract in writing may be charged as a principal upon oral evidence even where the writing gives no indication of an intent to bind any other person than the signer is as well settled as any part of the law of evidence."

In an action either upon a book account or upon a written contract, the book in the one case, and the writing in the other, are merely the evidence of the transaction, and no distinction can be drawn as to their admissibility in evidence when the fact of the agency is shown. Had this action been brought within the period of the two-year limitation, to recover upon the original account, there would seem to be no question upon the strength of the foregoing authorities as to the right of the creditor to recover against Dolores Loaiza upon this account, standing as it did in the name of her agent, W. Y.

Loaiza, after proof of his agency. This action, however, was brought to recover a balance due upon said account after the two-year period of limitation for actions upon simple accounts had expired. The defense of Dolores Loaiza is the statute of limitations. The respondent's answer to this defense is that the account had become an open book account by reason of payments made thereon by W. Y. Loaiza prior to the commencement of this action, and hence that, this action being one to recover the balance due upon an open book account, the period as to it is four years, as provided in subdivision 2 of section 337 of the Code of Civil Procedure, as said section and subdivision read at the time this action was begun. It must be admitted that this action has become an open book account as to W. Y. Loaiza, by virtue of his payments thereon. Mercantile Trust Co. v. Doe, supra. Why has it not also become an open book account as to his principal, Dolores Loaiza, for a like reason? The same reasons and the same authorities which would render this a book account against Dolores Loaiza, under the name of her agent, W. Y. Loaiza, would render it an open book account against her, if by the payments thereon it had become an open book account against him. It is true the payments were not made by her, but they were made by her coprincipal upon this account, and were made for her benefit and in order to reduce, as they did reduce, the amount of her liability thereon. Having thus received the full benefit of these payments made by her coprincipal, who was also her agent upon this account, and which had the effect of keeping the account open as to him, is she in a position to claim that it was closed as to her so as to entitle her to plead the two-year limitation as her sole defense to this action? There would seem to be neither reason nor justice behind such a contention.

The judgment should be affirmed.

I concur: VICTOR E. SHAW, Judge pro tem.

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177 Cal. 540

NORTHWESTERN MUT. LIFE INS. CO. v. ROBERTS, State Treasurer.

MASSACHUSETTS MUT. LIFE INS. CO. v. SAME.

(S. F. 7585.)

(Supreme Court of California. Feb. 18, 1918. Rehearing Denied March 18, 1918.)

1. Taxation 🔑137—Property Exempt—Returned Premiums—"Every."

Const. art. 13, § 14, subd. "b," providing that "every insurance company or association doing business in this state shall annually pay the state a tax of one and a half per cent. upon the amount of the gross premiums received upon its business done in this state less return premiums and reinsurance in companies or associations authorized to do business in this state," imposes a tax upon "every" insurance company or association, whether a stock or mutual concern, doing business within the state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Every.]

2. Taxation 🔑140 — Property Exempt — "Return Premiums."

In Const. art. 13, § 14, subd. "b," imposing a tax upon the gross premiums of every insurance company or association doing business in the state, less "return premiums," the quoted words must be confined to that portion of the premium which has been unearned and which insured has the legal right to have returned.

3. Taxation 🔑140 — Property Exempt — "Return Premiums."

The excess of income over cost of insurance, which does not merely represent the excess of premiums over cost of insurance, but income from forfeitures, lapses, etc., paid by mutual benefit life insurance companies to members as dividends, cannot be deemed "return premiums" within Const. art. 13, § 14, subd. "b," exempting such premiums from taxation.

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Consolidated actions by the Northwestern Mutual Life Insurance Company and by the Massachusetts Mutual Life Insurance Company against E. D. Roberts, as State Treasurer. Judgments for defendant, and plaintiffs appeal. Affirmed.

David L. Levy, Walter Shelton, and Campbell, Weaver, Shelton & Levy, all of San Francisco, for appellants. U. S. Webb, Atty. Gen. (John W. Stetson, of Oakland, of counsel), for respondent.

RICHARDS, Judge pro tem. These are appeals from judgments rendered in favor of the defendant. The cases were consolidated upon the trial and upon appeal, being identical as to the legal principles involved. These actions were brought against the defendant as treasurer of the state of California to recover certain taxes paid by each of said plaintiffs under protest, which said taxes it was claimed by each of said plaintiffs had been illegally assessed and levied by the state board of equalization, and illegally collected by the defendant as state treasurer. The plaintiffs are each mutual benefit insurance companies. The particular taxes claimed by them to have been illegally assessed and unlawfully collected were assessed, levied, and collected in pursuance of article 13, § 14, subd. "b," of the Constitution of California as amended in the year 1910, so as to include said subdivision, which reads in part as follows:

> "Every insurance company or association doing business in this state shall annually pay to the state a tax of one and a half per cent. upon the amount of the gross premiums received upon its business done in this state, less return premiums and reinsurance in companies or associations authorized to do business in this state."

The single question involved in these appeals turns upon the construction to be given to the phrase "return premiums" as used in the provision of the Constitution above quoted. The contention of the plaintiffs in both of these cases is that this phrase must be given a construction which will be broad enough to include those sums which mutual benefit insurance companies annually pay to their insured membership in the form of what has heretofore been known as "dividends," but which, according to the plaintiffs' contention, is none other than the excess of premiums above the actual cost of insurance which has been prudentially collected from their membership in order to provide against contingent or possible loss during the year, and which, not having been needed or used for such purposes, is returned to them, and hence, under the construction of this phrase in the subdivision of the Constitution under review for which the plaintiffs contend, is returned premiums, and as such not subject to taxation. Turning to the subdivision of the Constitution above quoted in which this phrase occurs, there are several observations regarding its general language which may serve to clarify this discussion.

[1] In the first place it is to be noted that this provision of the Constitution has for its purpose an increase in the revenues of the state by the imposition of a tax upon every insurance company or association doing business within it. It is made to apply equally to fire insurance companies or associations and to life insurance companies or associations, and to each of these, whether the particular insurance company or association, either fire or life, is doing business as a stock concern, dividing its profits periodically among its members, regardless of whether these are also insured in it, or is doing business as a mutual concern, dividing its excess periodically among the body of its insured membership. The foregoing consideration is important in determining the construction to be placed upon the particular clauses of the Constitution under review, since it could not be seriously contended that the framers of this constitutional amendment had in mind one definition of the meaning of the clause in question in its application to one of the foregoing kinds of insurance companies or associations and quite a different meaning as applied to another. In other words, the interpretation to be put upon this phrase must be one applicable indifferently to each and to all of the general class of institutions subject to this form of taxation.

Proceeding from this point, it next becomes important to inquire whether the phrase "return premiums" had taken on a particular or technical significance in relation to any classes of insurance concerns included within the general terms of this amendment prior to the time of its adoption. As to this question there is no dispute among the parties to these proceedings, for it is conceded that in so far as the phrase "return premiums" had relation to fire insurance companies or associations doing business as stock concerns, and also in a more limited degree to life insurance companies or associations of the same character, the phrase "return premiums" had acquired a limited and technical significance, not only in this state, but generally in the insurance world, which meaning had become so definitely fixed as to have found a place in the law dictionaries and in the recognized textbooks upon fire and life insurance. In Black's Law Dictionary the phrase is listed and is defined to mean:

> "The repayment of the whole or a ratable part of the premium paid for a policy of insurance upon the cancellation of the contract before the time fixed for its expiration."

In Bouvier's Law Dictionary the phrase is also found and is similarly defined. In Joyce on Insurance and also in Elliott on Insurance—the two main modern text-books on this branch of the law—there are to be found in each an entire subdivision devoted to the subject of "return of premiums and assessments," in which these terms are given application to cases wherein the risk has not attached, or where the policy is void, or has been issued through a mistake of law or fact, or has been procured through fraud and the like, and wherein the use of the phrase is limited to the class of cases above enumerated. Joyce on Ins. c. 35; Elliott on Ins. § 299. See, also, Dawson's Elements of Life Ins. p. 166. Nowhere, in fact, so far as the industry of counsel in the search for precedents have gone, or as our own independent research has extended, had the phrase "return premium" ever been given in the domain of either fire or life insurance, prior to the enactment of the amendment to our Constitution under review, any other than the limited meaning in which that phrase has been defined and discussed by the law dictionaries and law-writers above referred to. And to this statement may be added another and a conceded fact by the parties herein, which is that the phrase "return premium" had never, prior to the adoption of the said amendment to the Constitution, been used or employed by mutual benefit insurance companies or associations anywhere in relation to the excess in the income of these concerns distributed periodically among their members. These considerations become all the more significant when we look to the origin of the phrase "return premium" in its relation to our California law. As early as 1862 the Legislature passed a statute imposing a tax upon foreign insurance companies and their agencies doing business in California. Stats. of Cal. 1862, p. 243. By the terms of this act an annual statement was required from the office or agency of every insurance company to be filed with the treasurer of the county in which such office or agency was located, exhibiting the gross amount of premiums collected by each, less the gross amount of "return premiums." The act further provided for a tax of 2 per cent. on the amount of gross premiums so reported after deducting "return premiums" upon all fire, marine, and inland risks, and a tax of 1 per cent. on the amount of premiums collected from life risks. In 1903 (St. 1903, p. 359), the substance of this early statute was carried into the Political Code, with the exception that its application was expressly limited to fire insurance companies. It is to be noted, however, that the precise language of the present constitutional amendment is to be found in this section of the Political Code, thus indicating the source from which the framers of the amendment derived its phraseology. Pol. Code, § 622a. This section of the Code was amended in 1905 (St. 1905, p. 136), and again in 1907 (St. 1907, p. 162), but its phrasing in respect to the point in question remained the same. In the meantime the Civil Code had been dealing with the same subject. In the year 1872, article VIII, title XI was enacted in that Code, in which article occur a number of sections treating of the subject of return of premiums, wherein are set forth the several conditions under which a return of premium may be had and may be enforced by the insured. These include cases where no part of the interest of the insured in the thing insured is exposed to the perils insured against, or where the policy has been surrendered before its time expires, or where the contract of insurance is voidable for fraud, or where there is an overinsurance by several insurers. Civ. Code, §§ 2616 to 2622, inclusive. The use of the phrase is thus found to be limited in the Civil Code to practically the same meaning embraced in its definition by the dictionaries and text-writers already referred to. Such was the state of the law and such was the limited meaning attributed with practical unanimity to the term "return premiums" at the time the amendment to the Constitution under review was framed by the Legislature and adopted by the people of California.

[2] Without doubt its use in defining a certain portion of the gross premiums of insurance companies to be excepted from the taxes imposed by the amendment might have been limited by express terms to life or fire insurance companies or associations doing business as stock concerns, or such meaning might have been in the same manner extended so as to include the cases of income over the cost of insurance which mutual benefit companies or associations are wont to distribute among their membership; but, in the absence of such a differentiation, we are constrained by rules of interpretation, too well known to require recital, to the giving to the phrase "return premiums," as used generally in this clause of the amendment to the Constitution, the one and only meaning which had been universally assigned to it for a long time prior to the date of the adoption of said amendment and which it bore by general acceptance at that time. Its meaning and application as thus interpreted must be confined to that portion of the premium of all insurance companies or associations affected by the amendment which has, for the reasons above referred to, been unearned, and to the return of which the insured has a right enforceable at law. It is clear that as to such portions of the gross premiums of insurance companies or associations as they are, for the reasons stated, not lawfully entitled to retain, no tax should be levied, and that it is to such portions of their premiums as they are thus lawfully bound to return that the exemption in this constitutional amendment was intended to apply.

[3] It is, however, strenuously and elaborately argued on behalf of the appellants herein that they and each of them come strictly within the class of mutual benefit insurance companies or associations the plan and purpose of which is to furnish insurance to the body of their membership at cost, and not to make a profit out of the business done, nor to accumulate any sum which would be distributable as dividends in the usual and ordinary acceptation of that term; that the amount of premiums periodically collected from their membership is only increased above the bare cost of insurance in order to protect them and their members against such unforeseen contingencies or extraordinary outlays as might arise during any year; and that when these do not occur the excess above the ascertained cost of insurance is returned to their membership under the name or form of dividends, but that it constitutes in fact a return of the excess of premiums collected, and hence should be included in the exemption provided for in the Constitution. The argument is specious, and were it founded entirely in fact is one which might well be presented to the Legislature or the people in an effort to effect a change in the phraseology of the constitutional amendment under review, but it cannot be availed of to procure from the courts another and different interpretation of a phrase which has been found to have had by universal usage a more restricted meaning at the time it was engrafted upon the law. Besides, it is by no means conceded by the respondent that the argument is founded in fact, for, while it may be admitted that mutual insurance companies or associations are theoretically committed to the policy of providing insurance to their members at cost, and of theoretically returning to them the excess of premiums prudentially collected for the purpose of taking care of unforeseen contingencies, the truth is that the so-called dividends which these institutions periodically distribute among their members, and which we are urged herein to define as "return premiums," do not actually represent the outworking of

these theories, and are not in fact limited to such excess, and do not, in practical effect, result in a return to the membership of these institutions the actual excess in premiums above the cost to each of his insurance. According to the evidence presented in these cases, mutual benefit insurance companies or associations have other sources of income than that of premiums. They derive certain incomes from forfeitures, surrenders, and lapses; also from the increase in the value of investments in securities or in lands, and from rents and interest on investments and loans, and from annuities. These are intermingled with premiums received in the general calculations of the earnings of the institution, and out of the funds thus accumulated there are paid the overhead expenses, the sums falling due on policies, the amounts to be set aside as reserve, etc. From this accumulation derived from these various sources is also paid periodically to its members such an amount as the business of the institution justifies, in the form of what, prior to the adoption of the constitutional amendment in question, was known and defined as dividends, but which is now sought to be designated as "return premiums." A consideration of the sources of the funds thus distributed discloses that these cannot, by any refinement of bookkeeping or of reasoning be made to represent either the actual excess over cost of insurance paid by the membership of these institutions, nor the actual return to each member of his excess of premium over the cost of insurance to him.

Aside, therefore, from the conclusion which we have felt impelled to draw as to the meaning of the phrase "return premiums," derived from its previous use, we thus discover that the amounts periodically distributed by these institutions among their membership in the form of dividends cannot be deemed "return premiums" when considered either from the viewpoint of the variety of sources from which they are derived nor from that of the conceded fact that they do not represent as to each member of the institution the excess of premium over cost of insurance which he has actually paid. In this connection it may be noted, as having a more or less important bearing upon this phase of the discussion, that there is no agreement, either express or implied, between the premium payer and the mutual benefit company or association of which he is a member, to the effect that he shall have insurance at cost, or that he shall have any enforceable right to receive or recover any amount in the form of a return premium or otherwise corresponding to the excess which he has paid in premiums over the cost of insurance. The amount of premium to be paid by each member is fixed by a consideration of the business principles governing successful insurance companies or associations whether they are stock or mutual benefit concerns. The premium once paid is gone from its payer forever, unless it can come back to him in the form of dividends or profits upon the business of the institution to which he belongs, and in which business the same principles of prudential management and wise and careful investment prevail as those regulating insurance of every kind and form. From this viewpoint the fact that the premium payer is or is not also a member, or in that sense a shareholder, in the particular form or class of insurance company or association with which he has chosen to be allied, ceases to be a matter of more than minor consideration. The framers of the constitutional amendment in question drew no distinction between the insurance companies or associations to be affected by the form of taxation it imposes, and evidently, by its general terms, intended that the gross premiums received by all insurance companies or associations indifferently should not be deleted by dividends in the levy of the state tax thereon. It is to be noted in this immediate connection that the state of California is unique among the commonwealths of this country in the phrasing of its laws relative to the imposition of taxes upon insurance companies or associations doing business within it. No other state, save one, has expressly laid its tax upon the gross premiums of such institutions, or has in express terms exempted from the effect of such taxation "return premiums." As a result of this there is a paucity of cases bearing directly or by any close analogy upon the question involved in the present controversy. Counsel for appellants cite a number of cases which it is claimed touch the point at issue here. Their chief reliance is upon the case of Mutual Benefit Life Ins. Co. v. Herold (D. C.) 198 Fed. 199. That was a case involving a construction of the federal Corporation Tax Act (Act Aug. 5, 1909, c. 6, 36 Stat. 112, § 38, U. S. Comp. St. Supp. 1911, p. 946), by the terms of which a special excise tax was to be levied upon all insurance companies organized under the laws of the United States or of any state or territory "equivalent to one per cent. upon the entire net income * * * received within the year from all sources." The action was brought by the plaintiff to recover from the defendant, a collector of internal revenue, certain taxes paid to him under said statute, upon the contention that certain dividends which it claimed represented an excess of premiums collected from its members, and which were accredited upon the amount of premiums such members were to pay in the succeeding year, were not to be classed as "income received" by the plaintiff so as to be subject to such taxation. The statement of facts in the case assumes that these dividends so applied were in fact merely excess premiums previously collected, a fact not conceded in the instant case, and the decision is predicated upon this assumption; but, aside from this, the distinction between that case and also the other cases which counsel cite as having followed its doctrine, is obvious, consisting, as it does, in the quite different phrasing of the law in each case. We do not regard this line of cases relied upon by the appellants herein as authority for the construction which they would have us place upon the peculiar wording of the constitutional provision here under review. The only other state having a statute with the same wording as that of the California law is the state of New Mexico, which, subsequently to the passage of our constitutional amendment, embodied its precise language in an act imposing taxes upon insurance companies in that state. In a case arising under said act the Supreme Court of New Mexico, by a decision of two of its three justices, held that dividends of mutual benefit life insurance companies were to be classed as return premiums and were to be deducted as such from the gross premiums of such companies subject to taxation. Life Ins. Co. v. Chaves, 21 N. M. 264, 153 Pac. 303. This decision is based upon the reasoning of the case of the Mutual Benefit Life Ins. Co. v. Herold, supra, and makes no reference to the history of the amendment to the California Constitution, from which the precise language of the act it assumes to construe was obviously taken. It is sufficient to say that we do not regard this case as controlling or even persuasive authority in the decision of the instant case. It may be said in conclusion that while the authorities upon the general subject of taxation of the incomes or earnings of insurance companies or associations are numerous and are quite conflicting, they depend so largely upon the peculiar wording and differing phraseology of the statutes of the several states, or of the United States, upon this subject, as to render unprofitable an attempt to review or harmonize them here. From what has heretofore been stated, we are of the opinion that the contentions of the appellants herein as to the construction to be placed upon the amendment to the Constitution in question cannot be sustained.

The judgments are affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; VICTOR E. SHAW, Judge pro tem.

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177 Cal. 577

WESTERN UNION TELEGRAPH CO. v. COMMERCIAL PAC. CABLE CO.

(S. F. 7792.)

(Supreme Court of California. Feb. 20, 1918.)

1. Telegraphs and Telephones 🔑34—Discrimination.

Where a Pacific cable company with its terminus in San Francisco had as its chief customers two telegraph companies, its requirement of one telegraph company that to the latter's messages received for cable transmission there be added the words "via San Francisco" and the date of acceptance, making four or five words in all, to be paid for at the regular cable toll of $1 per word, was not a necessary or reasonable requirement in the conduct of its business; such words not being required to be added to the cable messages of other customers, including the other telegraph company.

2. Telegraphs and Telephones 🔑34—Discrimination.

The discrimination arising out of the enforcement of such requirement against one telegraph company alone was unjust and unlawful; its effect, in adding an additional charge or toll upon each cable message sent for such company of approximately $5 a message, when no similar charge was exacted from the other telegraph company, being to increase the latter's business at the expense, amounting practically to the exclusion, of the telegraph company discriminated against, in relation to that particular field.

3. Estoppel 🔑99—Equity 🔑65(3)—Telegraphs and Telephones — Discrimination.

In suit by telegraph company against cable company to enjoin discriminatory requirement of additional words at toll rates on cable messages received through plaintiff, plaintiff was not estopped to claim such discrimination was unreasonable and unjust because it had itself been guilty of attempts to impose and enforce similar requirements as to adding words and tolls in the course of its own business throughout the country, for the maxim that he who comes into equity must do so with clean hands has reference to the particular transaction in which relief is sought, and not to the general morals or conduct of the plaintiff.

4. Telegraphs and Telephones 🔑67(4) — Loss of Profits—Discretion of Court.

In action by telegraph company against cable company for discrimination in charges, where damages claimed by plaintiff for shrinkage of its cable business during the enforcement of the discrimination were objected to as involving elements too remote and speculative for admeasurement, the fixing and allowance of $1,000 as damages for such shrinkage was not an unreasonable exercise of the court's discretion, where some falling off in plaintiff's business as a direct result of the discrimination was admitted, and the evidence adduced furnished some more or less definite data from which to make the approximation on which the court based its findings and judgment as to such probable loss.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Western Union Telegraph Company against the Commercial Pacific Cable Company. From judgment for plaintiff, defendant appeals. Affirmed.

Garret W. McEnerney and Percy E. Towne, both of San Francisco (Wm. W. Cook, of New York City, of counsel), for appellant. Beverly L. Hodghead, of San Francisco (Albert T. Benedict, of New York City, of counsel), for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment in favor of plaintiff in an action to have established that certain charges and tolls exacted by the defendant from the plaintiff for the transmission of its messages over the Pacific cable to Oriental points are discriminatory and excessive, and to have the defendant enjoined from the imposition and exaction of such charges and tolls, and to recover damages for injuries alleged to have been sustained by the plaintiff through such demand and exaction. The main facts of the case are not the subject of much controversy, though the conclusions drawn from them by the respective parties to the action are widely divergent. The defendant, Commercial Pacific Cable Company, is the owner of the Pacific Ocean cable having its American terminus at San Francisco and extending by way of Hawaii to the principal ports in China, Japan, and the Philippine Islands. This cable was constructed in 1902, and was put into operation in the following year. The American business transmitted over it westward originates in all parts of the United States where there are telegraph offices, and is transferred to the cable wires at San Francisco. The two principal suppliers of business in the way of cablegrams to the defendant have from the inception of the operation of its cable been the plaintiff, Western Union Telegraph Company, and the Postal Telegraph Cable Company. These two companies have offices scattered generally throughout the United States, and are not only competitors in the business of local telegraphy, but are also competitors and rivals in the business of receiving and forwarding messages for trans-Pacific telegraphy by the defendant's cable lines. This latter competition and rivalry began when the defendant's cable was opened for operation in 1903, and still continues. The defendant has from the beginning charged a uniform rate or toll of $1 per word for messages from San Francisco to the Orient. This charge or toll is collected by the telegraph company receiving the message for transmission at the point of its acceptance, in addition to its charge for the local service to San Francisco, and is paid by the company receiving it to the defendant. Prior to 1908 this charge or toll was uniform in its application to its chief competing customers. The defendant, though by the terms of its articles of incorporation it apparently contemplated the establishment by itself of a system of cable and telegraph lines to be owned by it extending from the Orient eastward as far as New York, has never, in fact, constructed or operated any telegraph lines to the eastward of San Francisco, which latter point has always been, and still remains, its terminal. In the year 1908 the defendant entered into an arrangement with the Postal Telegraph Cable Company, by which the latter corporation agreed to construct and maintain a telegraph line between New York and San Francisco for the transmission exclusively of cable messages. The result of this agreement was the establishment between the defendant and the Postal Telegraph Cable Company of friendly relations in which the plaintiff did not share. On May 23, 1908, the defendant company gave notice to the plaintiff that thereafter there would be added to each of the latter's messages delivered to defendant for transmission to the Orient, the words "via San Francisco," together with the date of the acceptance of the message at San Francisco, making four or five words in all; and that upon such added words the plaintiff would be required to pay the regular charge or toll of $1 per word. The effect of the enforcement of this requirement was to add approximately $5 to the cost of each cablegram delivered by the plaintiff to the defendant for transmission by its cable to Oriental points. A like addition of these words was not required by the defendant from the Postal Telegraph Cable Company, nor were they added to its messages, nor was a like charge or toll exacted by defendant from it. The direct result of the enforcement of this rule against the plaintiff was an increase in the cost of cable messages accepted by plaintiff for transmission to the Orient over the defendant's cable to the extent of such added charge or toll over that required to be paid for a like service by its competitor and rival, the Postal Telegraph Cable Company. The plaintiff paid under protest these added charges for about two months after the date of their imposition, and then, and on July 23, 1908, commenced this action for an injunction and for damages.

The trial court made its findings in the plaintiff's favor upon the issues tendered in the pleadings, and rendered its judgment accordingly, enjoining the defendant from the further imposition of these added charges and tolls. It also found the plaintiff entitled to recover the sum of $1,582.12, the amount actually paid by it as a result of the said exaction, and the further sum of $1,000 damages for injuries to plaintiff's business during the period of its imposition.

While the record contains many assignments of error on the part of the appellant, they all revolve about its four main contentions in this appeal. These are: First, that no added charge or toll is made by defendant against the plaintiff; that the charge or toll in question is made by the Postal Telegraph Cable Company, and whatever recourse, if any, plaintiff has is against it and not against the defendant; second, that the requirement of the added words to the plaintiff's messages is reasonable and necessary in the conduct of the defendant's business, and hence the added charges and tolls are proper; third, that any discrimination that may exist in favor of the Postal Telegraph Cable Company is neither unjust nor unreasonable, but is justified by the relation between the defendant and that company; fourth, that the court erred in its judgment for damages against the defendant, especially in its award of $1,000 for injuries to the plaintiff's business, such damages being too remote and speculative to be justified.

As to the first of these propositions we are of the opinion that the evidence does not sustain the appellant's contention. The evidence was without serious conflict that the defendant is and was at all times the owner of the Pacific cable since its construction from and including its terminus in San Francisco to its various Oriental terminii; that the defendant exacted from all customers using said cable the full amount of its usual charges and tolls from San Francisco to all points westward, and that such charges and tolls, in so far as they refer to the words of the message itself, were and are collected from both the Postal Telegraph Cable Company and the plaintiff herein without division or reduction; that the cable operator at San Francisco has supervision over all the defendant's cable operators wherever located, and keeps accounts of all its messages and reports the same directly to the defendant in its New York office, and that its customers make settlements upon these reports, paying directly to the defendant the sums shown therein to be due. It is true that by virtue of the aforesaid friendly arrangement between the defendant and the Postal Telegraph Cable Company the San Francisco office of the latter is also the office of the defendant, and that the operator there in charge is an employé of the Postal Telegraph Cable Company, and that the forwarding of all cable messages is accomplished through the Postal Telegraph Cable Company by the use of its offices, instruments, and employés; but the evidence sufficiently shows, and we think the court correctly found, that in performing these various services the Postal Telegraph Cable Company acts merely in the capacity of an agent for the defendant, and that it at all times acted as such agent in the addition of the words indicated to the plaintiff's cable messages and in the imposition and collection of the charges or tolls thereon which gave rise to this action.

Some emphasis is placed in the argument of counsel for appellant upon the form of the written agreement between the defendant and the Postal Telegraph Cable Company which is attached as an exhibit to its answer herein, but an examination of that document does not induce a change of view as to the relation of agency between the parties to it in so far as the operation of the San Francisco office which is the terminus of defendant's cable is concerned, nor as to the imposition of the charges or tolls of which the plaintiff complains. In addition, however, to this, it appears that this written agreement was not formulated or entered into between the parties to it until several months after the present action was begun, and must have little, if any, influence in the determination of these issues.

[1] The next contention of the appellant is that the requirement that the words, "via San Francisco," together with the further words giving the date of receipt of plaintiff's messages, is a reasonable and necessary requirement in the conduct of defendant's business, and hence that the charges therefor were proper and lawful. The evidence does not sustain this contention. It is conceded that the addition of these objectionable words was not requested by the plaintiff and were of no benefit to it, and were not requisite in order to clarify, identify, or improve in any way its cable messages. That they are not a necessary regulation in the conduct of the defendant's business is shown by the fact that like words are not added to the cable messages of the Postal Telegraph Cable Company or of any of its customers save only the plaintiff herein. Had the defendant been able to show that the addition of the words in question was required of all customers delivering to it cable messages for Oriental transmission, it might with a show of reason, backed by quite respectable authority, urge that the requirement of the addition of these words with the consequent charge therefor was a reasonable regulation; but the very authorities which the appellant cites as sustaining its claim in respect to the reasonableness of this exaction show that the basis of the claim must be laid in the fact that the requirement is applied impartially to all customers without distinction from whom the cable company receives messages for transmission. It was so expressly held in the case of Atlantic & Pacific Tel. Co. v. Western Union Tel. Co., 4 Daly (N. Y.) 527, which is relied upon by appellant as sustaining its views, wherein the court, referring to a similar requirement and the reasons for it, said:

> "Whatever may be the [form] grounds for adopting it, no court of justice would hold that such a regulation is unreasonable, if it is applied by the defendants to all telegraph companies in New York, without distinction, from whom they receive messages for transmission to Europe."

In the absence, however, of such a showing and in the presence of the conceded fact as to the two chief customers of the defendant seeking the transmission of cable messages, the imposition of the added words, with the consequent increase of tolls, is required of the one but not of the other, the inference is irresistible that the rule imposing this unequal burden upon the plaintiff alone is not a necessary or reasonable regulation in the conduct of the defendant's business, and is not therefore defensible upon that ground. This will appear all the more plainly a little later when its effect upon the plaintiff's cable business is the subject of review.

[2, 3] The appellant's third contention, to the effect that whatever discrimination may exist against the plaintiff and in favor of the Postal Telegraph Cable Company, arising out of the addition to the messages of the former of the required words with the consequent charges or tolls, is neither unjust nor

unreasonable requires little more than its mere statement to supply its refutation. The uniform charge of the defendant upon cable messages proper was and is a dollar a word. When to this charge or toll there was superadded an additional charge or toll of approximately $5 upon each cable message sent for the plaintiff when no similar charge was exacted upon messages received for like transmission from its chief competitor, the Postal Telegraph Cable Company, the inevitable result would follow that the latter, being thus able to send cable messages to the Orient by the defendant's cable cheaper than its rival could do to the extent of approximately $5 a message, would have a speedy increase in that line of business at the expense, amounting practically to the exclusion, of its rival in relation to that particular field. That these facts and consequences are sufficient to show an unjust and unlawful discrimination the authorities fully establish. Wyman on Pub. Ser. Corp. vol. 2, §§ 1286, 1290, 1291, 1299; Postal Telegraph Co. v. Cumberland T. & T. Co. (C. C.) 177 Fed. 726; Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765; Hutchison on Carriers, § 243; Commercial Cable Co. v. Western Union Tel. Co. (Interst. Com. Com'n R.) decided May 21, 1917. The friendly arrangement between the defendant and the Postal Telegraph Cable Company out of the existence of which this discrimination obviously arose can afford no justification for defendant consistent with the well-settled principles of equity governing the business of common carriers in their relation to their competing customers and to the public at large. The only serious attempt on the part of defendant to justify this evident discrimination is to be found in its contention that the plaintiff is estopped to claim that as to it the discrimination is unreasonable and unjust because of the fact that it has itself been guilty of attempts to impose and enforce precisely the same requirements as to adding words and tolls in the course of its business throughout the country, and has used, and is in fact still using, the same sort of discrimination among its customers in so doing. In its attempt to plead and prove by specific example the plaintiff's alleged delinquencies in respect to these matters, the defendant was frustrated by the action of the trial court through its order sustaining a demurrer to the defendant's supplemental answer setting forth the particulars of the plaintiff's sins in this regard and by the further refusal of the court to permit testimony to be offered in support of the defendant's claim. There was no error in the action of the court in respect to these rulings. The maxim that he who comes into a court of equity must do so with clean hands has reference to the particular transaction in which relief is sought, and not to the general morals or conduct of the person seeking such relief. Were it otherwise, courts of equity would have found themselves largely restricted in their powers to afford relief to that certain class of litigants which have most frequently sought to invoke their aid in modern times. We find no merit, therefore, in the defendant's plea of an estoppel to the plaintiff's claim of an unjust discrimination in the instant case.

[4] The final contention of the appellant is that the trial court was in error in its findings and judgment awarding plaintiff damages. The appellant does not very seriously complain that the court's award of $1,582.12, claimed and proven by the plaintiff to have been the amount which it actually paid for the transmission of the added words under the operation of the regulation of which it complains, was an improper allowance, nor do we think that it could well object to this item of damages. But the appellant insists that as to the allowance of $1,000 as damages to the plaintiff for the alleged shrinkage of its cable business during the enforcement of the regulation complained of, these elements of damage are too remote and speculative for admeasurement in the form of damages or for fixation at the amount awarded plaintiff. It admits with no dispute that the plaintiff would have some falling off in business, with its consequent loss of profits, as a direct result of the discrimination of which it complains. The injury which it would thus suffer through the loss of such probable profits has heretofore been held by this court to be the proper subject of admeasurement of damages in cases where the evidence disclosed a reasonable possibility of their approximate estimation. Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62; Pacific Steam Whaling Co. v. Alaska Packers' Ass'n, 138 Cal. 638, 72 Pac. 161; McQuilkin v. Postal Telegraph Cable Co., 27 Cal. App. 698, 151 Pac. 21. In the case at bar the averments of the plaintiff's verified complaint in respect to this particular element of damage were not controverted by the defendant, its general denial thereof being stricken from its answer on motion and not having been replaced by an amendment thereto. The court, nevertheless, took testimony in respect to such averments, the plaintiff producing several witnesses in support thereof and the defendant contenting itself with a cross-examination of these witnesses. From the evidence thus elicited it appeared that immediately prior to the imposition of the added charges and tolls upon its cable messages the plaintiff had been receiving for cable transmission over defendant's lines to the Orient an average of 30 messages a day from various parts of the United States, and that almost immediately after the said imposition of these added charges and tolls the number of these messages so received by plaintiff declined to an average of from 10 to 15 per day, which shrinkage in business continued up to the date of the institution of this action and the issuance of the injunction there-

in. There was also some evidence as to the cost and profit to the plaintiff in the sending of messages to the Orient by means of the defendant's cable as compared with that of the transmission of like messages to the same eastern points by way of the Atlantic cables. From the evidence thus adduced the trial court was furnished some more or less definite data from which to make the approximation on which it made its findings and judgment as to plaintiff's probable loss of patronage and profits from the defendant's wrongful act. We are unable to say that the amount fixed by the court as its estimate of such loss was an unreasonable exercise of its discretion in that regard. The finding and judgment in that respect will not, therefore, be disturbed.

No other points being presented for consideration upon this appeal, the judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; SHAW, J.; MELVIN, J.; WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

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36 Cal. App. 1

ARMSTRONG v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 2424.)

(District Court of Appeal, Second District, California. Jan. 12, 1918. Rehearing Denied by Supreme Court March 11, 1918.)

MASTER AND SERVANT 362 — WORKMEN'S COMPENSATION ACT—"EMPLOYÉ"—"CASUAL EMPLOYMENT."

Under Workmen's Compensation Insurance and Safety Act (St. 1913, pp. 279, 284) § 14, defining "employé," and excluding therefrom any person whose employment is both casual and not in the usual course of the trade, business, profession, or occupation of his employer, a carpenter, employed for over three months at day wages to erect a dwelling house for the owner, was an employé, and entitled to compensation when injured; his employment not being casual, not in the usual course of his employer's business.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

Application by Thomas V. Hardwick for workmen's compensation; opposed by Leroy Armstrong, employer. To review an award of the Industrial Accident Commission of the State of California in favor of the applicant, the employer petitions for a writ of review. Award affirmed.

Kuster & Salisbury, of Los Angeles, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

CONREY, P. J. On writ of review to determine the validity of an award made by respondent Commission.

Thomas V. Hardwick was employed by the petitioner Leroy Armstrong to work as a carpenter on day wages in the erection of a dwelling house to be occupied by the employer and his family. After Hardwick had been so employed for about three months, and while he was engaged in work on the employer's house, an accident occurred, whereby Hardwick received the injuries for which compensation has been awarded. It is admitted by respondent that the employment of Hardwick was not in the usual course of the trade, business, profession, or occupation of the employer. Respondent contends, however, that the employment was not "casual" within the meaning of the Workmen's Compensation Act, and that, therefore, the liability exists. This contention covers the only question for determination in this proceeding.

Section 14 of the Workmen's Compensation, Insurance, and Safety Act, in its definition of the word "employé," as used in that act, excludes therefrom "any person whose employment is both casual and not in the usual course of the trade, business, profession, or occupation of his employer." That clause was considered by this court in Blood v. Industrial Accident Commission, 30 Cal. App. 274, 157 Pac. 1140, where we referred to decisions from other jurisdictions where the same subject was under consideration. In that case the claimant was employed at a daily wage to apply two coats of paint to a two-story frame building at that time occupied by the owner. The employment was not for any definite period of time, but the evidence showed that the work would reasonably have been done within two weeks. After entering upon his work the claimant was accidentally injured while engaged in the work. This court held that the employment was casual, and as it was also not in the usual course of any business of the employer, the award was annulled. In Maryland Casualty Co. v. Pillsbury et al., Commissioners, etc., 172 Cal. 748, 158 Pac. 1031, the claimant was employed by the day to repair a farm tractor. On his behalf argument was made that the employment was permanent as being "for an indefinite period which may be severed by either party." The court replied that this definition of permanent employment did not fit the hiring of the claimant Snow, who was employed by the day. "There was nothing indefinite about it, except the time which might be consumed in making the necessary repairs on the tractor, but nevertheless Snow was hired for the definite period reasonably necessary for the fixing of that particular machine." Held, that the employment was "casual" in the sense of being "incidental" and "occasional"; that being undoubtedly the definition of the word as used in the statute. In Miller & Lux, Inc., v. Industrial Accident Commission, 32 Cal. App. 250, 162 Pac. 651, we have the opinion of the first District Court of Appeal upon the same question, illustrated by somewhat different facts.

There the claimant was employed as a carpenter and as the foreman in charge of the construction of a "14-room cottage" located upon the land of the employer. After having continued in this employment for a period of 57 days, and while so employed, the claimant suffered the accidental injury for which compensation was awarded to him by the commission. After a statement of the facts, the court held that the applicant's employment was neither casual nor out of the usual course of business of the employer, and the award was affirmed. The court said:

> "The cases collected with much industry and cited by counsel for the petitioner will, when analyzed, show that the rule depended in each case upon its particular state of facts; and that as to these facts they may each be easily differentiated from the case at bar. To hold that the applicant's employment to act as foreman over a number of other carpenters in the erection of a 14-room building, involving an engagement of several months of regular and daily recurring labor, to be 'casual' would, in our opinion, restrict the operation of the statute beyond its reasonable and liberal interpretation."

In Michigan the Workmen's Compensation Act (Pub. Acts Mich. 1912 [Ex. Sess.] No. 10), does not include in its benefits any person whose employment is but casual. An instructive case under that statute is Dyer v. James Black Masonry & Contracting Co., 192 Mich. 400, 158 N. W. 959. The employer was the principal contractor engaged in the construction of a building in the city of Detroit. Finding it necessary to have some person to look after the delivery of glass at the building and see to the unloading of the glass, the employer arranged with the claimant Dyer to do this work from time to time as the glass arrived. The claimant was injured while thus employed. In that case some of the principal decisions are referred to, including those relied upon by us in Blood v. Industrial Accident Commission, supra. It was held that the employment of the claimant was not casual.

With respect to this particular question, we think that the case of Miller & Lux, Inc., v. Industrial Accident Commission, supra, is closely like the case at bar, and the language which we have quoted from that decision is applicable here. Our own decision in Blood v. Industrial Accident Commission, supra, does not necessarily conflict with this conclusion. The claimant there was employed to do work, which was in the nature of repairs to an existing building. The claimant was employed at a fixed rate per day, but his contract was one of employment for the entire job, which was fixed and limited in its amount and in the description of the work which claimant was to do. It is not reasonably possible to set forth a hard and fast definition of casual employment, whereby every case may be determined like a mathematical problem. It is our opinion that the award made by the commission is based upon a correct application of the statute to the facts of this case.

The award is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

177 Cal. 631

E. CLEMENS HORST CO. v. NEW BLUE POINT MINING CO. et al.

DURST v. SAME (two cases).

(Sac. 2465–2467.)

(Supreme Court of California. Feb. 27, 1918. On Rehearing, March 29, 1918.)

1. Waters and Water Courses 🔑130—Appropriation—"Foreign Waters."

Where plaintiffs had always used the natural water of a stream, but the stream had been augmented by foreign waters deposited in it by a city, such foreign waters constituted abandoned personalty, and defendants, who could first take them from the stream, had the right to their use, since plaintiffs could recover, if at all, only on the strength of their own title, and not on the weakness of defendant's, and as plaintiffs could not prevent the removal of such foreign waters by those responsible for their presence in the stream, they could acquire no title to the waters by adverse possession.

2. Waters and Water Courses 🔑42, 142—Appropriation—Artificial Waters.

A riparian owner has a right to the usufruct of the natural water of the stream, but an appropriator of the waters artificially added is a taker of the corpus of that which exists in the stream only by virtue of its abandonment.

3. Waters and Water Courses 🔑152(11)—Rights of Riparian Owners—Judgments—Sufficiency.

A judgment finding that a riparian owner was entitled to all the natural flow of 1,191 inches, and that defendants were entitled to the foreign water varying from 500 to 1,400 inches in the course of the year, was sufficiently definite.

4. Appeal and Error 🔑907(1)—Scope of Review—Presumptions.

Under the rule favoring the sustaining rather than the reversal of judgments, the court, in the absence of the evidence, must assume that the evidence justifies the findings, and that the judgment is in accordance with equity.

5. Waters and Water Courses 🔑152(4)—Rights of Riparian Owner—Jurisdiction.

Where plaintiff sought to quiet its right to the natural flow of a river at its lands in one county, the mere fact that a tributary creek had a separate name, and extended through another county, did not make it less a part of the river, so that the court of the county wherein plaintiff's land lay had jurisdiction under Const. art. 6, § 5, requiring actions as to real property to be brought within county where the property is situated.

In Bank. Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Three suits by the E. Clemens Horst Company, Ralph H. Durst, and Rose Frances Durst, as executrix, respectively, against the New Blue Point Mining Company and others. From those parts of the judgments adverse to them, the plaintiff in each case appeals. Affirmed.

On petition for rehearing, petition denied.

W. H. Carlin, of Marysville, and Samuel C. Wiel, of San Francisco, for appellants. Bert Schlesinger, James F. Sheehan, C. J. Heggerty, and Knight & Heggerty, all of San Francisco, F. T. Nilon, of Nevada City, Byron Coleman, of Los Angeles, and John Mulroy, of Grass Valley, for respondents.

MELVIN, J. Plaintiffs appeal from parts of judgments identical in three cases involving the flow of Bear river and its tributary Wolf creek to the lands of plaintiffs in Yuba and Placer counties. The three appeals are by stipulation to be governed by the decision based upon the transcript in the case entitled "E. Clemens Horst Company v. New Blue Point Mining Company."

E. Clemens Horst Company (hereinafter to be known as "plaintiff" or "appellant") has owned for more than a quarter of a century land riparian to Bear river. The water flowing to said land comes partly from a tributary of Bear river known as Wolf creek, which has its confluence with the river above plaintiff's land. Upon Wolf creek the predecessors of defendants maintained a dam. This dam was completed in 1862, and was constructed at large cost, and has been maintained by defendants or their predecessors in interest ever since. Heading at this dam was a ditch sometimes known as the "Campbell Ditch." It was 28 miles long. Two miles from its head this ditch crossed a tributary of Wolf creek known as French ravine, and no water carried beyond French ravine in said ditch ever did, now does, or can return to Wolf creek or Bear river above the land of plaintiff.

Beginning in 1862, 2,000 inches of water was carried by said ditch in the winter time each year and not returned to either the creek or the river, being used in gravel mines at Smartsville. A small quantity has been and still is distributed in such manner that a portion of it has been returned to the stream above the land of plaintiff, but as there is no controversy over this water, it will not be considered in this opinion. Winter diversions through the ditch continued until 1883, when the mining at Smartsville outside of the watershed of Bear river and Wolf creek was stopped by injunction. Between 1883 and 1910 no water in winter was carried by the ditch outside of the said watershed.

In the irrigation season, however, from 1862 to 1901, water for irrigating purposes was distributed along the course of the ditch in amounts varying from 100 to 800 inches of water, none of which was returned at or above plaintiff's lands. All the other water diverted by the ditch was released before reaching French ravine. In 1901 the flume crossing French ravine broke down, and from that year until 1910 no water was conducted beyond that place. At all times between 1901 and 1910 all water taken from Wolf creek by the dam and ditch was returned to the stream above plaintiff's lands and flowed on plaintiff's lands, where it was used by plaintiff.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Upon this history of the use of the water it was held that defendants, between the years 1901 and 1910, had forfeited all right to take any of the natural flow of Wolf creek to any place outside of the watershed of that stream or that of Bear river, and had never recovered said right either by prescription or otherwise. In regard to all of the natural flow of these streams, plaintiff as a riparian owner was found to have rights prior and superior to any which defendants might assert. In 1909 defendants reopened Campbell ditch, rebuilt the flume across French ravine, and began to distribute at places beyond French ravine and outside of the watershed of Wolf creek and that of Bear river water varying in amount from 500 to 2,500 inches.

It was found by the court that Wolf creek receives, and for more than half a century has received, in addition to its natural flow, water coming from sources without its watershed and known as "foreign water." This "foreign water" is made up of sewage from the city of Grass Valley and water discharged from mines and mills, the city, mines, and mills receiving their supply from a canal which leads from Yuba river. The canal is owned by persons not in privity with these litigants, or any of them, and not parties to this controversy. All of the discharges of "foreign water" enter Wolf creek above the Campbell dam and commingle with the other waters of said stream. Said "foreign water" is never less than 500 inches nor more than 1,400 inches. The natural flow of Wolf creek at the lowest stage is found to be always at least 1,191 inches. It was further found by the court that plaintiff has a paramount right to the natural flow to its lands of the water in Wolf creek and Bear river, but that defendants have a right superior to plaintiff to all of the "foreign water" at all times for use at any place within or without the watershed of Wolf creek or Bear river.

The essential conclusions of law were that plaintiff is entitled to all of the natural flow to its lands; that defendants, as against plaintiff, have a right to use the "foreign water" not exceeding 1,400 inches; and that plaintiff may have an injunction restraining defendants from diverting any save the "foreign water" from Wolf creek. By the judgment which follows the conclusions of law, the title of plaintiff to the natural flow is quieted.

The principal question involved in this appeal is the following: Where the flow of a natural stream is augmented by artificial means, that is by waters which, without the intervention of human agency would never reach the stream, does this artificial flow inure to the benefit of riparian owners, or is it merely in the nature of abandoned personalty which may be appropriated by the first person who can take it from the stream?

Appellant agrees with respondents that the "foreign water" is an increment of Wolf creek abandoned by those who produce it. While the right of the producers at any time to forsake the practice of putting water into Wolf creek is conceded, the right of respondents, in the absence of any privity with said producers, to appropriate this surplus flow is denied. Appellant calls the court's attention to the case of Arkwright v. Gell, 5 Meeson and Welsby, 203–226. In that case mine owners had drained their workings by a tunnel from which water was discharged in such a way that it flowed to plaintiffs and was used by them to operate mills. For the purpose of securing better drainage the owners of the mine dug a deeper tunnel which caused the other to run dry. In this they were upheld on the ground that those creating the supply may discontinue it. In principle that case seems to fit the one point upon which appellant and respondents agree, namely, the right of the producer of the artificial flow to cease furnishing it, but appellant lays great stress upon the comment on the case in Washburn on Easements at page 420 (4th Ed.), which is as follows:

> "It will be remarked, as an important circumstance in this case, that the one who dug the second sough and caused the diversion was interested in the mines thereby to be drained. Had it been otherwise, had he been a stranger, or merely the owner of the land lying between the outlet of the first sough and the place where the water entered into the natural stream, he would have had no right to divert the current issuing from the mine, so as to deprive the plaintiff of the use of the water flowing in the same, after having enjoyed it so long."

It is contended that as among all the rest of the world except the producer, the mingled stream of natural and artificially introduced water follows the usual law of water courses, and that it is immaterial as between two claimants how the water got into the bed of the stream. In this behalf a number of authorities are cited, including Wood v. Waud, 3 Exch. 748, Druley v. Adam, 102 Ill. 177, Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408, Schulz v. Sweeny, 19 Nev. 359, 11 Pac. 253, 3 Am. St. Rep. 888, and Hollett v. Davis, 54 Wash. 326, 103 Pac. 423. In the case last cited it was held that the owner of a spring who diverts its waters into an artificial channel may not, after the lapse of the period of the statute of limitations, return the waters to their natural channel to the injury of a lower riparian owner on the water course through which the water has long been discharged. The case was decided upon the doctrine of estoppel, and has little value here. The other cases were determined upon authority of decisions under the common law. Eddy v. Simpson, the Californian authority cited was to the effect that producers of water who had abandoned it could not retake it from the stream into which it had been discharged if by so doing they prevented its application to the lands of lower riparian owners who had been making beneficial use of it; but in Hoffman v. Stone, 7 Cal. 46, this doctrine was modified and a ruling made, which has been consistently followed ever since, that an appropriator may use a natural water course as a part of the process of conducting the appropriated fluid to a place of storage. In that case it was held that only the natural water in the stream belonged to the first appropriator, and that the artificial water might be retaken by those who had discharged it into the water course. And in the leading case of Katz v. Walkinshaw, 141 Cal. 116–135, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, Eddy v. Simpson was cited during the discussion of the deviations from the common law which have been brought about by local necessities and the physical and climatic differences between England and California. Very early in the history of irrigation in California this court began to draw distinctions between the riparian rights recognized under the common law and the law of appropriation which was called a law of necessity, following custom rather than fixed conditions. In Miller v. Wheeler, 54 Wash. 429, 103 Pac. 641, 23 L. R. A. (N. S.) 1065, this difference is discussed and many cases are listed, the court citing with special approval and quoting from Butte Canal & Ditch Co. v. Vaughn, 11 Cal. 143, 70 Am. Dec. 769, wherein the right of the original appropriator of water again to take it after its discharge into an alien water course—a right denied in the case of Eddy v. Simpson—is again declared. It is unnecessary, however, to prolong the discussion of this phase of the case because appellant admits that, under the authorities, the people who put the water brought from sources outside of the watershed into Wolf creek might at their pleasure discontinue such increment, leaving appellant without remedy.

[1] If, then, the appellant can obtain no easement or right by adverse possession or user against the people at Grass Valley who add to the corpus of the stream, how, ask respondents, can plaintiff maintain the present action without first establishing a right to the use of this water? We can find no satisfactory answer to this question that will fit with appellant's contentions. Respondents invoke the rule of property that plaintiff must rely upon the strength of its own title, and not upon the weakness of that of its adversaries—citing Little Sespe Consolidated Oil Co. v. Bacigalupi, 167 Cal. 381, 139 Pac. 802. We can see no escape from the logic of the rule so invoked and its application to the conditions here presented for our consideration.

[2] A riparian owner has a right to the usufruct of the natural water of the stream, but an appropriator of the waters artificially added is a taker of the corpus of that which exists in the stream only by virtue of its abandonment. So jealous have the courts of this state been for economy in the use of water and the fair apportionment of the precious fluid for beneficial purposes that they have refused to restrain the diversion of water by a nonriparian appropriator, at the suit of a lower riparian owner, when the amount diverted would not be used by the latter, but would greatly benefit the person diverting it. San Joaquin & Kings River Canal & Irrigation Co. v. Fresno Flume & Irrigation Co., 158 Cal. 626, 112 Pac. 182, 35 L. R. A. (N. S.) 832; Modoc Land & Live Stock Co. v. Booth, 102 Cal. 151, 36 Pac. 431; Fifield v. Spring Valley Water Works, 130 Cal. 552, 62 Pac. 1054.

In Gallatin v. Corning Irrigation Co., 163 Cal. 405, 126 Pac. 864, Ann. Cas. 1914A, 74, the court was discussing a situation in which defendant proposed to divert for purposes of irrigation on nonriparian lands surplus water carried in a stream during periods of unusual flood. Injunction against defendants was refused when demanded by plaintiffs, who were lower riparian proprietors, on the ground that the taking of the flood waters wrought no present damage to said plaintiffs. After a review of the decisions applicable to the problem before the court the following language was used in the decision:

> "These decisions in effect establish the just rule that flood waters which are of no substantial benefit to the riparian owner or to his land, and are not used by him, may be taken at will, by any person who can lawfully gain access to the stream, and conducted to lands not riparian, and even beyond the watershed, without the consent of the riparian owner and without compensation to him. They are not a part of the flow of the stream which constitutes 'parcel' of his land, within the meaning of the law of riparian rights."

In Cohen v. La Canada Land & Water Co., 151 Cal. 680, 91 Pac. 584, 11 L. R. A. (N. S.) 752, the plaintiff sought to restrain defendants from diverting and carrying away certain waters developed by tunnels on lands from which plaintiff had conducted the flow of certain springs. It was found that the developed waters were not such as would under natural conditions find their way to the springs, and that, except for the tunnels the supply thereby made available would have gone by percolation outside of the watershed of the stream on which plaintiff's land was located. Among other things the court said:

> "Under these circumstances, as the waters developed by the tunnels were not waters which would have trended towards or supported or affected any stream flowing by the land of appellant, nor any springs in or to the waters of which she had any claim or interest, she was not injured as an adjoining proprietor or as an appropriator, and hence could not complain or insist upon the application of the rule announced in the cases cited to prevent the respondents from taking such developed waters to any lands to which they might see fit to conduct them. For authority sustaining this proposition, we cite Hanson v. McCue, 42 Cal. 306 [10 Am. Rep. 299], Gould v. Eaton, 111 Cal. 639 [52 Am. St. Rep. 201, 44 Pac. 319], and Montecito, etc., Co. v. Santa Barbara, 144 Cal. 585 [77 Pac. 1113]."

So in the present case it may be said that as the surplus waters would not in the course of nature reach appellant's land, that corporation may not complain of being deprived thereof either by the producers of the excess, by their assignees, or by a stranger to their title who appropriated the abandoned excess for proper purposes.

Respondents cite Dannenbrink v. Burger, 23 Cal. App. 587, 138 Pac. 751, as supporting their contention that where water has been conducted into a stream other than that from which it was taken and has been abandoned, the rights therein are in the nature of those which one may enjoy in personalty; the appropriator being entitled to the corpus thereof rather than the usufruct. The discussion in the opinion in that case supports the contention of respondents, for the following language is there used:

> "It is well settled that where water escaping or leaking from an artificial water course goes to waste by flowing promiscuously over other lands or finds its way to some other stream than the one from which it is diverted into such artificial water course, a person appropriating such water thus merely takes the corpus and not the usufruct therein. In such case, having the usufructuary right in such water, the owner of such ditch or artificial water course is at liberty at any time to change or alter it without invading any vested right of the appropriator, even though the effect of such change or alteration must inevitably result in depriving the appropriator of the water escaping from such water course and which he has appropriated and used, perhaps for a long period of time. As is said in Hanson v. McCue, 42 Cal. 303 [10 Am. Rep. 299], and approved in Katz v. Walkinshaw, 141 Cal. 116 [99 Am. St. Rep. 35, 64 L. R. A. 236, 70 Pac. 663, 74 Pac. 766], the owner of an artificial water course is not bound to maintain the artificial stream for the benefit of those who have appropriated waters escaping therefrom. * * * In other words, the appropriator merely secures the corpus of the water thus escaping as personalty, but does not thereby secure or acquire the right to the continuous flow of such water."

We are convinced that plaintiff and respondents were upon an equal footing with reference to the surplus water, and that the ones who first secured it may not be deprived of the right to the use of it, even outside of the watershed of Wolf creek by the person or corporation claiming as a lower riparian proprietor on Bear river. This disposes of the principal question involved herein, and our determination of this matter is not altered by the opinion in Schwann v. Cotton, [1916] 2 Chancery, 459, dealing with a controversy between riparian proprietors in a jurisdiction in which our law of appropriation of waters has no application. The case of Davis v. Gale, 32 Cal. 26, 91 Am. Dec. 554, also cited in this behalf, is of little value to us here because the points decided were so different from those involved in this controversy. That was a suit between appropriators, each claiming a priority, not a controversy based upon riparian rights of either party.

[3, 4] Appellant attacks the judgment upon the ground that it is not definite. That the amount of "foreign water" varies greatly at different periods during the year is found. Its maximum (1,400 inches) and its minimum (500 inches) are fixed by the findings, but it is argued that as the amount of the flow of the added water is never constant, and never will be, it is impossible to tell when respondents are going beyond the appropriation of the added water and taking from the natural flow. The effect of the judgment says appellant is to restrict it over the whole year to the minimum flow of natural water found to be in the stream at the end of the season. It is argued that the judgment is just as uncertain as that found erroneous for uncertainty in Watson v. Lawson, 166 Cal. 235–243, 135 Pac. 961. An examination of the said judgment shows, however, that it is much more specific than the one described in the cited case. In that case defendants had been found by the superior court to be entitled to "sufficient water for the proper irrigation of so much of their several lands as they have heretofore irrigated with such water." As there was nothing to show the number of acres previously irrigated, nor the amount of water such irrigation would require the judgment was of course hopelessly indefinite. In the case at bar defendants are adjudged to be entitled to all of the "foreign water" not exceeding 1,400 inches, and are enjoined from taking more than that quantity. Conversely stated, the court forbade defendants to take more than would leave in the stream 1,191 inches of the water from Wolf creek which had been judicially determined to be the minimum quantity of natural water flowing at the intake of their ditch. Under the rule which favors the sustaining rather than the reversal of judgments we must assume that the evidence (which is not set forth in this record) justifies the findings, and that said judgment is in accordance with fairness and equity.

[5] Certain of the respondents question the jurisdiction of the court to try this case and contend that they should have been awarded a judgment of dismissal under section 5 of article 6, of the Constitution of California. This, they say, is an action to quiet title to the waters of Bear river and its tributaries, including Wolf creek, and as the latter stream is entirely within the county of Nevada, they assert that the superior court in and for the said county alone had jurisdiction to entertain such a suit. The court found that plaintiff's right sought to be quieted was "a part and parcel of its Yuba county lands." The action was properly commenced and tried in Yuba county. Miller & Lux v. Madera Canal & Irrigation Co., 155 Cal. 59–73, 99 Pac. 502, 22 L. R. A. (N. S.) 391; Lux v. Haggin, 69 Cal. 255–391, 4 Pac. 919, 10 Pac. 674. Plaintiff was seeking to quiet its right to the natural flow of Bear river at its lands in Yuba county. The mere fact that Wolf creek has a separate name and extends through another county does not make it less a part of Bear river. Porters Bar Dredging Co. v. Beaudry, 15 Cal. App. 751–765, 115 Pac. 951.

It follows that respondents were not entitled to a judgment of dismissal.

The parts of the judgments from which appeals are taken are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; VICTOR E. SHAW, Judge pro tem.; SLOSS, J.; WILBUR, J.

On Rehearing.

PER CURIAM. The petition for rehearing is denied. The court does not construe the opinion herein as deciding the question as to what rights may be acquired in so-called "foreign waters," as between appropriators, or by prescription. The record in these cases presents a controversy between the plaintiffs claiming the waters in question solely by virtue of their lower riparian ownership of the banks of Bear river, of which Wolf creek is a tributary, and the defendants claiming the right to divert the foreign waters of Wolf creek by virtue of their appropriation and application of the same to beneficial uses.

177 Cal. 507

HOLLAND v. KELLY. (S. F. 7572.)

(Supreme Court of California. Dec. 27, 1917. On Rehearing in Bank, March 18, 1918.)

1. Descent and Distribution 🔑74—Statutes.

On death of a wife, intestate, all of her estate, real and personal, vested in her heirs, under Civ. Code, §§ 1383, 1384, 1386, 1402, but without right of immediate enjoyment, the rights and duties of the administrator intervening.

2. Descent and Distribution 🔑89—Collection of Debts—Title to Personalty.

Generally speaking, in the absence of some default or fraud or refusal on the part of the administrator to collect the property of the estate, the heir may not bring action in his individual capacity to collect debts due the estate or to preserve title to the personalty.

On Rehearing.

3. Descent and Distribution 🔑91(5) — Collection of Estate by Heir—Pleading Special Circumstances.

In order to maintain an action for the recovery of or affecting the personal estate of his decedent, an heir in his complaint must set forth the special circumstances which constitute as to him an exception to the general rule that the qualified personal representative of deceased alone may sue.

4. Executors and Administrators 🔑57 — Suit to Set Aside Fraudulent Transfer by Intestate.

An administrator cannot sue to set aside a fraudulent transfer made by his intestate unless there is a deficiency of assets wherewith to pay existing creditors.

5. Executors and Administrators 🔑49 — Money Procured from Decedent by Fraud—Action by Administrator.

Where decedent in her lifetime might have sued to recover money in bank which she was induced to part with by fraud, it is her personal representative's duty to sue for the recovery thereof as part of the estate to which he is entitled.

Department 2. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Patrick Holland against Julia McCarthy. From a judgment for defendant, plaintiff appeals; William A. Kelly, as executor of defendant's estate, being substituted on her death. Judgment affirmed.

See, also, 158 Pac. 1045; 169 Pac. 1000.

W. E. Cashman, of San Francisco (R. M. F. Soto, of San Francisco, of counsel), for appellant. William A. Kelly, of San Francisco, for respondent.

MELVIN, J. Plaintiff appeals from a judgment entered after the sustaining of defendant's demurrer to the complaint and the failure of plaintiff to amend his pleading within the time allowed by the court. Upon suggestion of the death of Julia McCarthy, the executor of her last will has been substituted as respondent.

Patrick Holland sued as surviving husband of Mary Anne Holland, deceased, to quiet title to a fund deposited by said Mary Anne Holland during her lifetime in the bank of defendant, the Hibernia Savings & Loan Society. There are four counts in which it is elaborately pleaded that prior to her death Mrs. Holland, by an instrument in writing, apparently made the account payable to herself or Julia McCarthy or to the survivor; that thereafter Julia McCarthy caused the money to be transferred to another and new account in the names of "Julia McCarthy or Mary Anne Holland, payable to either or the survivor"; and that all of the original sum still remained on deposit in the said bank except $500 drawn by Julia McCarthy during the life of Mrs. Holland. There are allegations, which we need not set forth in full, to the effect that Julia McCarthy by fraud, undue influence, and by plying Mrs. Holland with liquor, succeeded in wrongfully securing the fund in question, at a time when Mrs. Holland was incompetent lawfully to dispose of said property.

[1, 2] One of the points made by the demurrer to the complaint was that plaintiff did not have capacity to sue. This objection was, in our opinion, well taken.

While conceding that in California there is no authority supporting the right of one taking by inheritance as plaintiff herein to sue to quiet title to personal property of his decedent, nevertheless appellant bases his assertion of such right upon the propositions: (1) That upon the death of Mrs. Holland, intestate, all of her estate, real and personal, vested in her heirs (citing Civ. Code, §§ 1383, 1384, 1386, 1402; Estate of Patterson, 155 Cal. 626, 102 Pac. 941, 26 L. R. A. [N. S.] 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625; Raulet v. Northwestern National Insurance Co., 157 Cal. 213, 107 Pac. 292, and other authorities to the same effect); (2) that in California a tenant in common may sue alone without joining his cotenants (citing section 384, Code Civ. Proc.; Cassin v. Nicholson, 154 Cal. 497, 98 Pac. 190, and other authorities). While his premises are undoubtedly correct, the conclusion drawn by appellant is erroneous. Indeed one of the sections cited in his brief (1384 of the Civil Code) provides that the property of an intestate passes to his or her heirs "subject to the control of the probate court." Therefore, in the absence of special equitable reasons (of a sort which are not set forth in this complaint), no heir as such would be permitted to sue directly to quiet title to property belonging to the estate of his intestate. While title to the property of his intestate vests in an heir upon the death of such intestate, his title does not carry with it the right of immediate enjoyment. The rights and duties of the administrator of the estate intervene between vesting of title and right to possession. Section 1452, Code of Civil Procedure, authorizing such suits by heirs or devisees, is limited to real property. Therefore, generally speaking and in the absence of some default or some fraud or a refusal on the part of the administrator to collect the property of the estate, the heir may not, in his individual capacity, bring an action to collect debts due the estate or one to preserve title to the personal property. Robertson v. Burrell, 110 Cal. 568, 42 Pac. 1086; Bollinger v. Bollinger, 154 Cal. 695–707, 99 Pac. 196; Miller v. Ash, 156 Cal. 544–556, 105 Pac. 600; Rogers v. Schlotterback, 167 Cal. 35, 56, 138 Pac. 728; 18 Cyc. 355.

Our conclusion upon this branch of the case removes the necessity of deciding whether or not plaintiff is estopped to prosecute this action by the decision of the District Court of Appeal in McCarthy v. Holland, 30 Cal. App. 495, 158 Pac. 1045, a case which we refused to transfer to this court on petition to that end.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.

On Rehearing.

VICTOR E. SHAW, Judge pro tem. Defendant's demurrer to the complaint was sustained, and plaintiff failing to answer within the time allowed therefor, a judgment was entered for defendant, from which plaintiff appeals.

The complaint is in four counts, and, in so far as material to our consideration of the case, alleges: That plaintiff and Margaret I. McNamara are the sole heirs of Mary Anne Holland, who died intestate; that at the time of her death deceased had on deposit in the Hibernia Savings & Loan Society the sum of $5,633.43, which was her separate property; that some time prior to her death, by reason of the mental incompetency of the deceased and the wrongful acts of Julia McCarthy (for whom since her decease William Kelly, as executor of her estate, has been substituted as defendant), the latter secured from deceased a written instrument authorizing a transfer of said deposit from the name and account of Mary Anne Holland to a new account in the names of "Julia McCarthy, or Mary Anne Holland, payable to either, or the survivor"; that the instrument so authorizing such transfer was procured by undue influence; that it was never signed by Mary Anne Holland, nor delivered to Julia McCarthy, who wrongfully and without right claims title to the deposit of money. The prayer of the complaint is that said written instrument authorizing the transfer of the account be declared void; that said deposit of money be adjudged to be a part of the estate of the decedent; that the Hibernia Savings & Loan Society holds said money in trust for the use and benefit of the estate of deceased and for the plaintiff; and that the court direct that payment thereof be made to plaintiff. Among other grounds of demurrer sustained by a general order was want of plaintiff's capacity to maintain the action and want of sufficient facts to constitute a cause of action.

Assuming, as we must, against the demurrer, that this money as alleged belonged to deceased at the time of her death and that she died intestate, leaving plaintiff and Margaret I. McNamara as her sole heirs, they are, as provided by section 1384 of the Civil Code, entitled to it "subject to the control of the probate court, and to the possession of any administrator appointed by that court, for the purposes of administration." To like effect is section 1452 of the Code of Civil Procedure, which declares the executor or administrator entitled to the possession of all the estate of a decedent until the estate is settled or delivered by order of the court to those entitled thereto, but which, as to real estate only, provides that the heirs alone, or jointly with the executor or administrator, may sue to recover or quiet title to the same. By section 1581 of the Code of Civil Procedure, the executor or administrator is required to take into possession all the estate of a decedent, and by section 1582 such personal representative is empowered to institute actions for the recovery of such property, whether real or personal, "or to determine any adverse claim thereon." These sections, and the provisions of others pertinent to the subject, contemplate that transfers of property of deceased persons shall be effected by means of administration under the control and orders of the probate court acting under and pursuant to provisions of law designed to protect the rights and interests, not only of the estate of the decedent, but of all persons interested therein, whether creditors, claimants, heirs, or legatees. To permit one claiming to be sole heir of a deceased person, who is alleged to have died intestate, leaving a deposit of money in bank, to maintain an action of any character affecting the property, whether for the direct recovery thereof or to determine an adverse right thereto, is well calculated to lead to inevitable confusion and inconvenience. There might be legatees under a will, or heirs other than the one suing, or creditors of the decedent entitled to such money in payment of their claims, none of whom would be affected by the judgment.

Assuming that in the case at bar and upon issue joined upon all the allegations of the complaint, judgment had been rendered for the defendants, such judgment would be ineffectual as a plea in bar to an action against the same defendants for the same property brought by the administrator of the estate. One having possession of money or property of a decedent at the time of the latter's death should not at the suit of an heir be called upon at his peril to deliver or pay it over, unless he can conclusively establish for all time that there was no will, no legatees, no creditors of the estate, and no other heirs, without all of which he could not be exempt from liability, nor unless a judgment therein rendered in his favor would protect him in subsequent litigation for the same property by other heirs or the personal representatives of the deceased. In Grattan v. Wiggins, 23 Cal. 16, it is said, quoting from the syllabus:

> "A debt due to the intestate is a personalty, and does not descend to the heir like realty, but vests in the administrator, who has the sole right to maintain actions to collect the same."

To this point the case was cited with approval in Robertson v. Burrell, 110 Cal. 568, 42 Pac. 1086, where the court says:

> "Nor can the heir, by any act of his own, strip the representative of any of his rights, nor relieve him from the performance of any of his duties. The heir may sell his interest, but the administrator still has control of the property sold for the payment of debts and the general purposes of administration. The heir cannot bring an action to enforce payments or collect debts; * * * and, even when he attempts to do so by suing in his individual capacity and as executor, the right of action not being in both, but in the executor alone, a demurrer will be sustained."

To the same effect is Buchanan v. Buchanan, 75 N. J. Eq. 274, 71 Atl. 745, 22 L. R. A. (N. S.) 454, 138 Am. St. Rep. 563, 20 Ann. Cas. 91, where it is held that the next of kin of a decedent have no standing in a court of law or equity to maintain an action for the recovery of property alleged to belong to the estate of their decedent. The general rule, supported by all the authorities in this as in other jurisdictions, is that in the absence of special circumstances an heir cannot maintain an action for the recovery of or affecting the personal estate of his decedent.

[3] If such be the general rule, then it follows that in order to maintain the action the heir must in his complaint set forth the special circumstances which as to him constitute the exception to the rule, and by virtue of which he is entitled to maintain the action. To undertake to specify grounds which would bring a case within the exception could serve no purpose, since each case must be governed by the circumstances thereof. Sufficient to say that the complaint in the instant case (the material allegations of which we have set out) is entirely barren of any facts constituting grounds for invoking the equitable aid of the court in protecting plaintiff's interest in the estate of decedent. Such actions can be maintained only by the qualified personal representative of the deceased, the existence of whom, having charge of the estate, we must assume in the absence of any allegations to the contrary.

[4, 5] Appellant in support of his contention cites a number of cases to the effect that an administrator cannot sue to set aside a fraudulent transfer made by his intestate, unless there is a deficiency of assets wherewith to pay existing creditors. This is quite true, for the reason that the creditors only are interested. The heirs stand in the shoes of the fraudulent grantor, and since he would have been precluded from setting aside such conveyance it necessarily follows that they are likewise bound. Shiels v. Nathan, 12 Cal. App. 604, 108 Pac. 34; Emmons v. Barton, 109 Cal. 662, 42 Pac. 303. The instant case, however, does not involve a fraudulent conveyance made by plaintiff's intestate. According to the complaint, the fraud and wrong whereby Mary Anne Holland was induced to part with the money was committed by Julia McCarthy, and since Mary Anne Holland in her lifetime might have brought suit to recover it, her personal representative not only has the power, but it is his duty, to sue for the recovery thereof as a part of the estate of decedent, to which, as administrator, he is entitled. The cases of Tully v. Tully, 137 Cal. 60, 69 Pac. 700, and Estate of Page, 57 Cal. 241, cited by appellant as upholding the right of an heir to bring suit to quiet title to real estate, are not applicable, for the reason that such right is secured by the provisions of section 1452 of the Code of Civil Procedure.

Upon further consideration of the case, we are satisfied with the conclusion reached in the department decision.

The judgment is therefor affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; WILBUR, J.; RICHARDS, Judge pro tem.

177 Cal. 592

COHEN v. ADOLPH KUTNER CO. et al.

(S. F. 7923.)

(Supreme Court of California. Feb. 23, 1918. Rehearing Denied March 25, 1918.)

1. EASEMENTS 🔑26(4)—STAIRWAY—DESTRUCTION OF BUILDING.

An instrument giving an adjoining landowner, and her heirs forever, a right of way in a stairway in the grantor's building and referring to the privilege as an easement appurtenant to the grantee's property, conveyed no estate which survived the building's destruction by fire.

2. EASEMENTS 🔑26(4)—TERMINATION—DESTRUCTION OF BUILDING.

Ordinarily an adjacent landowner's right to use a particular part of a building for a special purpose terminates with the building's destruction.

Department 2. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action to quiet title by Ethel Ruth Cohen against the Adolph Kutner Company, a corporation, and Alfred Kutner. Judgment for defendants, and plaintiff appeals. Affirmed.

Wise & O'Connor, of San Francisco, for appellant. Barbour & Cashin, of Fresno, for respondents.

MELVIN, J. In this case defendants' demurrer to the complaint was sustained without leave to amend, and judgment was accordingly entered.

Plaintiff sought by this action to quiet title to an alleged easement on the land adjoining her property which was owned by the defendants; for an injunction to restrain defendants from interfering with plaintiff's use of the said easement; for damages; and for other relief. The essential facts set forth in the complaint are as follows: In 1885 W. D. Grady was the owner of lots 27, 28, and 29 of block 72 of the city of Fresno. Defendants herein are his successors in interest. On the Grady property was a building and at one end of the building nearest to lot 30 was a stairway extending from the street to the second story of said building. Eliza Ruth desired to purchase a part of lot 30 in block 72 adjoining the property of W. D. Grady and belonging to his infant son. On February 6, 1885, Mr. Grady and Mrs. Ruth entered into an agreement whereby said Grady did "grant, bargain, sell, and confirm unto said" Eliza Ruth, and to her heirs and assigns forever, "a right of way in, over, down, and up said stairway on said lot 29 in said block 72." Eliza Ruth purchased the part of lot 30 adjoining lot 29, erected a building thereon in accordance with the terms of the written agreement, made a doorway opening from her building onto the stairway in question, and she and her tenants used the said stairway from that time until the year 1915, when the Grady building was destroyed by fire. Defendants are about to erect upon their property a one-story building, making no provision for the restoration of the destroyed stairway.

[1, 2] It is agreed by counsel on both sides that there is just one question involved in this case, namely: Did W. D. Grady, by the instrument referred to, grant to Eliza Ruth any estate in the land? In order to discuss this question it will be necessary to quote the essential parts of the writing made by Mr. Grady and Mrs. Ruth. By the terms of this writing Mr. Grady, party of the first part,

> "does hereby grant, bargain, sell, and confirm unto said party of the second part [Mrs. Ruth], and to her heirs and assigns forever, a right of way in, over, down and up said stairway hereinbefore described on said lot 29 in said block 72 as aforesaid; for the said party of the second part, her heirs and assigns and her and their servants and tenants, at all times freely to pass and repass, on foot or otherwise, from said public street in said town of Fresno to the landing of said stairway in the second story of said brick building of said party of the first part and from said landing to the said public street as aforesaid; the said stairway being of the width of five feet and running from said I street to the second story of said brick building belonging to the said party of the first part as aforesaid, and the said way shall be forever of the dimensions as aforesaid."

The closing paragraph of the instrument is as follows:

> "To have and to hold said easement and privilege to the said party of the second part, her heirs and assigns, forever, as appurtenant to said lot 30 in said block 72."

Appellant insists that an easement was granted for the following reasons: First, the agreement refers to the right granted by Grady to Mrs. Ruth as an easement; second, the grant is in terms to her heirs and assigns forever; third, the habendum clause states that she is "to have and to hold said easement and privilege to the said party of the second part, her heirs and assigns, forever, as appurtenant to said lot 30 in block 72"; and, fourth, it is contended that the form of the entire instrument which appears to be most carefully drawn, permits of but one interpretation, and that is that a grant of an interest in the land was intended. While it is true that the right granted is referred to in the document as an easement, respondent cites authority to the effect that the words "easement" and "license" are used indiscriminately even by courts, and that in interpreting documents of this kind courts look to the intent of the parties rather than to the mere choice of words. As was said in Cook v. Chicago, B. & Q. R. R. Co., 40 Iowa, 451–456:

> "The distinction between a license and an easement is, oftentimes, very subtle and difficult to discern."

But, by whatever name we may call the right granted by the instrument in question, it is clear that the parties to the contract did not intend to convey any interest in the land beyond that which was necessary for the maintenance of the stairway during its existence. We are convinced that upon the destruction of the building the right of the plaintiff to the use of defendants' property ceased. The authorities amply sustain this conclusion. Mr. Leonard A. Jones, in his treatise on Easements, at section 838, uses the following language:

> "An easement in a building is extinguished by the destruction of the building, so that there is nothing upon which it can operate. An easement is an interest in real estate, and survives the destruction of a part of the servient estate when there is anything remaining upon which the dominant estate may operate. If the right is a mere license, the fact of destruction is not material, since the denial of the right works a revocation; there being no such right as a license not subject to revocation and falling short of an easement. But a reservation on the sale of half a lot improved by a double building, of a right of way over the stairways of the other half, such as would be necessary to the proper use of the second story, does not create an interest in the soil which survives the destruction of the building."

In support of his text he quotes Shirley v. Crabb, 138 Ind. 200–204, 37 N. E. 130, 46 Am. St. Rep. 376. Another oft-quoted authority which sustains respondents' position is Hahn v. Baker Lodge, No. 47, 21 Or. 30, 27 Pac. 166, 13 L. R. A. 158, 28 Am. St. Rep. 723. Defendant in that case owned a lodge hall in plaintiff's building, and as appurtenant thereto possessed an easement to a means of ingress and egress. The building was destroyed by fire, and subsequently defendant undertook to exercise its supposed right of rebuilding the walls for the purpose of reconstructing an upper story and recreating a middle room in place of the one destroyed by fire. It was held that under the language of the grant to the defendant no interest in the property was given, and that upon the loss of the building the right to maintain the room vanished. Regarding the easement, the court spoke as follows:

> "The remaining question is whether the easement for the purpose of ingress and egress was extinguished by the destruction of the building. The facts show that such easement was granted for the particular purpose of affording ingress and egress to the building. Without it the principal thing (the room granted) would be practically useless. It was essential and necessary for the enjoyment of the room, and was granted on account of it. Nor is it of any use, within the purposes of the grant, without the existence of the room. In such case the general rule, as stated by Mr. Washburne, is that, 'if an easement for a particular purpose is granted, when that purpose no longer exists, there is an end of the easement.' Wash. on Ease. 654, 657. When the reason and necessity for the easement ceased, within the intent for which it was granted, as it did when the building was destroyed by fire, it would logically result there was an end of the easement."

In Douglas v. Coonley, 84 Hun, 158, 32 N. Y. Supp. 444, the conveyance under discussion granted, sold, and conveyed to Margaret A. Cantwell, her heirs and assigns, the right of way to pass and repass up and down the passageway or stairway between the store owned by said Margaret A. Cantwell and that of the grantors. The Appellate Division of the Supreme Court held that the easement continued only so long as the building of which the stairway was a part existed, and that it ceased with the destruction of the building. In that case it appeared, however, that the building had been reconstructed upon exactly the same lines as its predecessor, and the Court of Appeals reversed the judgment, holding that under the peculiar circumstances of the case the easement had been revived. Douglas v. Coonley, 156 N. Y. 521, 51 N. E. 283, 66 Am. St. Rep. 580. That decision, however, is authority in favor of respondents' position in the case at bar. In the very able opinion by Mr. Chief Justice Parker the following language is used:

> "The Appellate Division regarded the case as controlled by Heartt v. Kruger, 121 N. Y. 386 [24 N. E. 841, 9 L. R. A. 135, 18 Am. St. Rep. 829]. That case is certainly authority for the proposition that these plaintiffs had no right to insist upon a reconstruction of the party wall or of the stairway. The buildings having been destroyed without fault on the part of the defendants, it was their right thereafter to make such use of the land as should seem to them most conducive to their interests; they could not by their own act affect the plaintiffs' easement, but an outside force beyond the defendants' control having destroyed the buildings and the major part of the party wall, it was within their power thereafter to so use the land that the plaintiffs' easements should not be revived. Had they done so, a situation would have been presented within the doctrine of Heartt v. Kruger, supra."

It is to be noted that the terms of the grant in the Coonley Case and those of the writing in the case before us are very similar. Plaintiff's predecessor in this case was granted "a right of way in, over, down, and up said stairway." While there was a covenant for maintenance of the stairway at the width indicated, there was no agreement to rebuild in case of its destruction, and there can be, we think, no rational doubt that the parties had not in contemplation the grant of any interest in the real property as distinguished from the stairway itself.

The use of the word "forever" in connection with the words "heirs and assigns" adds no particular strength to plaintiff's position. Doubtless that word would become highly significant if defendants had reconstructed the building on its former lines without building a stairway similar to the one destroyed by fire. But in the present state of facts the word "forever" does not, as we have indicated, assist plaintiff materially. Nor is the appurtenance made a perpetual adjunct to the soil merely because it is specified as an appurtenance in the grant. An appurtenance does not remain a servitude for all time, but only during the existence of the servient tenement. Where a mere right to use a part of a building is granted, no proprietary interest in the land is conveyed, and upon this principle it has been held that one to whom is granted the right to construct a second story upon a building "to have and to own said second story" for his use perpetually does not thereby acquire any proprietary interest in the freehold of which such second story becomes a part. Thorn v. Wilson, 110 Ind. 325, 11 N. E. 230, 59 Am. Rep. 209. Generally speaking, the right to the use of a particular part of a building for any special purpose by the owner of adjacent property terminates with the destruction of the building, and the courts will only hold otherwise in cases where a different intention is plainly manifested by the language of the grant. For example, the right to the use of a wall on a neighbor's property ends when the building of which the wall is a part is destroyed by fire. Bowhay v. Richards, 81 Neb. 764, 116 N. W. 677, 19 L. R. A. (N. S.) 883. And the Supreme Court of New Hampshire has held that the grantee of a right to grind at a cornmill cannot maintain an action against one owning the mill for not keeping it in repair. Bartlett v. Peaslee, 20 N. H. 547, 51 Am. Dec. 242. It is unnecessary to multiply authorities upon this point.

As we are convinced by an examination of the instrument pleaded by plaintiff that the intent of the parties thereto was that the easement over the stairway should be enjoyed only while the building existed, in its then present form, we agree thoroughly with the conclusions reached by the superior court.

The judgment is affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

177 Cal. 618

KEMPER v. INDUSTRIAL ACC. COMMISSION. (S. F. 8434.)

(Supreme Court of California. Feb. 25, 1918. Rehearing Denied March 25, 1918.)

1. Master and Servant ⟹414—Workmen's Compensation—Powers of Commission.

The Industrial Accident Commission has the power to determine whether or not it has jurisdiction to hear a controversy after the apparent bar caused by the passage of the period of the statute of limitations.

2. Limitation of Actions ⟹15—Agreement—Estoppel.

Parties to a controversy may agree to forego the statute of limitations for a definite period, and such an agreement may operate as an estoppel to a plea of the statute.

3. Limitation of Actions ⟹15—Waiver—Estoppel.

Where employer and insurer agreed to waive the statute of limitations for a reasonable time, as to an injured servant's claim, when he later attempted to file a claim, he ceased to rely on such waiver or estoppel, and when his claim was not completed for over six months thereafter, a denial of award could not be disturbed, since estoppel in no case extends beyond the act done or omitted in reliance on the conduct or representation of the party sought to be estopped.

In Bank. Proceeding by William H. Kemper for workmen's compensation, opposed by the Nathan-Dohrmann Company, employer, and the Ætna Life Insurance Company, insurer. To review a denial of an award by the Industrial Accident Commission, Kemper seeks writ of review and order to show cause. Order discharged, and writ denied.

Edwin H. Williams and George J. Hatfield, both of San Francisco, for petitioner. Christopher M. Bradley and Redman & Alexander, all of San Francisco, for respondent.

MELVIN, J. Petitioner sought a review of a judgment made by respondents, as members of and constituting the Industrial Accident Commission of the state of California, denying to such petitioner any compensation for certain injuries which the commission found he had sustained in the course of his employment on or about the 29th day of September, 1915. An order to show cause was issued, and a hearing was duly had before this court.

On the date mentioned the applicant received an injury to his hand by scratching it upon a piece of scrap iron. Infection set in, but in October he returned to his employment, and worked from that time until nearly the end of November. In December he was afflicted with what was believed to be metastatic infection, and he quit work until the 3d day of January, 1916, when he returned to his employment and remained two weeks. Subsequently he went to a hospital and was treated for serious illness for a long time. An application for adjustment of the controversy was not filed until the 5th day of March, 1917, and the Industrial Accident Commission found that under the limitation provided by section 16 of the Compensation Act (St. 1913, p. 279) his cause of action was barred. The commission found that under the facts the applicant would have been entitled to compensation, but, "inasmuch as he failed to file any application at all until more than six months from the date when disability occurred, this commission is without jurisdiction to extend any relief in the premises."

The petitioner admits that his claim was not filed within the time prescribed by the statute, but insists that the time limit was waived by the defendants below. Respondents contend, however, that conceding everything claimed by petitioner, he did not rely upon any assurances of the defendants after October, 1916, and that therefore he is not entitled to claim estoppel after that date. The applicant asserts that he relied upon a letter written by Mr. Stockwell, of the Ætna Life Insurance Company, his employer's insurance carrier, and also upon the assurances given him by Mr. Nevin, superintendent of Nathan-Dohrmann Company, his employer. It appears virtually without contradiction that Mr. Nevin, at the suggestion of Mr. Kemper, took up with the insurance company the matter of a waiver of the statute of limitations, and such a letter was written under date of September 21, 1916, and was as follows:

> " 'In re W. H. Kemper.
>
> " 'Mr. Muesdorffer has requested us to write you concerning our attitude in regard to pleading the statute of limitations if a claim should be made against us by the above injured before the Industrial Accident Commission. While the time within which the injured has to prove his claim has long since passed, we are willing to waive the statute of limitations if the injured presents his claim within a reasonable time from this date.' "

[1-3] We are of the opinion that undoubtedly the commission has the power to determine whether or not it has jurisdiction to hear a controversy after the apparent bar caused by the passage of the period of the statute of limitations. It is undoubtedly true that parties to a controversy may enter into an agreement to forego the statute of limitations for a definite period, and that such an agreement may operate as an estoppel to a plea of the statute. Wells Fargo & Co. v. Enright, 127 Cal. 669, 60 Pac. 439, 49 L. R. A. 647; State Loan & Trust Co. v. Cochran, 130 Cal. 245, 62 Pac. 466, 600. But nevertheless we do not feel constrained to set aside the action of the Industrial Accident Commission for the reason that the uncontradicted testimony shows that after October, 1916, when Mr. Kemper took affirmative action looking to the filing of his claim for compensation, he no longer depended upon the agreement to forego the statute. At that time he telephoned to the officers of the commission advising them of his condition and telling them of his desire to file a claim. A representative of the Industrial Accident Commission was sent to the hospital. A blank application was partially filled. The employé of the commission was requested to complete the preparation of the document and to file it with the commission, and Mr. Kemper supposed that he had done so, but, as a matter of fact, no claim was actually filed until March, 1917.

As is suggested by respondents, the insurance carrier is not responsible for this abortive attempt on Kemper's part to commence his suit. Obviously he did not rely upon the agreement to forego the statute after the day he took matters into his own hands, for he then intended to wait no longer. Estoppel "in no case extends beyond the act done or omitted in reliance on the conduct or representation of the party sought to be estopped." 16 Cyc. 783; Bigelow on Estoppel (6th Ed.) 694 et seq. The person asserting an estoppel must be induced to act or refrain from acting by his opponent's conduct. Barnhart v. Fulkerth, 93 Cal. 497, 29 Pac. 50. Considered in its strongest aspect, the waiver of the statute of limitations only extended to a reasonable time from the date thereof. Undoubtedly the commission was clothed with authority to determine what in fact was a reasonable delay for the commencement of the action, and inasmuch as the commissioners have determined this question, we are not in a position to overrule their findings. While the language of the commission to the effect that it was without jurisdiction to determine that the waiver nullified the plea of the statute of limitations is somewhat equivocal and not altogether clear in its meaning, it is probable that, as suggested by counsel for respondents, "the person drawing the findings for the commissioners merely meant to convey the idea that, as the plea of the statute of limitations had been sustained, the commission would not hear the case in chief." But, whatever may have been the intent of the commissioners in the use of the word "jurisdiction," the fact remains that they had the right to apply the statute of limitations under the facts as presented, that they did apply it, and that therefore their finding must stand.

Upon this record we may not review the judgment.

The order to show cause is discharged, and petitioner's prayer for the issuance of a writ of certiorari is denied.

We concur: ANGELLOTTI, C. J.; SHAW, J.; VICTOR E. SHAW, Judge pro tem.; WILBUR, J.; SLOSS, J.; RICHARDS, Judge pro tem.

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177 Cal. 610

MARYLAND CASUALTY CO. v. MATSON NAV. CO. et al. (S. F. 7428.)

(Supreme Court of California. Feb. 23, 1918. Rehearing Denied March 25, 1918.)

1. WHARVES 🔑22—INJURIES TO—LIABILITY.
In action for damages from collision of defendant's steamer with dock warehouse of plaintiff's assignor, plaintiff could only recover upon a sufficient showing of negligence on the part of defendants in the handling of their steamer.

2. APPEAL AND ERROR 🔑1011(1)—FINDING BASED ON CONFLICTING EVIDENCE—REVIEW.
The evidence being in sharp conflict on issue of negligence, trial court's finding that defendants were not negligent will not be disturbed.

3. WHARVES 🔑22—INJURIES DUE TO SUDDEN UPHEAVAL OF TIDE.
Defendants handling their vessel with due care would not be responsible for injury to dock if heaving forward of vessel, the cause of injury, was due to the sudden upheaval in tide.

4. NEGLIGENCE 🔑121(2)—RES IPSA LOQUITUR—APPLICATION.
Conceding that plaintiff was entitled to the application of the principle of res ipsa loquitur, defendants could avoid its application by an affirmative showing of due care which would justify a court finding that any inference to be drawn from application of principle had been overcome.

Department 1. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by the Maryland Casualty Company against the Matson Navigation Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Gavin McNab, A. H. Jarman, and Nat Schmulowitz, all of San Francisco, for appellant. Andros & Hengstler and Golden W. Bell, all of San Francisco, for respondents.

RICHARDS, Judge pro tem. This is an action for damages, commenced by the plaintiff as assignee of California & Hawaiian Sugar Refining Company, against the defendants, said damages being alleged to have arisen by reason of the negligence of the defendants in the management and operation of the steamer Hyades, through which the said steamer collided with the dock warehouse of the California & Hawaiian Sugar Refining Company, at Crockett, Cal.; the consequence of which collision being the breakage of certain water pipes constituting a sprinkler system for the extinction of fire within said warehouse, by which the waters in said pipes escaped and damaged a large quantity of sugar stored therein. The complaint sets forth in detail the facts relating to the arrival of the steamer Hyades at the dock of the plaintiff's assignor on the day preceding the occurrence of the collision, and its safely docking there and discharging the greater part of its cargo, after which it moved out into the bay, remaining over night, but returning the following morning to resume its former position at the dock. It was while said steamer was again attempting to lay alongside of said dock that the collision occurred which caused the damage out of which this action arose. The complaint in that behalf alleges that the defendants so willfully, negligently, carelessly, and unskillfully managed and steered said steamer that it ran into said dock warehouse with great force, tearing and destroying a portion of the north wall thereof, and causing the immediate injury complained of. The answer of the defendants, while admitting in the main the plaintiff's detailed statement of the movements of the steamer on the day preceding the accident, and up to the time of its attempted second docking at the pier, denies that the management and operation of its said steamer was in any respect negligent, careless, or unskillful, or that said steamer ran into or against said dock warehouse through any negligence, willfulness, or want of skill upon the defendants' part. The defendants' answer proceeds to aver that the only negligence existing at the time of such accident was that of the plaintiff's assignor, consisting in the maintenance by it of an improper, insecure, insufficient, and faultily constructed dock warehouse, by reason of which the injuries in question arose. The cause was tried by the court sitting without a jury, and upon submission of the cause it made its findings of fact to the effect that the defendants had been guilty of no negligence, carelessness, or unskillfulness in the management and operation of their said steamship at the time of the collision, or at any time having relation thereto; as to the defendants' plea regarding the improper and faulty construction of the dock warehouse of plaintiff's assignor, the court found "that said dock warehouse at the time when said steamer Hyades made fast thereto was improper, insecure, insufficient, and faulty in its construction and nature." The judgment of the court was accordingly in the defendants' favor, and from such judgment the plaintiff prosecutes this appeal.

[1] The appellant takes the position that the only question presented upon this appeal is the question as to whether the defendants were negligent, careless, or unskillful in their attempted docking of said steamer at the immediate time of the accident from which its assignor's injuries arose. Our attention is called to a colloquy between counsel for the respective parties to the action, at the inception of the trial, as a result of which, according to the appellant's contention, every other question, including the question as to the faulty construction of the dock warehouse, was eliminated from the case. The respondents did not so construe the colloquy, and apparently the trial court did not regard the issue as to the faulty construction of the dock warehouse as abandoned, since it made a finding thereon; but in our view of the case this particular controversy is not material, since the plaintiff could only recover, if at all, upon a sufficient showing of negligence on the part of the defendants in the handling of their ship, as a result of which the injury complained of arose; and if the finding of the trial court, to the effect that there was no negligence in respect to the matter complained of on the part of the defendants, is sustained by sufficient evidence, there is an end to the plaintiff's case.

[2, 3] Upon this branch of the case the record is voluminous, and the evidence is in sharp and irreconcilable conflict. Just what caused the collision does not appear very definitely, but there is ample evidence on the part of eyewitnesses to the docking of the ship to justify the finding of the trial court that this was being brought about in the exercise of due care on the defendants' part; and there is also some evidence to the effect that the action of the vessel in heaving forward at a critical moment in the process of bringing her up to the dock was due to a sudden upheaval in the tide, throwing the bow of the ship in towards the wharf in such a way as to strike the dock warehouse at the point of its injury; a fact for which the defendants would not be responsible, if, as the court finds, they were handling their ship with due care. In this state of the evi-

dence in the case this court will not disturb the findings and judgment of the trial court.

[4] The appellant, however, contends that it is entitled to the application of the principle of res ipsa loquitur in aid of its assertion that the accident occurred through the negligence of the defendants. But conceding, without determining, that this is a proper case for the application of this principle, and that the plaintiff would have had a right to rely upon it, as affording a prima facie showing of negligence, still the defendants would not be prevented from avoiding its application and effect by affirmative proof that it had been in no wise negligent in docking its ship; and the trial court, sitting as a jury and hearing these proofs, would be entitled to find, as it did find, that any inference which might have arisen through the application in the plaintiff's favor of the doctrine of res ipsa loquitur had been overcome by the defendants' affirmative showing of due care.

Judgment affirmed.

We concur: SLOSS, J.; SHAW, J.

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177 Cal. 614

FIDELITY & CASUALTY CO. OF NEW YORK et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (L. A. 4794.)

(Supreme Court of California. Feb. 25, 1918. Rehearing Denied March 25, 1918.)

1. MASTER AND SERVANT 🔑371—WORKMEN'S COMPENSATION ACTS — CONSTRUCTION — "ACCIDENT."

Under the Workmen's Compensation Act (St. 1913, p. 279) § 12, as it stood in January, 1914, providing for compensation for any personal injuries by accident arising out of and in the course of the employment, the word "accident" cannot be confined to an injury by external, violent, and accidental means, but includes injuries to workmen which are unexpected and unintentional.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accident.]

2. MASTER AND SERVANT 🔑371—WORKMEN'S COMPENSATION ACTS—CONSTRUCTION—"ACCIDENT."

A show card sign writer who used quantities of wood alcohol in an air brush used in writing cards, and owing to rush of work used such quantities of the alcohol that his sight was permanently impaired, was entitled to compensation; his injuries having been sustained by accident.

In Bank. Application to the Industrial Accident Commission by Lester M. De Witt for workmen's compensation, opposed by Jacoby Bros., Incorporated, employer, and the Fidelity & Casualty Company of New York, Incorporated, insurer. To review an award of the Commission in favor of the applicant, the insurer and the employer apply for writ of review against the Commission and A. J. Pillsbury and others, members thereof. Petition denied and award affirmed.

Jennings & Horton and R. P. Jennings, all of Los Angeles, for petitioners. Christopher M. Bradley, of San Francisco (Frank P. Doherty, of Los Angeles, of counsel), for respondents.

RICHARDS, Judge pro tem. This is an application for a writ of review after an award by the Industrial Accident Commission in favor of one Lester M. De Witt against his employers, Jacoby Bros., a corporation, and its insurer, the Fidelity & Casualty Company of New York, a corporation, the petitioners herein.

The facts of the case upon which it is alleged by the petitioners that the commission arrived at an erroneous conclusion as a matter of law are set forth in the findings of the commission, which it is conceded there was evidence adduced before it sufficient to support. Said findings are as follows:

"(1) That Lester M. De Witt, applicant herein, was injured by accident on the 7th day of January, 1914, while in the employment of defendant Jacoby Bros., and that said accident arose out of and happened in the course of said employment and in the manner following:

"(a) Said Lester M. De Witt was for about two years prior to the happening of said accident a show card sign writer, and, the better to shade in colors in the artistic writing of said cards, he was, and for about 1½ years had been, in the habit of using dyes dissolved in wood alcohol and forced through a fine needle by air pressure.

"(b) That ordinarily he used this appliance only a very small portion of time, but during the holidays immediately preceding said accident there was a very much greater use of [this] apparatus, and directly after the holidays, when the pressure of work had somewhat slackened, said De Witt used an extraordinary quantity of wood alcohol in cleaning the apparatus and in washing and cleaning his hands; that he used such extraordinary quantity by pouring it on cloths.

"(c) That on the 7th of January said De Witt had not noticed anything the matter with his eyesight, but, on that day, he suddenly found that his vision was very greatly affected and went to see an oculist who fitted him with glasses, but told him that glasses would do him very little good because there was a degeneration of the optic nerves.

"(d) By the 13th of January he was entirely unable to use his eyes for the work he had been doing, and from and after that date until the date of hearing had been barely able to make his way about the streets and was unable to do any work requiring even ordinary vision.

"(e) That, while using wood alcohol, as hereinbefore described, for such cleaning purposes, on or about the 7th of January, 1914, the eyes and optic nerve were exposed to and came in contact with the vapor of wood alcohol in unusual quantities, involving the sudden impairment of the vision of said applicant, and that said injuries so received constituted an accident which arose out of and happened in the course of said employment, and were not the result of an occupational disease."

[1, 2] It is the concluding phrase of the foregoing findings which the petitioners assail as a legal conclusion not justified by the language of the Workmen's Compensation Act as it read at the time of the injury up-

on which the award herein was made. Section 12 of the Workmen's Compensation Act, the so-called Boynton Act, as it stood in January, 1914, the time of the applicant's injury, provided that:

> "Liability for the compensation provided by this act, in lieu of any other liability whatsoever, shall, without regard to negligence, exist against an employer for any personal injuries sustained by his employés by accident arising out of and in the course of the employment."

It is the contention of the petitioners herein that the injury suffered by the applicant under the state of facts as found by the commission was not an "injury sustained by accident" within the meaning of that phrase as used in the foregoing excerpt from the Workmen's Compensation Act. In support of this contention the petitioners urge that the words "injury sustained by accident" are to be given a meaning which would confine their application to cases where the means or cause of the injury was accidental; as where it was the result of a casualty or of the happening of some precedent circumstance or event which, being itself unexpected or out of the ordinary, was thus to be deemed accidental; and that the word "accident" as employed in the act cannot be given application to the instant case where the result in the way of injury to the applicant, however unexpected and unintended, was due to the doing by him of acts which he intended to do and to the use of means which he intended to use in the course of his ordinary employment. In support of this contention the petitioner herein chiefly relies on the cases of Rock v. Travelers' Ins. Co., 172 Cal. 463, 156 Pac. 1029, L. R. A. 1916E, 1196, and the cases cited therein, where this doctrine is laid down as applicable to accidents to recover upon ordinary life or accident insurance policies. There can be no doubt as to the correctness of the principle announced in these cases in respect to the construction to be placed upon such insurance policies which, as in the case of the policy sued upon in the Rock Case, limited their application to "injuries effected through external, violent and accidental means."

This court has, however, heretofore held that the phrase "injuries sustained by accident" as used in the Workmen's Compensation Act is to be given the broader interpretation in harmony with the spirit of liberality in which it was conceived and in which by the terms of the act we are required to construe it, so as to make it applicable to injuries to workmen which are unexpected and unintentional and which thus come within the meaning of the term "accidents" as it is popularly understood. In adopting this interpretation of the terms of the act above referred to we have been mindful of the source from which our statute was evidently derived, viz. the Workmen's Compensation Act of England, enacted by Parliament in the year 1897, under section 1 of which employers are declared to be liable to their employés for "personal injuries by accident arising out of and in the course of the employment." Construing this act of Parliament, Lord MacNaughton, in the leading case of Fenton v. Thorley, Ld. (1903), A. C. 443, said:

> "The expression 'accident' is used in the public and ordinary sense of the word as denoting an unlooked for event which is not expected or designed."

In the case of Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398, this language was expressly adopted as defining the word "accident" as used in our Workmen's Compensation Act. In the case of Southwestern Surety Insurance Co. v. Pillsbury, 172 Cal. 769, 158 Pac. 762, this court drew attention to the distinction to be drawn between cases arising out of the more limited phraseology of life or accident insurance policies as illustrated in the Rock Case, and the broader meaning to be applied to the language employed in the Workmen's Compensation Act; while in the yet more recent case of Ocean Accident & Guaranty Co. v. Industrial Accident Com., 173 Cal. 313, 159 Pac. 1041, L. R. A. 1917B, 336, the words of the act in question were again considered as having been taken literally from the Workmen's Compensation Act of England with the construction they had there received prior to their incorporation into our California statutes. Applying this current of authority to the facts of the case at bar, it must be evident that the injury suffered by the applicant as set forth in the findings of fact of the Industrial Accident Commission and for which he was awarded compensation was an "accident" within the meaning of the act. Many cases might be cited from other states having similar statutes and from England, in which like unforeseen, unexpected, and unintended injuries to employés have been classed as "accidents" and held sufficient to justify awards, such as injuries sustained by persons while lifting heavy objects, or through exposure to drafts or chilly air, or icy water in mines, or through the rupture of blood vessels brought on by unusual heat or over exertion, or through the inhalation of poisonous gases, and the like; but we think the reasoning of the decisions of this court above cited sufficient to define the scope and meaning of the act so as to justify its application to the instant case.

For the foregoing reasons the petition herein is denied, and the award of the commission affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; WILBUR, J.; MELVIN, J.

177 Cal. 600

HALLIDIE v. FIRST FEDERAL TRUST CO. (S. F. 7678.)

(Supreme Court of California. Feb. 23, 1918. Rehearing Denied March 25, 1918.)

1. APPEAL AND ERROR 🔑996, 1011(1)—FINDINGS BASED ON CONFLICTING EVIDENCE—REVIEW.

Finding made upon conflicting evidence is conclusive, and appellate court must view inferences which the trial court might reasonably have drawn as evidence tending to support the finding assailed.

2. FRAUD 🔑20—RELIANCE ON MISREPRESENTATIONS—NECESSITY.

Reliance on fraudulent misrepresentations is a necessary element in an action based on fraud or deceit.

3. FRAUD 🔑58(4)—RELIANCE ON REPRESENTATIONS—SUFFICIENCY OF EVIDENCE.

In an action to compel an accounting for dividends realized by purchaser of shares of stock, *held*, under evidence, that the seller did not rely upon purchaser's alleged fraudulent representations, but upon his own judgment, experience, and information.

4. FRAUD 🔑23—PARTIES IN FIDUCIARY RELATION—DUTY TO DISCLOSE FACTS.

As between the purchaser of stock who was director and general manager of a corporation and the seller who was director and president, there was no duty of either to disclose all facts within his knowledge.

5. CORPORATIONS 🔑116—SALE OF STOCK—SETTING ASIDE—GROUNDS—INADEQUACY OF PRICE.

Where the parties stood on equal terms, that stock purchased was worth very much more than the price paid would not afford a ground for setting aside sale.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Martha E. Hallidie, as trustee for the stockholders of the California Wire Works, against the First Federal Trust Company, as administrator of the estate of Victor Enginger, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

Osgood Putnam and Wm. C. Crittenden, both of San Francisco, and Chas. C. Boynton, of Oakland, for appellant. Cushing & Cushing, William H. Gorrill, and Wm. S. McKnight, all of San Francisco, for respondent.

SLOSS, J. For many years California Wire Works, a corporation, had been engaged in the manufacture of various wire products, including wire netting. The company had been founded by A. S. Hallidie, who was its manager and principal stockholder. Victor Enginger, who had been in its employ, engaged in the manufacture of wire cloth and netting on his own account. In 1895 Hallidie and Enginger organized California Wire Cloth Company, a corporation which was formed to take over the wire cloth and netting business of the wire works and that of Enginger. Enginger took a majority of the stock of the new corporation, and became its treasurer and general manager. Certain machinery of the wire works was sold to the wire cloth company for an agreed price, paid in part by the issuance to California Wire Works of 50 shares of the capital stock of the California Wire Cloth Company, regarded by the parties as paid up to the extent of $50 per share.

In January, 1899, Enginger bought these 50 shares for $1,625, or $32.50 per share. The present action was brought to compel an accounting of dividends and other proceeds realized by the purchaser, on the ground that the sale had been induced by fraudulent misrepresentations made by Enginger to Hallidie, who was acting in the transaction for California Wire Works. The plaintiff, who is the widow of A. S. Hallidie, maintains the action as trustee for the stockholders of California Wire Works, which has forfeited its charter. Judgment went in favor of the defendant Enginger, and the plaintiff appeals. Pending the appeal Enginger died, and the First Federal Trust Company, the administrator of his estate, has been substituted as defendant and respondent.

The findings of the court were against the averments of fraud contained in the complaint. There is a further finding that neither Hallidie nor the California Wire Works acted or relied upon any false statement or representation alleged to have been made by Enginger. The only substantial ground urged by the plaintiff in support of her appeal is that the evidence does not support these findings.

The complaint set up two classes of fraudulent misrepresentations, which, as was claimed, had operated to induce Hallidie to sell the stock of the wire works to Enginger at $32.50 a share. It was alleged, in considerable detail, that during the several years preceding the sale Enginger had made false entries in the inventories and accounts of said California Wire Cloth Company, and had thereby deceived Hallidie into the belief that the assets and profits of said corporation were smaller than they in fact were. We may dismiss this branch of the case with the statement that the court found that there had been no falsification of the corporate records, and that a reading of the transcript satisfies us that the appellant concedes little enough when she admits that this finding is sustained by the evidence. The learned judge of the trial court had strong warrant for saying, as he did, that "the evidence is conclusive that the defendant [Enginger] did not make those alterations." The other alleged misrepresentations were oral, relating, principally, to the profits earned by the California Wire Cloth Company for the two or three years preceding the purchase of the fifty shares by Enginger. In substance, the allegation of the complaint is that the corporation had made large profits during the years from 1895 to 1899; that Enginger repeatedly stated to Hallidie that the company was not making any profits; that these representations were made by him for the purpose of misleading Hallidie and inducing him, as manager of the California Wire Works, to sell said 50 shares of stock to defendant for a price far below their actual value, which is alleged to have been, at the time of the sale, in excess of $185 per share.

[1] As we have said, the court found that no false representations were made. The appellant's claim that this finding is contrary to the uncontradicted evidence is based upon a distorted and partial view of a few isolated extracts from the testimony of Enginger. Findings made upon conflicting evidence are conclusive here, and an appellate court must view all inferences which the trial court might reasonably have drawn as evidence tending to support a finding assailed. Ryder v. Bamberger, 172 Cal. 791, 158 Pac. 753. The record, read in the light of this rule, is entirely consistent with the conclusion that whatever representations Enginger may have made to Hallidie were substantially true. Much is sought to be made of the fact that the California Wire Cloth Company derived large profits from the sale of netting for use in fish nets, a branch of business that began to develop shortly before the sale of the shares of stock here in question. Without going into this matter at length, we deem it sufficient to say that the evidence fully justified the conclusion that Enginger said and did nothing tending to mislead Hallidie in this, or in any other matter affecting the value of the stock.

[2, 3] But, regardless of these considerations, the appellant is still confronted by the finding that Hallidie did not rely upon Enginger's statements. Such reliance is, of course, a necessary element in an action based on fraud or deceit. Maxon-Nowlin Co. v. Norswing, 166 Cal. 509, 137 Pac. 240. The finding is amply sustained by the evidence. Hallidie was a man of long experience in the manufacture and sale of the very class of articles made and sold by the California Wire Cloth Company. The California Wire Works, of which he was manager, had for many years been engaged in the manufacture of wire netting. As stated above, the wire cloth company was organized for the purpose, among other things, of taking over the wire netting business and machinery of the California Wire Works. Hallidie became a director and the president of the California Wire Cloth Company, and continued in these capacities until the sale of the 50 shares. It was his practice to attend the meetings of the board of directors, which were held monthly. While his health was somewhat impaired, there is no suggestion that he was suffering from any mental weakness or derangement, or that he was incapacitated from attending to business. At the meetings of the California Wire Cloth Company, statements of the accounts and transactions of the company were presented by Enginger and read to the directors. The general conditions of the business were discussed. The evidence indicates that, throughout the first years of the business career of the wire cloth company, Hallidie was anything but optimistic with regard to the company's ability to realize substantial profits from the manufacture of wire netting. In August or September, 1898, Enginger made an offer of $32.50 per share for the stock owned by California Wire Works. Hallidie did not act on the offer for three or four months. Finally, in January, 1899, he advised Enginger that the board of directors of the Wire Works had decided to sell the stock at the figure offered. Just prior to this, public announcement had been made of a consolidation of the manufacturers of wire to whom the wire cloth company had to look for its supplies of wire to be used in the making of its netting and cloth. The record justifies the inference that Hallidie feared that the manufacture and sale of wire netting would be rendered more difficult and hazardous by the amalgamation, and that this apprehension was, in large part at least, the moving cause of his decision to sell. At any rate, the trial court was warranted in concluding that Hallidie relied upon his own judgment, experience and information in acting upon the offer made by Enginger. That he had not the same faith in the future of the business that Enginger had is apparent. That the subsequent progress of the corporation vindicated Enginger's judgment is equally plain. But the fact that the purchase proved very profitable to Enginger would not justify a court in setting it aside.

[4] It is suggested in the appellant's brief that, even if there was no active misrepresentation by Enginger, there was a failure upon his part to disclose all of the facts within his knowledge. But the evidence did not show any such relation between the parties as to impose upon Enginger the stringent obligations of a trustee. While Enginger was a director and general manager of the wire cloth company, it must be remembered that Hallidie himself was not only a director but the president of the corporation. In negotiating for the stock, the two stood on equal terms, and neither owed the other any special duty of a fiduciary nature.

[5] This being the relation between the parties, the fact, if it be a fact, that the stock was, at the time of the purchase, worth very much more than the price paid, does not furnish a ground for setting the transaction aside.

> "Where the parties were both in a situation to form an independent judgment concerning the transaction, and acted knowingly and intentionally, mere inadequacy in the price, * * * unaccompanied by other inequitable incidents, is never of itself a sufficient ground for canceling an executed or executory contract." Pom. Eq. Jur. (3d Ed.) § 926.

We see no reason to question the correctness of the conclusions reached below.

The judgment is affirmed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

177 Cal. 626

BRYAN v. TEVIS. (S. F. 8548.)

(Supreme Court of California. Feb. 27, 1918.)

1. Appeal and Error 🔑622—Transcript—Time for Filing.

From a judgment of March 16, 1914, defendant appealed on May 13, 1914, having given notice of intention to move for new trial "upon a statement of the case," on April 24, 1914. No transcript was filed. On May 1, 1916, the proceeding for new trial was dismissed for lack of diligence, and such order became final. On May 6, 1916, defendant gave notice of motion to vacate such order. On September 15, 1916, the order was vacated, but on September 21, 1916, the last order was vacated and the motion to vacate was set for further hearing. On January 5, 1917, such motion was finally denied. *Held*, that the last order in effect ended such proceedings for new trial, and from its date the time began to run within which the transcript must be filed where proceedings for new trial are pending in the lower court, under rules 2 and 5 (119 Pac. ix and x), providing that the transcript must be filed within 40 days after perfection of appeal, but that, if prepared under Code Civ. Proc. § 953a, the time for filing shall not begin to run until the proceeding to obtain it has been terminated.

2. Appeal and Error 🔑622—Transcript—Time for Filing.

In such case, where defendant on January 15, 1917, was refused settlement of statement on motion for new trial to be used on appeal from the judgment, such order being in effect dismissal and termination of the proceeding for settlement, thenceforth no proceeding for the settlement of the statement which might be used on the appeal was pending, and the time within which the transcript might be filed commenced to run.

3. Appeal and Error 🔑624—Transcript—Time for Filing.

In such case, pendency of appeals from the orders of January 5 and 15, 1917, did not ipso facto extend the time for filing transcript on appeal from the judgment.

4. Appeal and Error 🔑628(2)—Transcript—Time for Filing.

If, in the matter of obtaining a record, it is clearly made to appear in the Supreme Court on a motion to dismiss an appeal that there had been an arbitrary disregard by the lower court of the rights of the appellant in the dismissal of his proceeding for a record or bill to determine whether the appellant had proceeded with due diligence, with the result that there is substantial merit in an appeal involving the question of the right of a party to a record on another appeal, and the party is prosecuting the same diligently, the court might be warranted in refusing to dismiss the former appeal until the question of the right to the record is finally terminated, but in the absence of such a showing in regard to the subsequent appeal the court will not regard its pendency as an answer to the motion to dismiss.

In Bank. Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Sarah A. Bryan, administratrix of the estate of Jesse W. Bryan, deceased, against William S. Tevis. On plaintiff's motion to dismiss defendant's appeal from judgment for plaintiff. Appeal dismissed.

John E. Bennett, of San Francisco, for appellant. Thomas, Beedy & Lanagan, of San Francisco, for respondent.

ANGELLOTTI, C. J. This is a motion to dismiss an appeal from a judgment on the ground that appellant has failed to file his transcript on appeal within the time prescribed by our rules. Rules 2 and 5 (119 Pac. ix, x). The appeal was taken May 13, 1914, from a judgment entered March 16, 1914, notice of intention to move for a new trial "upon a statement of the case" to be thereafter prepared, having been given and filed April 24, 1914. No transcript has ever been filed. Under the rules hereinbefore referred to, the 40-day period within which appellant could file his transcript did not begin to run "until the motion for a new trial has been decided, or the proceeding therefor dismissed." Likewise such time did not begin to run during the pendency of any proceeding "for the settlement of the bill of exceptions or statement which may be used in support of such appeal." It is upon these provisions of our rules that appellant must necessarily rely to defeat the motion to dismiss.

[1] As to the motion for a new trial, it appears that on April 1, 1916, the trial court, on motion duly made, heard, and submitted, made an order dismissing the proceeding on the ground that the defendant had not prosecuted the same with due diligence. No appeal was ever taken from this order, and it has long since become final. This motion was in effect one denying the motion for a new trial. Voll v. Hollis, 60 Cal. 572; Lang v. Superior Court, 71 Cal. 491, 12 Pac. 306, 416; Galbraith v. Lowe, 142 Cal. 295, 75 Pac. 831. Instead of appealing from this order appellant, on May 6, 1916, gave notice of a motion to vacate it, on the ground that his delay in prosecuting the motion for a new trial was due to mistake and excusable neglect. On September 15, 1916, the superior court made an order purporting to vacate the order of dismissal. On September 21, 1916, the superior court made an order ex parte purporting to vacate the last-named order, and setting the motion to vacate the order dismissing the proceedings for a new trial for further hearing. On January 5, 1917, after a hearing, the superior court made its order finally denying the motion to vacate the order dismissing the proceedings for a new trial. Whatever may be said as to the effect of any of the previous orders made after that of April 1, 1916, dismissing the proceeding for a new trial, this order of January 5, 1917, was certainly in substance and effect one deciding and denying the motion for a new trial and definitely ending the

proceeding therefor. In so far as the provision of our rules postponing the commencement of the time within which the transcript must be filed where a proceeding for a new trial is pending in the lower court is concerned, the time for transcript commenced to run at least as early as that date.

[2, 3] As to the pendency of the proceeding for a statement which might be used on said appeal from the judgment: On January 15, 1917, appellant demanded of the judge of the lower court that he settle the statement on motion for a new trial in order that he might use the same on his appeal from the judgment. The judge refused to do this. On the same day an order signed by the judge was entered on the minutes of the court denying the application for the settlement of the statement. This order was in effect one dismissing and terminating the proceeding in the lower court for the settlement of the statement. Thenceforth, within the meaning of our rules, no proceeding for the settlement of the statement which might be used on the appeal was pending, and the time within which the transcript might be filed commenced to run. See Williams v. Williams, 168 Pac. 19. No resort to mandate to compel the settlement of the statement was made prior to the service of the notice of motion to dismiss the appeal (October 26, 1917), and indeed no application for any such remedy has been made up to this time. See Murphy v. Stelling, 138 Cal. 642, 643, 72 Pac. 176; Hartmann v. Smith, 140 Cal. 461, 467, 74 Pac. 7. Appellant in February, 1917, did appeal from the orders of January 5th and 15th, and is now seeking to obtain the settlement of a bill of exceptions to be used on those appeals, but up to this time apparently without success. If we concede that these orders are appealable, the pendency of the appeals does not ipso facto extend the time for filing transcript on the appeal from the judgment. See Williams v. Williams, supra.

[4] As substantially suggested in the case just cited, if, in the matter of obtaining a record, it is clearly made to appear in this court on a motion to dismiss an appeal that there had been an arbitrary disregard by the lower court of the rights of the appellant in the dismissal of his proceeding for a record or bill—a gross abuse of the discretion committed to it, to determine whether the appellant had proceeded with due diligence, with the result that there is substantial merit in an appeal involving the question of the right of a party to a record on another appeal, and the party is prosecuting the same diligently, we might be warranted in refusing to dismiss the former appeal until the question of the right to the record is finally determined. But where such a showing in regard to the subsequent appeal is not made to appear, we will not regard its pendency as an answer to the motion to dismiss. In the case at bar appellant's proposed bill of exceptions on the subsequent appeals has been presented as a part of the evidence on this motion. It is apparent to us, therefrom, that there is no merit in the subsequent appeals. The conclusion of the court below that the appellant had not proceeded with due diligence in the matter of obtaining a settlement of the statement to be used on the motion for a new trial, and that the lack of diligence was inexcusable, which was the very matter determined by the court in dismissing the proceeding for a new trial, could not be disturbed by us under the circumstances shown, in view of such authorities as Dorcy v. Brodis, 153 Cal. 673, 675, 96 Pac. 278, Galbreith v. Lowe, 142 Cal. 295, 75 Pac. 831, and Miller v. Queen Ins. Co., 2 Cal. App. 267, 83 Pac. 287. The order regarding the new trial proceeding would therefore have to be affirmed, as would also the order of January 15, 1917, relative to the statement itself, which, in view of the ground upon which the order dismissing the new trial proceeding was based, was a necessary consequence thereof. The inexcusable lack of diligence was necessarily the same in each case, and the showing was of such a nature that the action of the trial court could not be disturbed as to either.

It follows that the motion to dismiss the appeal is well based, and must be granted.

The appeal is dismissed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

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177 Cal. 622

THE EMPORIUM v. CITY OF SAN MATEO et al. (S. F. 7395.)

(Supreme Court of California. Feb. 26, 1918.)

1. LICENSES 🔑6(12) — POWERS OF CITIES — DELIVERY WAGONS.

Under Const. art. 11, § 11, providing that any city may make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws and Municipal Incorporation Act (St. 1883, p. 270) § 862, subd. 10, authorizing the board of trustees of cities of the sixth class to license all kinds of business transacted and carried on in such city, a city of such class was authorized to impose a license tax on persons operating or maintaining delivery wagons on its streets.

2. LICENSES 🔑6(12) — POWERS OF CITIES — DELIVERY WAGONS.

Where the proprietor of a department store in San Francisco established and regularly maintained in the city of San Mateo a local delivery system with horses, wagons, and employés regularly engaged in receiving goods from the railroad stations in such city, and delivering them to the store's customers, it brought itself within the taxing powers of the city of San Mateo, and an ordinance, imposing a license tax on persons operating or maintaining delivery wagons on the streets of the city, was valid as applied to it.

In Bank. Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by The Emporium against the City of San Mateo and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Dudley D. Sales and Theodore A. Bell, both of San Francisco, for appellant. Charles N. Kirkbride, City Atty., and Joseph B. Gordon, both of San Mateo, for respondents.

PER CURIAM. This appeal was first heard in the District Court of Appeal for the First District, where the following opinion, prepared by Mr. Justice Richards, was filed:

"This is an appeal from a judgment in the defendants' favor following an order sustaining their demurrer without leave to amend.

"The complaint shows that the plaintiff is a corporation engaged in the retail dry goods business in the city of San Francisco, having customers within said city and also within the several cities and towns in proximity to said metropolis and around the San Francisco Bay, among which is the city of San Mateo; that for the purpose of delivery of articles of merchandise purchased from it by residents of or in the vicinity of the city of San Mateo the plaintiff maintains within said city of San Mateo a system of local delivery, consisting of horses and wagons in charge of its employés, whose daily duty it is to receive such articles of merchandise at the stations in said city to which they have been shipped by rail, there to load same upon such delivery wagons and deliver the several articles of merchandise to their respective purchasers within and about said city; that the city of San Mateo has an ordinance entitled 'General License Ordinance,' which provides, in subdivision 13 of section 11 thereof, for the levying and collection of a license tax upon every person, firm, or corporation driving, operating, or maintaining upon any street in said city a delivery wagon or wagons, at a specified rate for each such wagon according to its tonnage capacity. The defendants are averred to have persistently attempted to collect the amount of license required by this ordinance from the plaintiff, and this action was instituted to enjoin them from so doing. The plaintiff contends that the ordinance is invalid for several reasons, and also that, even though generally valid, it is inoperative in its application to the plaintiff.

[1] "With respect to the power of the city of San Mateo to enact the ordinance in question we think its authority to do so was ample under section 11 of article 11 of the state Constitution; and also under section 862, subd. 10, of the Municipal Incorporation Act (St. 1883, p. 270), under which San Mateo was organized as a city of the sixth class.

[2] "The main question in the case arises out of the disputed applicability of the ordinance to the plaintiff, its contention in that behalf being that the power conferred by the Constitution and statute upon the city of San Mateo and attempted to be exercised in the form of the ordinance in question was that of imposing a tax upon business privileges, and that as such said ordinance must be confined in its operation to such business as is transacted and carried on in such city and town, and under the express terms of the grant of power to it in the act of its incorporation; and hence that the plaintiff, as a business institution established and being conducted in San Francisco, is not subject to the terms of said ordinance.

"It may be conceded that if the case presented by the complaint shows that the plaintiff, selling articles of merchandise in and at its place of business in San Francisco to persons residing in the city of San Mateo and its vicinity, and as an incident to such sales was engaged in making such casual and occasional deliveries of such merchandise in San Mateo and other outside towns or cities as their retail sales therein required, by means of delivery wagons going out from its said place of business in the metropolis and passing over and along the streets of the city of San Mateo in the course of making such deliveries, the said plaintiff would not be subject to the imposition or collection by such outside municipality of a license tax upon its said delivery wagons. It would seem to be the rule that such use of the streets of a city as would be merely occasional and incidental to a business conducted elsewhere than within its boundaries would not be the proper subject of taxation. In re Smith, 33 Cal. App. 161, 164 Pac. 618. On the other hand, when a business institution, though located as to its central place of conduction or of the sale of its goods or products in one city or town, conducts through delivery wagons or other vehicles a regular system of delivery to customers within another municipality, the latter under proper authority may impose a license tax upon the wagons or other appliances of the distributing business which is thus actually done within it and upon and along its streets. Memphis v. Battaile, 55 Tenn. (8 Heisk.) 524, 24 Am. Rep. 285; City of Carterville v. Blystone, 160 Mo. App. 191, 141 S. W. 701; Wonner v. Carterville, 142 Mo. App. 120, 125 S. W. 861. These authorities from other jurisdictions seem to us to correctly state the rule in this regard, and they are not out of harmony with the recent case of Bramman v. City of Alameda, 162 Cal. 648, 124 Pac. 243, which upon a somewhat different state of facts lays down a broad rule respecting the powers of municipalities in this state to levy taxes for revenue and regulation upon business privileges conducted within them, to the extent of holding that under a proper classification the city of Alameda had power to pass an ordinance imposing a license tax upon persons doing a certain business within it, and also upon the delivery wagons of those engaged in such business who maintained, in addition thereto and in aid thereof, a system of delivery wagons within the municipality. The present action presents an even stronger case for the application of the latter and, we think, the better rule. The plaintiff in the instant case, as its complaint affirmatively shows, has not been satisfied to make deliveries of its goods sold to patrons in San Mateo through the occasional and purely incidental means of delivery wagons operated as an immediate adjunct to its drygoods store in San Francisco, and using the streets of San Mateo therefor in a transient way; but, on the contrary, the plaintiff has established and regularly maintains in the said city of San Mateo a local delivery system, with horses, wagons, and employés regularly engaged in the occupation of going daily to the railroad stations of said city, and there receiving and loading upon their said wagons the goods and merchandise of the plaintiff sent to said places of distribution by rail and thence carried by regular deliveries upon and along the streets of said city to the places of business or residence of the persons purchasing the same. In other words, the complaint herein places the case in precisely the same position it would have been had the plaintiff, instead of organizing and equipping its own local delivery system in San Mateo, made a contract with a local delivery establishment for the sole carriage and delivery by it of the goods of the plaintiff shipped to said point by rail, which local institution would seek to avoid the burdens of the ordinance in question upon the ground that it and its activities were merely incidental to the business of the plaintiff conducted in San Francisco. This statement of the situation illustrates the distinction in principle between the different lines of cases cited by the respective parties to this controversy. The business which the defendants are seeking to bring within the

> scope of the ordinance is not that which the plaintiff is conducting at its San Francisco store, but is that which it is maintaining in its regular local delivery system within and upon the streets of San Mateo. Under the foregoing circumstances as outlined by its own pleading we are entirely satisfied that the plaintiff has brought itself within the taxing powers of the city of San Mateo, and that the ordinance in question is not only valid as within the scope of the powers of the municipality to enact the same, but is also valid in its application to the plaintiff upon the state of facts disclosed in this complaint.
>
> "Judgment affirmed."

Upon petition of the appellant, the cause was ordered transferred to this court. After careful consideration of the points presented, we have reached the conclusion that the opinion of the District Court of Appeal makes an entirely correct and satisfactory disposition of the questions presented.

For the reasons therein stated, it is ordered that the judgment appealed from be affirmed.

(36 Cal. App. 16)

OBERHOLZER v. HUBBELL. (Civ. 2297.)

(District Court of Appeal, First District, California. Jan. 19, 1918. Rehearing Denied by Supreme Court March 18, 1918.)

1. Municipal Corporations 🔑706(7) — Use of Streets — Personal Injuries — Question for Jury.
   That occupants of buggy on left side of street injured in collision with automobile which, in order to avoid collision with vehicle on right side, turned obliquely to left side, could have seen automobile and would have stopped had they been looking, does not constitute contributory negligence as a matter of law.
2. Municipal Corporations 🔑706(4) — Use of Street—Collision—Evidence.
   In action for injuries to occupants of buggy in collision with automobile, evidence of disposition of horse is irrelevant where there was no showing that horse was frightened or was unmanageable before the collision.
3. Trial 🔑28(3)—View by Jury—Change of Conditions.
   Where 15 months intervened between time of collision of buggy with automobile, during which time the automobile had been in use and had made several long trips, refusal to permit jury to inspect automobile was proper.
4. Appeal and Error 🔑974(1) — Discretion—Special Issues.
   Under Code Civ. Proc. § 625, as amended in 1909, making submission of special issues to jury discretionary with trial court, such discretion will not be reviewed unless abuse is shown.

Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by Mary Oberholzer against Orton B. Hubbell. From judgment for plaintiff, defendant appeals. Affirmed.

Rolfe L. Thompson and R. M. Barrett, both of Santa Rosa, for appellant. Gil P. Hall, of Petaluma, and W. F. Cowan, of Santa Rosa, for respondent.

LENNON, P. J. This is an appeal from a judgment of $1,000 obtained by plaintiff in an action for damages for personal injuries sustained by her in the collision of an automobile owned by the defendant with the buggy in which she was riding.

The evidence which supports the allegations of plaintiff's complaint is to the effect that the plaintiff, accompanied by her husband, was riding in a horse-drawn vehicle driven by her husband westerly along and on the right-hand side of Western avenue in the city of Petaluma; that an automobile owned by the defendant Hubbell was being driven by him at a speed of about 20 miles per hour along Keller street, in said city, in a northerly direction; that upon arriving at the intersection of Western avenue and Keller street the automobile suddenly encountered another horse and wagon; that in an endeavor to avoid a collision with the latter rig the defendant turned his automobile obliquely from the right to the left-hand side of Keller street, and collided with the plaintiff's rig, which had partly passed the intersection of the center line of the two streets; that because of the fact that the defendant had turned and directed his automobile to the left-hand side of the street and behind the horse and wagon which he first encountered he failed to observe the plaintiff's rig, and consequently collided with it; and that the defendant had sounded no warning whatever of the approach of his automobile. The result of the collision was that the plaintiff and her husband were thrown to the roadway and injured.

[1] It was developed upon the cross-examination of the plaintiff that there was nothing to obstruct her view or that of her husband of the approach of the defendant's automobile; that neither she nor her husband looked to see if other vehicles were approaching; and that if they had looked in the direction from which the defendant's automobile approached they could have seen it and "would have stopped." Because of this testimony it is insisted upon behalf of the defendant that the plaintiff should have been nonsuited upon the theory that the evidence adduced in support of her case showed contributory negligence affirmatively and as a matter of law. In an endeavor to sustain this contention counsel for defendant rely upon the rule declared in a series of cases decided in this and other jurisdictions which deal with the standard of conduct by which the contributory negligence of persons who are approaching and intending to cross the tracks of a railway company is ascertained.

It is obvious that the rule governing the standard of conduct of a person approaching a railway track, in itself a warning of danger, is not applicable to a case where the facts, as here, are of such a character as to give no warning to the plaintiff of any immediate danger, and that the amount of vigilance necessary to constitute due care is correspondingly less in the latter case.

Similarly the case of Davis v. Breuner Co. et al., 167 Cal. 683, 140 Pac. 586, cited and relied on by defendant, is distinguishable on its facts. That case deals with the standard of conduct of a pedestrian in crossing a street, and there it is said that it is the duty of the pedestrian to look both ways before starting to cross.

Ordinarily plaintiff and her husband would not be required to observe the progress of vehicles to the left of them, and prior to the collision involved here there was no warning of the approach of the defendant's automobile, which had swerved to the left and wrong side of the road, and thereby suddenly came into a position which plaintiff and her husband were not required and had no reason to anticipate.

In the case of Hamlin v. Pacific Electric Ry. Co., 150 Cal. 776, 89 Pac. 1109, the court said:

> "Manifestly it is impossible for one driving a vehicle along a street to look in both directions at once, and it should ordinarily be left to the jury to determine under the circumstances of each particular case what amount of vigilance was requisite in order to constitute due care."

Under these circumstances the question of the alleged contributory negligence of the plaintiff and her husband was, we think, not one of law, but was rather one of fact for the jury to determine, and that question having been decided adversely to the defendant in accord with the evidence, the finding of the jury in that behalf cannot be successfully assailed upon appeal.

[2] The court did not err in excluding evidence of the nature and disposition of the plaintiff's horse. It was not claimed, and there was no showing or offer to show that the horse had become frightened at the approach of the defendant's automobile or was in any way unmanageable until after the collision had occurred.

[3] Nor did the court err in refusing to permit the jury to inspect the defendant's automobile for the purpose of ascertaining the extent and character of the damage done to the automobile by the collision. Some 15 months had intervened between the time of the collision and the hearing of the case, during which time the automobile had been in use, and had made several long trips, one as far as to Los Angeles and back. Under these circumstances we think that the trial court was justified in refusing to permit the jury to inspect the automobile upon the ground that such inspection was too remote in point of time from the collision complained of. Moreover, it appears from the record that the nature and extent of the injuries to the automobile resulting from the collision were testified to in detail by a witness for the defendant, and that testimony was neither disputed nor attempted to be contradicted by the plaintiff.

[4] There is no merit in the contention that the court erred to the prejudice of the defendant in refusing to submit to the jury two special issues proposed and presented by the defendant relative to the alleged contributory negligence of the plaintiff. Section 625 of the Code of Civil Procedure, as amended in 1909, makes the submission of special issues discretionary with the trial court, and we cannot say that under all of the circumstances of the case that the court abused its discretion.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

36 Cal. App. 29

SANTINA v. TOMLINSON. (Civ. 2292.)

(District Court of Appeal, First District, California. Jan. 23, 1918.)

1. MUNICIPAL CORPORATIONS 🔑706(4)—USE OF STREETS—NEGLIGENCE—PLEADING.

Generally, in an action for injuries from collision with automobile on street ordinances claimed to be violated are admissible in evidence under the general averment of negligence.

2. MUNICIPAL CORPORATIONS 🔑705(4) — USE OF STREET — PERSONAL INJURIES—ORDINANCES—EVIDENCE.

A traffic ordinance providing that driver of vehicle shall keep such vehicle six feet on right side of running board of street car which is stopping to take on or discharge passenger is not applicable to running board on left side of car, and such ordinance is irrelevant in action for injuries to passenger alighting on left side of car struck by automobile running nearer to left running board than six feet.

3. APPEAL AND ERROR 🔑1050(2)—HARMLESS ERROR—EVIDENCE.

Under such circumstances the admission of the ordinance was prejudicial error as leading the jury to believe that ordinance had been violated.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Peter Santina against Richard R. Tomlinson. From a judgment for plaintiff, defendant appeals. Reversed.

Chas. L. Brown and John J. Mazza, both of San Francisco, for appellant. Hadsell, Sweet & Ingalls, of San Francisco, for respondent.

LENNON, P. J. This is an appeal from a judgment in favor of the plaintiff in the sum of $300 damages.

Peter Santina, the plaintiff, was riding on a street car traveling in a northwesterly direction along Columbus avenue in the city and county of San Francisco. When the car approached the crossing of Vallejo street and Columbus avenue the plaintiff asked the conductor to stop at Vallejo street. There is a conflict in the testimony as to whether or not the car had fully stopped when the plaintiff alighted, but the testimony is clear to the effect that the plaintiff swung off the front left-hand side of the car. Immediately upon reaching the ground plaintiff started for the corner of Columbus avenue and Vallejo street. A Ford automobile was parked along the curbing on Columbus avenue and plaintiff descended from the street car in front of this machine. Defendant, Dr. Tomlinson, driving his automobile, was traveling in a southeasterly direction along Columbus avenue, and was passing the parked Ford car, driving the wheels of his automobile astride the outer rail of the westerly car track at the time plaintiff alighted. The plaintiff had taken a couple of steps when he was struck by defendant's automobile. The car upon which the plaintiff was riding was composed of three sections, an open front, a closed middle section, and an open back, and passengers could, if they desired, board or alight from the car without interference on either side thereof.

[1] The principal point made in support of the appeal is that the trial court erred to the prejudice of the defendant in permitting in evidence over objection a traffic ordinance of the city and county of San Francisco, which provides that:

> "Every person riding, driving, propelling or in charge of any vehicle upon any street shall keep such vehicle at least six feet on the right hand side from the running board or lower step of any street car which is stopping for the purpose of taking on or discharging passengers."

The only objection made to the introduction of the ordinance in evidence was that it was immaterial, and it is now urged that this objection was well taken because the plaintiff failed in the first instance to plead the ordinance, and that the evidence adduced in support of the plaintiff's case did not establish nor tend to establish any fact or set of facts upon which the ordinance in question had any natural legitimate bearing or influence. With reference to the first phase of this contention it will suffice to say that in actions of this character the existence of an ordinance and the fact of its violation are essentially matters of evidence and not of pleading, and therefore are, generally speaking, admissible in evidence under the usual general averment of negligence such as was made in the present case. Cragg v. Los Angeles Trust Co., 154 Cal. 663, 98 Pac. 1063, 16 Ann. Cas. 1061; Connell v. Harris, 23 Cal. App. 537, 138 Pac. 949; Fresno Traction Co. v. Atchison, etc., Ry. Co. (Sup.) 165 Pac. 1013.

[2] The second phase of the defendant's contention concerning the materiality of the ordinance in question is well taken and must be sustained. Although not required to be specifically pleaded, nevertheless the existence of the ordinance and the fact of its violation were neither relevant nor material in the face of the manifest fact that the ordinance itself had no application to the main, material facts and circumstances developed upon the plaintiff's case concerning the cause and character of the collision of the defendant's automobile with the plaintiff. For instance, it was an established fact of the plaintiff's case that the defendant was driving an automobile in a southerly direction upon the right-hand side of the street where he was privileged and required to be, and that the street car was proceeding in a northerly direction upon the opposite side of the street. Thus it will be seen that the defendant's automobile was traveling to the left of the street car as the car itself was proceeding in an opposite direction up Columbus avenue. While there was some evidence that the defendant's automobile was traveling less than six feet away from the left-hand running board of the street car at or about the time it was stopped to permit the defendant to alight therefrom, nevertheless the ordinance in question plainly and unequivocally pertains to and prohibits the driving of an automobile on the right-hand side of a stopping street car closer than six feet from the running board on that side of the car. In other words, the ordinance plainly refers to one and only one running board, and that is the running board on the right-hand side of the street car. No other construction can be placed upon the ordinance.

[3] This being so and the evidence showing without conflict that the defendant's automobile never approached the right-hand running board of the car upon which the plaintiff was riding, it seems very clear that the ordinance in question was entirely irrelevant and immaterial to the facts established and relied upon by plaintiff to support his cause of action for negligence and damages. That the admission of the ordinance in evidence was prejudicial to the defendant is obvious. Undoubtedly it had a tendency to cause the jury to believe that the defendant had been guilty of a violation of it. Its admission could serve no other purpose, and serving that purpose doubtless prejudiced the defendant and his case upon the issue of negligence in the eyes of the jury. It is further contended upon behalf of the defendant that the evidence does not support the finding of the jury implied from the verdict that the defendant was guilty of negligence in the operation of his automobile at the time of the collision, and that the evidence on the other hand does show that the plaintiff was guilty of contributory negligence.

The argument made in support of this contention is directed largely to a consideration of the weight of the evidence and the credibility of the witnesses, and we are satisfied, after a review of the record, that the question of the negligence of the defendant and the claimed contributory negligence of the plaintiff were, under all of the facts and circumstances of the case, questions of fact for the jury to determine, and were therefore properly submitted to it for decision.

The judgment and order appealed from are reversed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

36 Cal. App. 20

PEOPLE v. TANNER et al. (Cr. 420.)

(District Court of Appeal, Third District, California. Jan. 21, 1918.)

1. ROBBERY 🔑23(1)—EVIDENCE—HEARSAY—MATERIALITY.

In prosecution for robbery, while exclusionary hearsay rule does not apply to documents and testimony that defendants sought to force the prosecuting witness to join the I. W. W., the issue of membership of defendants in the I. W. W. was irrelevant, except for the purpose of establishing motive in the robbery after prosecuting witness refused to join the order.

2. CRIMINAL LAW 🔑1169(5) — APPEAL — HARMLESS ERROR.

In prosecution for robbery, no prejudice resulted from admission of evidence concerning connection of defendants with the I. W. W., and their attempt to force the prosecuting witness to join such organization, where the judge specifically instructed the jury to disregard all testimony not pertinent, and especially that concerning the I. W. W.

3. CRIMINAL LAW 🔑1144(8)—APPEAL—PRESUMPTIONS—SELECTION OF JURY.

On appeal, the court must assume that a jury carefully selected were men of at least average intelligence, fully capable of appreciating and following the instructions given them.

4. CRIMINAL LAW 🔑730(12) — APPEAL — HARMLESS ERROR.

Misconduct of district attorney in prosecution for robbery in referring to connection of defendants with the I. W. W. was not prejudicial, where the court specifically instructed not to consider any insinuations that defendants were members of the I. W. W.

5. ROBBERY 🔑24(1)—EVIDENCE—SUFFICIENCY.

Evidence *held* to sustain conviction of the crime of robbery.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

George Tanner and Edwin Engle were convicted of robbery, and from the judgment and order denying new trial they appeal. Affirmed.

Metzler & Mitchell, of Eureka, for appellants. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendants were informed against by the district attorney of the county of Humboldt for the crime of robbery committed upon one James McMurray. They were thereupon duly tried and convicted of the crime charged. Defendants moved for a new trial, which motion was denied, and they were thereupon sentenced to imprisonment in the state prison, the judgment fixing an indeterminate sentence. Defendants prosecute this appeal from the judgment and order, alleging for reversal that the court erred in its rulings on the admissibility of evidence, that the district attorney was guilty of misconduct, and that the verdict was against the law and the evidence.

Briefly the facts disclose that soon after James McMurray had met the defendants and convivialized with them, he was invited to their room in a hotel; that upon entering the room defendants locked the door; that after a few drinks defendants, exhibiting certain I. W. W. blanks and documents, requested McMurray to join the I. W. W.; that upon his refusal one of the defendants assailed him with a small table that stood in the room, and then ordered him to deliver over his money. McMurray was forced to undress and get into bed and his clothes were searched. Upon arising in the morning McMurray found defendants to have left. He then reported the matter to the police, who found upon defendants, when arrested, money in denominations possessed by the prosecuting witness the night before.

Appellants' complaint is particularly and solely aimed at the admission of the evidence that defendants in the room requested McMurray to join the I. W. W., to the admission of certain papers of defendants bearing the I. W. W. title, and to the remarks of the district attorney characterizing defendants as members of that organization. The gist of all defendants' objections is the reference to the I. W. W.

[1] Respondent seeks to support the admission of this evidence as a part of the res gestæ. Whatever the meaning of that phrase, it is at once apparent that the exclusionary hearsay rule has no application here. The truth or falsity of defendants' membership in the I. W. W. is, as is at once obvious, irrelevant to the charge of robbery. It is probable, however, and the remarks of the district attorney seem to so indicate, that the prosecution's theory was that McMurray's refusal to join the organization of Industrial Workers furnished a motive, at least in part, for the treatment he subsequently and immediately received. We can readily understand how the evidence could be offered and received for such purpose, and the ruling of the court was undoubtedly correct.

[2] As to the question of membership in said organization and the district attorney's reference thereto, it is clear that defendants suffered no prejudice in view of the following instructions given at defendants' request:

> "You are instructed to disregard all testimony given, other than that pertinent to the crime as alleged in the information; the fact that some evidence has been introduced which would tend to show that the defendants had some literature of the I. W. W.'s (Industrial Workers of the World) upon them or in their possession must have no weight in determining the guilt or innocence of the defendants of the crime of robbery, and you are not permitted to take any evidence which does not pertain to the crime as alleged in the information into consideration in rendering your verdict.
>
> "You are instructed that the defendants are on trial for the commission of the crime as charged in the information; and in reaching a verdict, you are not to take into consideration any insinuations that may have been made, during the trial that the defendants are or were members of any disreputable organization, or any organization at all. Neither are you to consider the presence of any literature found in the possession of the defendants as a circum-

stance tending to prove that they are guilty of the crime as charged in the information."

[3] The jurors were carefully examined by defendants, who exercised many peremptory challenges, to the end, unquestionably, that they might obtain a jury with whose intelligence, common sense, and impartiality they were satisfied. And we must assume that the jury thus carefully selected were men of at least average intelligence and understanding, and fully capable of appreciating and following the instructions given them. We cannot hold otherwise than that they followed the instructions in question and put from their minds any influence that may have been occasioned by reference to the Industrial Workers of the World. So viewing the case, it is difficult to see how defendants suffered the prejudice complained of.

[4] What is said above disposes also of the question of the district attorney's misconduct in referring to the organization of the I. W. W. It thus becomes unnecessary to descant further upon that point.

[5] The evidence was sufficient to justify the verdict.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(36 Cal. App. 25)

PEOPLE v. BARKDOLL. (Cr. 409.)

(District Court of Appeal, Third District, California. Jan. 22, 1918.)

1. Criminal Law 🔑37—Illegal Sale—Defense—Purchase by Detective.

It was no defense to a prosecution for unlawfully selling alcoholic liquor in no-license territory that the purchase was made by one in the service of the county, employed by the sheriff for $50 a month to ferret out "blind piggers," or illicit sellers of intoxicants.

2. Witnesses 🔑318—Character Evidence—Absence of Attack.

In a prosecution for unlawfully selling alcoholic liquor in no-license territory, where defendant's reputation for truth and veracity was not questioned by any evidence introduced by the people, his offer to prove that his character in such respect was good was properly refused.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Charles D. Barkdoll was convicted of having unlawfully disposed of alcoholic liquor within no-license territory, and, from the judgment and an order denying his motion for new trial, he appeals. Affirmed.

Weldon & Mockler, of Ukiah, for appellant.
U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was indicted for and convicted of having unlawfully sold, furnished, and distributed alcoholic liquor to one William Frey within the boundaries of the third supervisor district of Mendocino county; the same being no-license territory. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

Counsel for appellant present three questions for review: (1) That the court erred in not granting defendant's motion, made at the close of the people's evidence, to instruct the jury to acquit; (2) that the court erred in not permitting defendant to introduce evidence of his good character; (3) that the court erred in not pronouncing judgment on the verdict of the jury. The first and third of these points rest upon the same proposition as stated in defendant's brief:

> "That all the evidence in this case shows that instead of a sale it was an 'entrapment'; that it was made by an officer who was under the pay of officers of this county; that if any crime was had it was instigated by a representative of the officers of the county and at their instance and with money furnished by them."

Defendant was conducting a barber shop in the town of Covelo, Round Valley. The shop consisted of a front or operating room and a room back of the working room. One Swaney was in the service of the county, employed by Sheriff Byrnes, and was receiving $50 per month, and no other compensation for his services, which were to ferret out "blind piggers," or illicit sellers of intoxicating liquors, in Round Valley. Among his acquaintances in the valley was one Frei or Frey, the prosecuting witness. Frei was well known to defendant, and was in the habit of visiting defendant in his shop "to chat with him—pretty chummy." Swaney and Frei met at Covelo in front of defendant's barber shop, on the day charged in the indictment, and Swaney asked Frei to go into defendant's shop and buy a small bottle of whisky, giving Frei a dollar of his own money with which to pay for it. Frei did not know at the time that Swaney was a detective. Frei was somewhat given to drinking, and admitted that he had been drinking that day, and might have been in some degree intoxicated. His testimony was that he went into the shop and purchased "one of the small soda bottles or pint bottles," and afterward delivered it to Swaney, and drank some of the contents with Swaney and another man in a nearby alley; that it was delivered to him personally in the back room of his shop by defendant, to whom he paid the dollar given him by Swaney. The bottle, with what remained of the contents, was afterwards delivered to the sheriff, who marked it for identification and placed it in his safe, where it remained and was produced at the trial and its contents shown to contain 45 per cent. "of absolute alcohol by volume." Detective Swaney was asked to state what was done at the time, and testified as follows:

> "Why, I met Frei on the street in front of Barkdoll's barber shop, and I asked him if he could get me a bottle of whisky, and he said, 'Yes,' he would, so I gave him a dollar, and we went over on the sidewalk in front of the bar-

ber shop, and he told me to wait outside, and he went in, and about ten minutes he came out and said he didn't have any; he would have to wait a little while, so I waited about 20 minutes, and then I went in to see about it, and Frei wasn't in there at the time, so I went into the back room, and there was a couple of Indians in there, and opened the back door, and I seen Mr. Barkdoll coming with a sack. Q. Where was he? A. Why, he was coming in from the back yard. Q. He was out in the back yard when you saw him? A. Yes, sir. Q. Well, go ahead and tell us. A. And I asked him if Frei hadn't given him a dollar for a bottle, and he told me, 'Yes'; I told him I would like to get the bottle, and he told me that he wouldn't give me the bottle; he would give it to Frei; he was the one that gave him the dollar. So I went out then, and I see Frei on the sidewalk, and I reminded him of it again, and about ten minutes he came out with a bottle and told me to come over into the pool room next door there. About ten minutes after I came out, I met Mr. Frei; I reminded him of the bottle again, and he went back into the barber shop; when he came out with the bottle why he told me to come into the pool room; I went into the pool room, opened the bottle then, and had a couple of drinks out of it, him and another fellow by the name of George Fitch. Then he gave me the remainder of the bottle. Q. And what kind of a bottle was it in? A. That's the bottle there."

He testified that he kept the bottle with its remaining contents and delivered it to Sheriff Byrnes without in any way changing the contents of the bottle. He testified further:

"Q. Where were you when Frei went in the last time? A. I was on the sidewalk in front of Barkdoll's barber shop. Q. And are there windows in the front of the barber shop? A. Yes. Q. Could you see into the shop? A. Well, there was two rooms in the shop, front room and barber room and back room in there. Q. Well, could you see into either one of the rooms? A. Yes, I could see into the front room. Q. And could you see into the back room? A. No, sir. Q. Did you see where Mr. Frei went when he went into the barber shop? A. Yes. Q. And where did he go? A. Into the back room. Q. And was Barkdoll in the shop, that is, in the front part of the shop, when Frei went in? A. Yes. Q. And did he remain there all of the time that Frei was inside? A. No, sir; he went into a back room when Frei went in. Q. Did you see Frei when he came from the back room? A. Yes. I seen him when he came out. Q. And did you see Barkdoll? A. No, sir. I didn't see Barkdoll. Q. He didn't come out with Frei? A. No, sir."

Counsel for defendant cite certain Colorado cases which announce the rule that:

"The sale of liquors, in violation of a town ordinance, to one who purchases the liquor, at the instigation of the town, for the purpose of laying a foundation to prosecute the seller, does not authorize a conviction under the ordinance." Wilcox v. People, 17 Colo. App. 109, 67 Pac. 343; Ford v. City of Denver, 10 Colo. App. 500, 51 Pac. 1015; People v. Braisted, 13 Colo. App. 532, 58 Pac. 796.

In People v. Chipman, a later Colorado case, 31 Colo. 90, 71 Pac. 1108, the detective was in the pay of the municipality, but purchased the liquor with his own money. It was held no defense that he was an officer. In People v. O'Brien, 35 Mont. 482, 90 Pac. 520, 10 Ann. Cas. 1006, a Montana case, the money with which the liquor was purchased was furnished the witness by the county attorney. It was held no defense. Citing the rule as stated in 23 Cyc. at page 184:

"It is no defense to a prosecution for an illegal sale of liquor that the purchase was made by a 'spotter' detective, or hired informer."

Numerous cases are cited in support of the text.

[1, 2] Where a person is innocent of any intention to commit a crime, and is inveigled into its commission by an officer of the law for the purpose of advancing his standing for efficiency or to obtain revenue by fine for the municipality, it might be said to uphold such practices would be repugnant to any just conception of good morals and violative of sound public policy. But we have no such case here. The facts and circumstances surrounding the transaction in the present instance were quite sufficient to justify the jury in believing that the defendant was ready, able, and willing to comply with the request made of him. He testified in his own defense, and his testimony went no further than to deny that he sold or gave a bottle of liquor to Frei, as testified to by him. The evidence in the case has no tendency to place defendant in the category of those persons in whose behalf some courts have enforced the rule invoked by him. Defendant's reputation for truth and veracity was in no wise questioned by any evidence introduced by the people. It was not error to refuse defendant's offer to prove that his character in that respect was good where there was no evidence introduced tending to show that his general reputation for truth and veracity was bad. People v. Cowgill, 93 Cal. 596, 29 Pac. 228; Title Ins. Co. v. Ingersoll, 153 Cal. 1, 7, 94 Pac. 94.

The judgment and the order are affirmed.

We concur: BURNETT, J.; HART, J.

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36 Cal. App. 23

PEOPLE v. FRANKLIN. (Cr. 413.)

(District Court of Appeal, Third District, California. Jan. 22, 1918. Rehearing Denied by Supreme Court March 21, 1918.)

CRIMINAL LAW ⚿1202(5)—VERDICT—FINDING ON PRIOR CONVICTION.

Under Pen. Code, § 1158, where the information charges a prior conviction, unless the answer admit it, the verdict must find thereon; and its omission to do so is fatal, unless the subsequent crime charged is itself one for commission of which the court can impose punishment.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Ida Franklin, convicted of selling morphine, was granted a new trial, and the People appeal. Affirmed.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People. Walter F. Lynch, of Stockton, for respondent.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

CHIPMAN, P. J. Defendant was informed against by the district attorney of San Joaquin county for the crime of selling and furnishing morphine, and having suffered two prior convictions for like crimes and punishable under the same statute. The defendant moved the court for a new trial, which was granted, and the people thereupon took an appeal from the order.

The minute order made by the court following the motion reads as follows:

> "Thereupon the court made an order granting defendant's motion for a new trial upon the ground that the defendant had not been properly arraigned, in that said defendant had not been asked whether or not she had suffered the prior convictions charged against her in the information and had not specifically entered her plea thereto, and that the jury did not find specifically on the charge of the prior convictions."

The minute entry made at the arraignment of defendant reads as follows:

> "The defendant waived time allowed by the statute before answering the information, and, upon being asked by the court whether she pleads 'guilty' or 'not guilty,' to the offense charged in the information, the defendant in person pleads that she is not guilty."

Thereupon the court fixed the day for the trial. The verdict reads:

> "We, the jury in the above-entitled cause, find the defendant, Ida Franklin, guilty as charged."

The points now urged as grounds for reversing the order were before this court in People v. Dueber, 168 Pac. 578. In a careful and painstaking opinion, written by Mr. Justice Hart, it was shown, we think with clearness, that under section 1158 of the Penal Code, where a previous conviction of the accused is charged, the jury must, unless the answer of the defendant to the charge of a previous conviction admits it to be true, find whether or not he has suffered such previous conviction, and where the jury fail to make such specific finding, the omission is fatal to the judgment, unless the subsequent crime charged is itself one for the commission of which it is within the jurisdiction of the superior court to impose punishment. The Dueber Case cannot be distinguished from this case, and, as no reason is advanced which convinces us that the Dueber Case was not correctly decided, it must rule this case.

The order is therefore affirmed.

We concur: BURNETT, J.; HART, J.

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36 Cal. App. 63

PEOPLE v. DONALDSON. (Cr. 699.)

(District Court of Appeal, First District, California. Jan. 26, 1918. Rehearing Denied Feb. 26, 1918. Denied by Supreme Court March 25, 1918.)

1. CRIMINAL LAW 🔑1167(4)—HARMLESS ERROR—AMENDMENT OF INFORMATION.

Amendment of an information was not prejudicial, where evidence of matters therein would have been admissible without amendment.

2. FALSE PRETENSES 🔑38 — INFORMATION — SCOPE OF INVESTIGATION.

Under an information for obtaining money by false pretenses, in that defendant falsely represented that mining property contained a "vast quantity of pay ore," evidence of acreage of claim, improvements, personal appearance, and innocent expression of defendant and his beguiling smile was admissible.

3. CRIMINAL LAW 🔑703 — MISCONDUCT OF PROSECUTION.

In prosecution for obtaining money by false pretenses, it was not misconduct for the prosecuting attorney to state that he was going to prove conspiracy between defendant and a pretended psychologist, who foretold the coming of the defendant, and then not to introduce any evidence concerning the conspiracy, where there was nothing to show that the statement was not made in good faith, and that testimony was not offered on such phase because the prosecution found it was unable to prove the conspiracy.

4. CRIMINAL LAW 🔑728(5)—MISCONDUCT OF PROSECUTION—WAIVER OF OBJECTION.

Objection to statement made by prosecution is waived, where it was not assigned as misconduct and no request was made to admonish the jury.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

John T. Donaldson was convicted of obtaining money by false pretenses, and he appeals. Affirmed.

Edgar D. Peixotto, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

KERRIGAN, J. Defendant was charged by information filed by the district attorney of the city and county of San Francisco with the crime of obtaining money by false pretenses. He was tried, convicted, and sentenced to four years' imprisonment in the state prison. He now appeals from said judgment and from the order denying his motion for a new trial.

From the record it appears that one Marguerite H. Nesbitt, the prosecutrix, conducted a small grocery store in the outskirts of San Francisco, and that the defendant, having heard that she had recently won $20,000 in a lottery, conceived a plan to get this money from her. Accordingly, after having by a ruse made her acquaintance, he represented to her that he was the owner of a very valuable mine out of which he had made within the past six months the sum of $100,000; that if she cared to do so he thought he could arrange to let her invest $20,000, which amount was needed to complete certain necessary improvements on the mining property, and that if she should do so she would, within a short time, thereby gain at least $100,000. She was inexperienced, gullible, and guileless; he was persuasive, tactful, and unscrupulous. She parted with her money. The mine was worthless. This prosecution resulted.

Taking up the main point relied upon by the defendant for a reversal of the judgment, we find that during the trial, in order to meet an objection of the defendant and out of an excess of caution, the court made an order permitting the district attorney to make a further amendment to the information (one having already been made) so as to include within its averments certain specific pretenses not set forth therein. The defendant now assigns as error the order allowing this amendment, claiming that it was one of substance and not within the terms of section 1008 of the Penal Code. The asserted defect in the proceedings of course does not appear upon the fact of the information, and therefore is not raised by the demurrer; and, as the defendant did not object to the admission of the evidence introduced under this amendment, he cannot now be heard to complain unless the motion to strike the information from the record, which was filed by the defendant, may on the ground set forth therein be regarded as broad enough to raise the point now made.

[1, 2] Assuming, without deciding, that this is so, still we think the contention untenable, for in our view the evidence was admissible under the information before the amendment complained of was made; and if this be true the amendment was unnecessary, and no prejudice to the rights of the defendant resulted from the admission of this evidence. We think that where, as in the present case, the main inducing cause of the parting with the money or property is stated in the information, it is sufficient, and that evidence amplifying such main inducing cause is admissible. In the case at bar it appears from the averments of the information that the chief misrepresentations made by the defendant were as to the immense value of the mining property claimed to be owned by him, and as to the "vast quantity of pay ore" on the claim all ready to be worked. Under these averments the evidence introduced by the prosecution of representations made by the defendant as to the value in money of such ore, as to the acreage of the claim, the improvements thereon, and the number of men there employed was, we think, clearly admissible. Such representations were but detailed statements relating to and tending to support the principal false pretenses averred in the information, and no amendment thereof was essential in order to permit those matters to go to the jury. Carrying defendant's argument to its logical conclusion, it would be necessary to charge all the inducing statements which may have influenced the victim to part with her money. Here it appears that the defendant, when about to propose this so-called investment to the prosecutrix, dressed for the occasion, that he wore a large diamond stud in his shirt front, and caused his face to be freshly massaged. Suppose the testimony had gone further and had described his well-dressed appearance, his expression of countenance, his beguiling smile, his appearance of frankness, and attributed to him all the charm of a Wallingford, would it be pretended that such matters were not admissible in evidence unless incorporated in the information? No doubt the rule is that where the main pretense is charged, evidence is admissible of minor pretenses which may have exercised some influence in producing the result. Although the sacks might not have broken the camel's back without the final straw, yet if the sacks be specified without the straw, that must be sufficient. Cowen v. People, 14 Ill. 348.

[3, 4] In his opening statement to the jury the prosecuting officer stated that he expected to be able to show a conspiracy between the defendant and a certain so-called psychologist parading under the name of Dr. Byron Kingston, in which Kingston called upon the prosecutrix concerning certain charitable work in which he claimed to be interested, on which occasion, pretending to be greatly pressed for time, he asked her to call on him at his office the next day to discuss the subject further; that she did so, and during their conversation she was led to speak of spiritualism, whereupon Kingston drew some mystic signs upon a piece of paper and also a star and circle, placed the palm of his open hand across his forehead, and informed the prosecutrix that a man would call upon her soon (describing the defendant) with a business proposition, which she ought to accept, and that if she did so she would have limousines and rings and things and fine array. Three days later the defendant visited her, pretending to be looking for one Frank Pollock, with whom, he said, as boys they "skinned cattle together in Santa Cruz," and for whom he was now looking with a view to letting him in "on the ground floor" of a rich mining investment. Here follows a statement of the prosecuting officer of the conversations between the defendant and the prosecutrix to which a brief reference has already been made. It appears that the prosecution, through inability to prove the conspiracy, offered no testimony thereon; and the defendant now claims that the reference to such matters constituted misconduct for which the judgment should be reversed. There is absolutely nothing in the record indicating that the statement of the district attorney was made in bad faith, and therefore it did not constitute misconduct. People v. Gleason, 127 Cal. 323, 59 Pac. 592. But even if it did, the defendant did not assign it as such, nor request the court to give the usual admonition. Consequently the objection of the defendant made at the time must be deemed to have been waived. People v. Mancuso, 23 Cal. App. 146, 137 Pac. 278.

There is no merit in the defendant's further point, raised by the demurrer, that the information does not show the causal connection between the false pretenses and the parting with the money.

Judgment and order affirmed.

We concur: LENNON, P. J.; BEASLY, Judge, pro tem.

177 Cal. 656

LEE v. HIBERNIA SAVINGS & LOAN SOC. et al. (S. F. 7917.)

(Supreme Court of California. March 2, 1918. Rehearing Denied April 1, 1918.)

1. INFANTS 🔑58(2)—DEEDS—EFFECT.

Under Civ. Code, § 33, prohibiting a minor under the age of 18 from making a contract relating to real property, a deed of trust executed by a girl under the age of 18 was absolutely void, notwithstanding her mature appearance, and no legal duty devolved upon her as a condition of disaffirming the deed to restore the consideration.

2. INFANTS 🔑57(1)—DEEDS—EFFECT.

Where the grantee of a minor under 18 years of age, on learning that at the time of the deed she was under such age, and when she then represented herself to be over 18, persuaded her to ratify and confirm the deed when in fact she was then under 18, such ratification and confirmance were ineffectual to validate the deed.

3. TRIAL 🔑395(5)—FINDINGS—ULTIMATE FINDING OF FACT.

Though findings should be construed most strongly in support of the judgment, an ultimate finding of fact, drawn as a conclusion from the probative facts previously found, cannot stand if the specific facts upon which it is based do not support it.

4. INFANTS 🔑58(2)—DEEDS—VALIDITY.

Under Civ. Code, § 33, prohibiting a minor under the age of 18 from making a contract relating to real property, and section 35, authorizing a minor to disaffirm either before or after attaining majority, but requiring repayment of consideration if the minor was over 18, where the court found that plaintiff was under 18 when she made a trust deed, it could not also find that she was estopped by her conduct, and her mature appearance from disaffirming without tendering back the consideration.

Department 2. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Suit by Sibyl M. Lee, a minor, by her guardian ad litem, Kate C. Perry, against the Hibernia Savings & Loan Society and others. From the judgment rendered, defendants R. McColgan and others appeal. Affirmed.

Cullinan & Hickey, of San Francisco, for appellants. Frank W. Sawyer, Sydney Schlesinger, and Tobin & Tobin, all of San Francisco, for respondents.

VICTOR E. SHAW, Judge pro tem. While in form this action is one to quiet title, its real purpose was to have declared void two instruments in so far as they affected the lot described in the complaint and owned by plaintiff. One of these instruments is a mortgage executed by plaintiff, together with her mother and brother, on August 1, 1913, to the Hibernia Savings & Loan Society, upon property which included that herein involved. The other is a deed of trust executed by the same parties on August 6, 1913, whereby the same property was conveyed to R. McColgan and F. W. Morrison, trustees, to secure a loan of money made by Daniel A. McColgan. The ground upon which plaintiff sought relief was that at the time of the execution of these two instruments she was a minor under the age of 18 years. The court made findings and conclusions of law, followed by a judgment for plaintiff quieting her title as against the Hibernia Savings & Loan Society, and in favor of defendants Morrison and the McColgans whose interest in the property was founded upon the deed of trust. Thereafter the court made an order, granting plaintiff's motion, made under section 663 of the Code of Civil Procedure, to vacate and set aside the judgment in favor of said last-named defendants upon the ground that the conclusions of law were inconsistent with the facts found. The conclusions of law were thereupon amended, and a new judgment conformable thereto entered in favor of plaintiff, the effect of which was to declare the deed of trust, as well as the mortgage, void. The appeal is from this judgment, and prosecuted by Morrison and the McColgans, whose chief contention is that the findings do not support the amended conclusions of law and judgment.

The findings, other than as to facts hereinbefore stated, which are material to the controversy, are as follows: "That the plaintiff, Sibyl M. Lee, became 18 years of age on the 31st day of December, 1914." That at the time when plaintiff executed the deed of trust on August 6, 1913, given in consideration of the loan so made, she did not inform Daniel A. McColgan that she was under 18 years of age. That about November or December, 1913, defendant learned that plaintiff was under 18 years of age when she executed the deed of trust, and upon his threatening to have the trust executed on account of default in paying said note she represented that she would be 18 years of age on December 31, 1913, and promised if he would forego sale of the property on account of such default and advance to her and her mother an additional $500 under the security of the trust deed, she would, after December 31, 1913, ratify and confirm the same. That such sum was advanced prior to January 14, 1914, on which date plaintiff and her mother, both knowing the same to be false, made affidavit that Sibyl became 18 years of age on December 31, 1913, and on the same day (January 14th) ratified and confirmed the trust deed by executing an instrument fully set out in the findings wherein she stated: "I also ratify and confirm that certain deed of trust, dated August 6, 1913, made and executed * * * by myself in favor of Daniel A. McColgan." That plaintiff prior to commencement of the action never disaffirmed her said acts in executing said deed of trust. That but for the security of said deed of trust defendant will be unable to enforce payment of the loan so made to plaintiff. That defendant was deceived by said affidavits as to plaintiff's age, who, on August 6, 1913, had the physical appearance and mentality of an adult woman.

Section 33 of the Civil Code provides that "a minor cannot give a delegation of power, nor under the age of eighteen, make a contract relating to real property, or any interest therein;" and section 35 of the Civil Code provides that contracts, other than those specified in sections 36 and 37 of the Civil Code, of which this is not one, so made by minors under 18 may be disaffirmed by the minor himself either before his majority or within a reasonable time afterwards, but as to contracts of the character here involved made by minors over 18 years of age the consideration must, as a condition of such disaffirmance, be restored to the party from whom it was received.

[1] Under these provisions and as declared in Hakes Investment Co. v. Lyons, 166 Cal. 557, 137 Pac. 911, the deed of trust so executed by plaintiff on August 6, 1913, was, notwithstanding her mature appearance as found by the court, absolutely void, and no legal duty devolved upon her, as a condition of disaffirming the deed, to restore to defendants the consideration received therefor from them. Lackman v. Wood, 25 Cal. 147–153.

[2] This being true, it is equally clear that since she was not 18 until December 31, 1914, her act on January 14, 1914, in executing the instrument purporting to confirm and ratify such deed of trust was likewise ineffectual for the purpose of validating the deed.

Appellants insist, however, that the findings of fact as to them show that she is estopped from asserting that she was under 18 years of age at the times in question. In support of this contention they rely upon the fact that, following the findings hereinbefore referred to, the court found as follows:

> "That by reason of the facts herein set forth and found, the said Sibyl M. Lee is and ought to be estopped and prevented from asserting or proving, and ought not to be permitted and ought not to be and will not be permitted to assert or prove that she was on the 14th day of January, 1914, or at any time after the 31st day of December, 1913, or that she is, or at the commencement of this action was, under the age of 18 years."

[3] The rule is that findings should be construed most strongly in support of the judgment. Cooley v. Brunswig Drug Co., 30 Cal. App. 58, 157 Pac. 13; Ballou v. Sunflower Gold Mining Co., 165 Cal. 557, 132 Pac. 1036. The finding above quoted, and upon which appellants rely, is not one of fact, but a conclusion of law which the trial court, as stated, found from "the facts herein set forth and found." Fritz v. Mills, 12 Cal. App. 113, 106 Pac. 725. Even an ultimate finding of fact which is drawn as a conclusion from the probative facts previously found cannot stand if the specific facts upon which it is based do not support it. Matter of Forrester, 162 Cal. 493, 123 Pac. 283; McKay v. Gesford, 163 Cal. 243, 124 Pac. 1016, 41 L. R. A. (N. S.) 303, Ann. Cas. 1913E, 1253.

[4] The court specifically found that plaintiff, at the time when she executed the instruments, was under 18 years of age, hence she was incapable of making the deed. While it is true, as stated by appellants, that this court in Hakes Investment Co. v. Lyons, supra, in discussing an alleged estoppel in a like case, said, "There must be some act which is the equivalent of the execution of a new contract, or something which operates as an estoppel," nevertheless, such acts to operate as an estoppel must be performed after the minor reaches an age where she has capacity to act. To hold otherwise and say that, notwithstanding the express statutory declarations, a minor under 18 years of age is, because of her mature appearance and false representations as to her age, estopped from disaffirming a conveyance of real estate without restoring the consideration received therefor would nullify and destroy the plain provisions of sections 33 and 35 of the Civil Code.

The judgment and order are affirmed.

We concur: MELVIN, J.; WILBUR, J.

177 Cal. 664

TAINTER v. BRODERICK LAND & INVESTMENT CO. et al. (S. F. 7907.)

(Supreme Court of California. March 4, 1918.)

1. FRAUDULENT CONVEYANCES 🔑74(4) — RIGHTS OF CREDITORS.

Civ. Code, § 3442, making void as to existing creditors a conveyance by an insolvent without consideration, does not apply where the creditor attacking a transfer was not an existing creditor at the time of the conveyance, and there is no allegation that the debtor was then insolvent or in contemplation of insolvency.

2. FRAUDULENT CONVEYANCES 🔑261—PLEADING—SUFFICIENCY.

In suit to set aside an alleged fraudulent conveyance, allegation that the debtor "is insolvent" relates to the time of the beginning of the action, and does not show insolvency at the time of the conveyance.

3. TRUSTS 🔑371(2) — RESULTING TRUSTS — FRAUDULENT CONVEYANCE.

In suit to set aside alleged fraudulent conveyance, where plaintiff claimed on the theory that a resulting trust arose in favor of the debtor, under which plaintiff could claim, but alleged that there was no consideration for the conveyance, such allegation showed that there was no trust, in view of Civ. Code, § 847, stating that trusts in real property are those only specified in the title, and section 853, providing for resulting trusts where title to land is taken in the name of another than him who paid the consideration, since the absence of consideration prevented application of the statute.

4. TRUSTS 🔑371(2)—OPERATION OF LAW—PLEADING—SUFFICIENCY.

Complaint alleging that plaintiff was a judgment creditor of the debtor, who caused a corporation to be formed to take title to land of which he would continue in possession, only the legal title being transferred and that such transaction was to hinder his creditors, but failing to allege that he was then insolvent, did not show a trust under which the judgment creditor could claim which arose by operation of law under Civ. Code, §§ 852, 2217, 2223, 2224, as to trusts by operation of law, or voluntary trusts, and as to involuntary trusts arising from fraud or mistake.

5. TRUSTS 🔑13 — AGREEMENT—CONVEYANCE WITHOUT CONSIDERATION.

A conveyance without consideration creates no trust in favor of the grantor.

Department 1. Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Suit by Frank L. Tainter against the Broderick Land & Investment Company and others. From a judgment sustaining demurrer to the complaint, plaintiff appeals. Affirmed.

Arthur Crane, of San Francisco, for appellant. James H. Boyer, of San Francisco, for respondents.

SHAW, J. The demurrer to the complaint was properly sustained. The object of the action was to subject to the payment of the plaintiff's judgment certain real estate standing in the name of the defendant corporation. The complaint alleges that on June 10, 1908, Dudley was the owner of the property; that Dudley, Upham, and Meigs agreed to organize a corporation for the purpose of saving said property from Dudley's creditors, and providing that Dudley should remain in possession thereof, and that the title should be transferred to the proposed corporation without consideration, and for the purpose of defrauding Dudley's creditors; that in pursuance of said agreement said defendants caused the defendant corporation to be incorporated, and on July 13, 1908, caused Dudley to convey said property to said corporation "without consideration, and for the purpose of changing the legal title only"; that Dudley continued in possession of the land thereafter and used and still uses it as his own, and that said corporation holds the legal title thereto for and on behalf "of its true owner, said E. C. Dudley"; that but for said "resulting trust in his favor, and said ownership of said property, said defendant E. C. Dudley is wholly insolvent." It further alleges the recovery of a judgment by Tainter against Dudley on October 8, 1914, and that the same was given upon a demand for money advanced and after the conveyance to said defendant corporation by Dudley, and that said judgment is wholly unpaid. Execution had been issued thereon and returned wholly unsatisfied.

[1, 2] Section 3442 of the Civil Code provides that a transfer of property without valuable consideration "by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors." As the plaintiff was not an existing creditor of Dudley at the time of this transfer, and as there is no allegation that at the time of said transfer Dudley was either insolvent or in contemplation of insolvency, this provision has no application to this case. Atkinson v. Western D. Syndicate, 170 Cal. 506, 150 Pac. 360; Bull v. Bray, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576. The allegation is that he "is insolvent." This relates to the time of the beginning of the action. The record does not show the date of the beginning of the action. The complaint in question is the third amended complaint. But as the judgment recovered by plaintiff was given in October, 1914, which must necessarily have been prior to the beginning of the action, while the transfer was made in July, 1908, it is apparent that there is no allegation that Dudley was insolvent or in contemplation of insolvency at the time of the transfer.

[3] The appellant contends that the allegations of the complaint are sufficient to show that a resulting trust in the property exists in favor of Dudley, and therefore that the plaintiff may avail himself of Dudley's interest in the property and subject the same to his judgment. The facts alleged do not show the existence of any resulting trust. By section 847 of the Civil Code, it is declared that trusts in real property "are those only which are specified in this title." The only trust mentioned that bears any re-

semblance to the trust claimed in this case is that provided in section 853, that "when a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." Such a trust arises only when there is a consideration paid. The allegation that there is no consideration takes the case out of the provisions of that section.

[4] The only other trust which could exist under the Code is that declared by the third subdivision of section 852, that is, trusts created by operation of law. There are no allegations sufficient to constitute a trust created by operation of law. Such a trust is designated as "an involuntary trust." Civ. Code, § 2217. An involuntary trust arises when one wrongfully detains a thing from the owner (section 2223), or gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act (section 2224). There are no allegations in the complaint to show that the corporation gained the property by any of these means.

[5] A conveyance without consideration creates no trust in favor of the grantor. Tillaux v. Tillaux, 115 Cal. 668, 47 Pac. 691; 1 Perry on Trusts, § 162. Hence there is no showing of any trust estate in Dudley which could be reached either by him or by the plaintiff as his creditor.

The judgment is affirmed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

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177 Cal. 678

PEOPLE v. SCHOON. (Cr. 2099.)

(Supreme Court of California. March 6, 1918. Rehearing Denied April 4. 1918.)

1. Homicide 🔑253(1) — Murder — Evidence—Sufficiency.

Evidence *held* to sustain conviction of murder in the first degree.

2. Jury 🔑97(1, 3) — Qualification — Bias.

Where a juror stated that he had formed no opinion and had no bias against an ex-convict or an I. W. W., challenge for actual bias was properly disallowed, although he did not state a belief in defendant's innocence.

3. Jury 🔑133 — Qualification — Bias.

Where a juror on his examination made conflicting statements, the court could properly determine whether he was biased, and it was not, as matter of law, error to disallow the challenge for actual bias.

4. Criminal Law 🔑444—Evidence—Maps—Authentication.

In prosecution for murder, a map could properly be used in evidence as a diagram for the purpose of illustration only if shown to be accurate.

5. Criminal Law 🔑404(4) — Demonstrative Evidence.

In prosecution for murder, there was no error in admitting in evidence a pair of gloves found in deceased's pocket.

6. Criminal Law 🔑448(2) — Evidence — Conclusion.

In prosecution for murder, a witness could say that at the time the shots were fired he then thought he saw somebody lying on the sidewalk at the point of the killing; such statement not being his conclusion, but the result of his personal observation.

7. Criminal Law 🔑407(1)—Admissions—Silence.

In prosecution for murder, a witness could testify that when accused was arrested an officer broke accused's pistol, smelled it, and said it had recently been fired, and that accused made no denial; such evidence tending to show tacit admission.

8. Criminal Law 🔑407(1) — Evidence — Admissions.

In prosecution for murder, a witness could say that another said to him, in accused's presence, that, "This is the gun we took from him," which statement accused did not deny; there being no conflict as to the identity of the pistol.

9. Criminal Law 🔑412(3) — Evidence — Statements of Accused.

Statements of accused, after he was arrested, denying the accusation, and denying other statements of those who arrested him, though, taken with other facts, they tended to establish his guilt, were admissible, since they were not confessions.

10. Criminal Law 🔑1137(5) — Appeal — Invited Error—Admission of Evidence.

Claim of error in admitting evidence that one accused of murder was under a sentence of deportation as an undesirable alien cannot be sustained, where such evidence was admitted by stipulation in which defendant's attorney concurred.

11. Criminal Law 🔑1141(1) — Prejudicial Error—Evidence—Presumption.

Emphasis during trial on fact that one accused of murder was a member of the I. W. W. cannot be presumed to have been prejudicial.

In Bank. Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Joseph Schoon was convicted of murder, and from the judgment and an order denying motion for new trial, he appeals. Affirmed.

W. H. Briggs and Fred H. Moore, both of Stockton, and S. Luke Howe and Roy Hibbitt, both of Sacramento, for appellant. U. S. Webb, Atty. Gen., for the People.

ANGELLOTTI, C. J. The defendant was informed against for the crime of murder, in the unlawful killing of John L. Brisco, a police officer of the city of Stockton. He was convicted of murder in the first degree, and prosecutes this appeal from the judgment and from an order denying his motion for a new trial.

[1] It is claimed that the evidence given on the trial is not sufficient to sustain the verdict. Defendant and a companion, who had come to Stockton on the evening of February 4, 1917, and spent the evening and night up to about 1 o'clock visiting several saloons and a restaurant begging, were arrested about 1 o'clock a. m., February 5, 1917, at the corner of Weber and El Dorado streets by deceased, and taken by him toward the police station, which fronted on Bridge street, between El Dorado street on the west and Hunter street

on the east, distant about 104 feet from El Dorado street. Deceased turned with his two prisoners from El Dorado street into Bridge street. Almost immediately thereafter was heard a shot in the vicinity of the police station, and, according to the testimony of many witnesses, shortly thereafter three shots in quick succession. There were officers in the police station, and many people in the Hotel Stockton, which occupied an adjoining block, who were roused by the shooting and who were able to give material evidence. There was testimony to the effect that immediately after the first shot a voice was heard to cry, "Oh, my God!" and then came the three shots in quick succession. A little alley adjoined the police station on the east, running from Bridge to Channel street. On the sidewalk of Bridge street, at the easterly corner of this alley, the deceased was found prostrate and dying from a bullet wound through his body. Near him was his revolver with three empty cartridges therein. The defendant and his companion had disappeared, and the companion has never been found by the authorities. The testimony quite clearly indicated that, after being shot, the deceased had attempted to pursue his assailant or assailants, firing three shots from his revolver, and had succeeded in reaching the corner where he fell. The deceased was at once taken to the emergency hospital, where he almost immediately died. His body was then taken to the morgue, where, on removing his clothing, a bullet was found between his skin and shirt which gave every evidence of being the bullet which had passed through his body. Within about an hour from the time of the shooting the defendant was captured by the officers at a point quite a distance from the police station, where apparently he was endeavoring to conceal himself. There was testimony that he was perspiring and breathing heavily, and gave every indication of having been running. A 38-caliber pistol was found in one of his pockets, fully loaded, and an extra cartridge in a vest pocket. There was testimony on the part of those who examined the pistol to the effect that it showed it had been very recently discharged. There was testimony to the effect that the bullet found in the clothing of deceased was in all respects such a bullet as would be discharged from defendant's pistol. There was also evidence to the effect that the coat of deceased show that at the time of the shooting of deceased the muzzle of the weapon was so close to his body that it left the carbon from the powder on his coat. We are at a loss to see how, in the face of this proof, it can be held that the verdict is without sufficient support in the evidence.

Certain errors in the proceedings in the trial court are alleged.

[2] 1. It is claimed that the trial court erred in disallowing the challenge for actual bias to one Franklin C. Turner, who had been called and examined as to his qualifications to serve as a juror. The record shows that Mr. Turner did not serve as a juror in this case. He was excused on peremptory challenge by the defendant. Regardless of this, however, the court did not err in disallowing the challenge for actual bias. His examination showed him to be absolutely qualified in all respects to serve as a juror. He had formed or expressed no opinion; had no prejudice whatever; it would not make any difference that the man was an ex-convict or an I. W. W.; he would require the state to prove the case, beyond a reasonable doubt before he would convict; he would presume him innocent until the evidence established his guilt. The whole contention of appellant in regard to this juror is based on the fact that he could not say that, as matter of fact, he then had no doubt of his innocence. It has never been held that absolute belief of a defendant's innocence is an essential qualification of a juror. All that he meant by his statement was that in view of the charge there might be something against the defendant.

[3] 2. It is claimed that the court erred in disallowing a challenge for actual bias to Juror F. E. Russell. Mr. Russell was the twelfth juror sworn to try the cause, and the peremptory challenges of the defendant had then been exhausted. To our minds, a reading of the entire testimony of the juror on his voir dire shows that he was entirely unprejudiced, and in such a condition of mind that he could and would try the case fairly and impartially. While some of his answers, taken alone, might indicate a possible prejudice in the event that certain facts appeared in evidence, the case is one fully covered by what was said in People v. Ryan, 152 Cal. 364, 371, 92 Pac. 853, to the effect that where answers of the juror to questions of counsel are contradictory, the trial court must decide which of the answers most truly shows the juror's mind, and its decision is binding on the appellate court. We see no reason to doubt the correctness of the action of the trial court in this matter.

[4] 3. The map used in evidence as a diagram for the purpose of illustration only was shown to be an accurate diagram in all material respects. We see no error in the action of the trial court in regard thereto.

[5] 4. Why it was error to admit in evidence a pair of gloves found in a pocket of the clothing of deceased is not pointed out, and we can see no ground for the claim.

[6] 5. The trial court did not err in refusing to strike out a portion of an answer given by Mr. Neumiller, a witness who, hearing the shots, went to his window in the Hotel Stockton, from which he could see the police station and Bridge street in the vicinity thereof. He said:

> "I saw some one come from the police office and rush down Bridge street towards Hunter, and I thought then I saw somebody lying on

the sidewalk there opposite the vestibule of the saloon."

The witness was simply stating the result of his personal observation. In substance, he said that looking at the place indicated it appeared to him that somebody was lying on the sidewalk there. He was not positive as to this, but it then seemed to him that such was the case. There is no legal objection to such testimony. Whatever objection there may be to the same goes purely to its weight, which is a question for the jury. See, as bearing on this matter, People v. Rolfe, 61 Cal. 540; People v. Soap, 127 Cal. 410, 59 Pac. 771; 1 Wigmore on Evidence, § 658, p. 753.

6. No reason is stated why the court erred in refusing to strike out a portion of the testimony of L. J. Hansen, and we can conceive of none.

7. What we have said as to the refusal of the court to strike out a portion of the testimony of Mr. Neumiller applies equally to the action of the court in regard to the testimony of Mr. Tulan.

[7] 8. When the defendant was arrested and his pistol taken from him, some of the officers, in his immediate presence and hearing, broke it and smelled it and said it had been recently fired. The defendant remained silent, making no denial. A motion to strike out testimony of Frank Prahser to this effect was denied. In view of our decisions there was no error in this. Defendant's conduct in the face of this action and this statement of the officers, in his presence and hearing, there being no reason why he would not feel at liberty to reply and deny, was evidence tending to show a tacit admission by him of the truth of the statement of the officers, the weight of which was a question of fact for the jury. See People v. Amaya, 134 Cal. 536, 66 Pac. 794.

[8] 9. The same thing is true as to the testimony of Dr. L. R. Johnson that, "Mr. Perryman said 'this is the gun we took from him, Doctor.'" It may properly be added that there was no conflict of evidence as to the identity of the pistol, that matter being proved by a great amount of testimony which was in no degree questioned.

[9] 10. A shorthand reporter was allowed to testify to statements made by the defendant to the district attorney and other officers shortly after his arrest, in response to questions asked by the district attorney. A great part of this came in without objection of any kind being made. A part was introduced by defendant's attorney. The objection urged here is that the statements were not free and voluntary, but were obtained through the "old-fashioned third degree sweat process." The record indicates that there was no improper inducement of any kind, and that the defendant when questioned in a perfectly proper and ordinary way, without the slightest pressure, answered freely. There was no acknowledgment of guilt by the defendant in these statements. He steadily insisted that he did not discharge his pistol that night; that it had not been out of his pocket until taken therefrom at the time of his arrest; that he saw no one shoot; that he heard some shots, saw his companion run, and ran himself, etc. There was nothing in the nature of a confession. As said in People v. Miller, 122 Cal. 87, 54 Pac. 524:

> "The term 'confessions' is restricted to acknowledgments of guilt. 1 Greenleaf on Evidence, 170. This court said in People v. Parton, 49 Cal. 632, 'An admission of a fact, not in itself involving criminal intent, is not to be rejected as evidence (without the preliminary proof) merely because it may, when connected with other facts, tend to establish guilt,'"

See, also, People v. Le Roy, 65 Cal. 613, 4 Pac. 649; People v. Velarde, 59 Cal. 461.

[10] 11. For some reason defendant's attorney deemed it to defendant's advantage to get before the jury the fact that at the time of the shooting defendant was under sentence of deportation from the country to his native country (Holland) as an undesirable alien, having been paroled from the state prison at San Quentin on that condition, and that while being transported in the custody of federal officers with that end in view, he had escaped from such officers somewhere "in the Dakotas," about two months before, and had ever since been at large. He had produced a witness to prove certain of these facts, when, at his own suggestion, these matters were stipulated. The same things were subsequently substantially disclosed by the testimony of admissions and statements made by the defendant. It is now urged that the acceptance of such a stipulation was prejudicial error necessitating a reversal. We do not see how any claim of error can be predicated on this action of the court, insisted on, as it was, by the defendant's attorney. It may have been an ill-advised thing for the defendant to himself show these facts, but as to that we are not at all satisfied. Doubtless the district attorney, who, by reason of defendant's previous admissions, knew the facts, could have made proof thereof as evidence of motive for the killing—to show that the circumstances were such that the defendant deemed it necessary to resort to any means in order to escape from the custody of the officer. Perhaps the attorney for the defendant, knowing this, very properly concluded that it would be advisable for defendant to frankly admit the facts himself, rather than have the matters proved against him by the state, especially as he might fairly claim that such facts explained his flight from the scene of the shooting on a theory other than that of guilt in the matter of the killing, viz. the desire to escape a return to the state prison for violation of his parole, and deportation, which would be almost certain to follow his arrest and any investigation into his antecedents. Certainly we would not be warranted in reversing the judgment

because the defendant, through his counsel, saw fit to adopt this policy in his defense.

[11] On the oral argument much stress was laid on the fact that it was disclosed on the trial that the defendant was a member of the "Industrial Workers of the World," or the "I. W. W.," as it is commonly known, having joined it two or three months before his arrest. It is claimed that this must have prejudiced him in the minds of the jurors. An examination of the record has disclosed no action or ruling of the trial court relative to this matter that can be held erroneous. We are not warranted in assuming that the jurors were influenced by this fact in arriving at a verdict.

No other point is made in support of the appeal. We have examined the whole record and find therein nothing that would warrant us in ordering a reversal.

The judgment and order denying a new trial are affirmed.

We concur: SLOSS, J.; MELVIN, J.; SHAW, J.; VICTOR E. SHAW, Judge pro tem.

177 Cal. 660

In re EWER'S WILL. (S. F. 8557.)

(Supreme Court of California. March 2, 1918.)

1. Executors and Administrators 🔑315(6)—Decree of Distribution—Conclusiveness.

A decree of final distribution "that in accordance with the provisions of the will" residue shall be distributed to N. "as trustee for E. B. E." is not contrary to a will providing that on death of E. B. E. the trust estate should go to A. E., and the two must be construed together.

2. Executors and Administrators 🔑315(6)—Decree of Distribution—Construction.

The rule that a decree of distribution prevails over provisions of the will where the two conflict is one of necessity, and where the necessity does not exist, the decree should be construed so as to be consistent with the will, if possible.

In Bank. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

In the matter of the trust created by the last will of Warren B. Ewer, deceased. The beneficiary, Eliza B. Ewer, having died, her special administrator, Jesse L. Healy, petitioned for distribution, and Alfred Ewer appeared claiming the trust property. From an order in favor of the latter, the special administrator appeals. Affirmed.

Watt, Thornton & Watt and Watt, Miller, Thornton & Watt, all of San Francisco, for appellant. Carter P. Pomeroy, of San Francisco, for respondent.

SHAW, J. The decree of final distribution of the estate of Warren B. Ewer, deceased, recited:

> "That in accordance with the provisions of the last will and testament of said deceased the said residue now remaining in the hands of said executor should be distributed as follows: To Ora S. Ewer, widow, $5,000. To Eliza B. Ewer, surviving daughter, $500. * * * To Chas. E. Naylor, as trustee for Eliza B. Ewer, $25,000."

The decree then provided:

> "That the residue of said estate hereinabove particularly described and mentioned be, and the same is hereby, distributed as follows: To Ora S. Ewer, widow $5.000. To Eliza B. Ewer, surviving daughter, $500. To Chas. E. Naylor, as trustee for Eliza B. Ewer, $25,000."

The will of Warren B. Ewer bequeathed $25,000 to Chas. E. Naylor on certain trusts therein described, and provided that upon the death of Naylor the Mercantile Trust Company should succeed him as such trustee. Naylor afterwards died and the trust company was substituted as his successor. Eliza B. Ewer, the beneficiary named in the decree, died on January 4, 1917. The appellant, Jesse L. Healy, was thereupon appointed special administrator of her estate. After her death the trust company filed its final account, and asked that the trust be closed, and that the corpus of the estate be ordered distributed to the party entitled thereto. Upon the hearing of this account and petition Healy, as administrator of Eliza B. Ewer's estate, appeared and asked distribution of the balance remaining in the hands of the trustee, on the ground that the decree of distribution vested the title thereto absolutely in Eliza B. Ewer, and that upon her death it descended to her heirs and became a part of her estate. Alfred Ewer also appeared and claimed that by the terms of the trust he was entitled to distribution of the said residue remaining in the hands of the trustee. The court held in favor of Alfred Ewer, and ordered that the residue be paid over to him by the trustee. From this order Healy appeals.

It is the contention of the appellant that the direction in the decree of distribution of the estate of Ewer to distribute $25,000 to Chas. E. Naylor "as trustee for Eliza B. Ewer" is unconditional and positive, and that no other person is thereby given any interest in the property; that the beneficial interest and equitable title vested in Eliza B. Ewer accordingly, in consequence whereof at her death it descended to her heirs. The respondent claims that by virtue of the reference in the decree to the last will of Warren B. Ewer the court may look to said will to determine the nature of the trust upon which Naylor was to hold the money distributed to him.

[1] We are of the opinion that the contention of the respondent is correct. The rule is well established that where the decree of distribution is contrary to the provisions in the will, the decree controls and prevails over the terms of the will with respect to the distribution of the property; in other words, that the will cannot be used to impeach the decree of distribution. Goad v. Montgomery, 119 Cal. 557, 51 Pac. 681, 63

Am. St. Rep. 145; McCloud v. Hewlett, 135 Cal. 368, 67 Pac. 333. But while the will cannot be used to impeach the decree, it can be used to explain it where the decree taken alone is uncertain, vague, or ambiguous. In McCloud v. Hewlett, supra, the court said:

> "It is true that the judgment is a final determination of the rights of the parties to the proceeding, and that the will cannot be used to impeach the judgment, although it may be referred to in aid of the judgment where necessary."

A similar ruling was made in Horton v. Winbigler, 165 Pac. 428. The direction to pay the $25,000 to Chas. E. Naylor, as trustee for Eliza B. Ewer, gives no information as to the nature of the trust upon which the money was to be held. The decree further provided that Naylor should be required to give a bond as trustee before distribution was made to him, and it also named Alfred Ewer as the "residuary legatee." The finding that the residue remaining in the hands of the executor should be distributed "in accordance with the provisions of the last will and testament of said deceased," together with the other references in the decree, sufficiently incorporated the provisions of the will into the decree for the purposes of reference to aid the decree and ascertain the nature of the trust. The will was a part of the record of the proceedings in the estate, and it may therefore be considered for the purpose stated. Turning to the will, we find that it bequeathed to Naylor as trustee $25,000, "to be held by him and finally disposed of by him or his successor as hereinafter specified." The money was to be invested by the trustee so as to produce an income. Such income was to be paid to Eliza B. Ewer, daughter of the decedent, and at her death—

> "the unexpended portion of the principal sum thereof shall be delivered by my said trustee to my residuary legatee hereinafter named, or to his surviving child or children should he not survive my said daughter, my intention being that when my said daughter is deceased the said principal sum of twenty-five thousand dollars or the remainder thereof shall go to and will have been delivered by said trustee or his successor to my said residuary legatee or to his surviving children."

The will also declared:

> "I give, bequeath and devise unto my nephew, Alfred Ewer * * * all the rest, residue and remainder of my property and estate of whatever kind and description, and wherever situated, including therein the unused or unexpended balance of the aforesaid sum of $25,000.00 comprising the trust fund herein created."

Interpreting the decree in connection with the will, therefore, the nature of the trust is made entirely clear. The trustee named, or his successor in case of his death, was to use the income for the benefit of the daughter Eliza B. Ewer during her lifetime, and was then to deliver the unexpended balance to the residuary legatee, Alfred Ewer. Taking the two documents together, there is no ambiguity or doubt in regard to the final distribution of the trust estate.

[2] The rule that the decree of distribution prevails over the provisions of the will where the two are in conflict is one of necessity. It should not be applied in cases where the necessity does not exist, and if reasonably possible the decree should be construed so as to be consistent with the will, and so as to incorporate the will into it as a part of its directions, rather than to give it a meaning which conflicts with the provisions of the will. There was no controversy as to the meaning of the will, and we cannot ascribe to the court any purpose or intent to dispose of the estate contrary to its terms. While a single phrase of the decree, apart from the context, though indefinite in itself, could possibly be construed as a distribution of the fund absolutely to Eliza B. Ewer, yet the decree as a whole shows that the intention of the court making it was to give the fund over to the trustee to hold and dispose of it upon the trust stated in the will, and in accordance therewith. It should, therefore, be given that effect. We think the court below properly directed that the money be paid to the residuary legatee, the respondent herein.

The order is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; VICTOR E. SHAW, Judge pro tem.; SLOSS, J.; RICHARDS, Judge pro tem.; MELVIN, J.

177 Cal. 685

COOPER v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.

(L. A. 5342.)

(Supreme Court of California. March 6, 1918.)

Master and Servant 🔑361—Workmen's Compensation Act—Relationship—Partner—"Partnership"—"Employé."

Where a mining partnership, sending one of its members to examine a mine which the firm owned, agreed to pay him expenses and $5 a day for his time on the trip, and he was killed at the mine by operation of machinery owned and operated by the firm, his widow was not entitled to compensation, he not being an employé of the firm under the Workmen's Compensation Act (St. 1913, p. 284) § 14; the definition of the term "partnership" as "an association of two or more persons for the purpose of carrying on business together and dividing its profits between them" implying that each of its members shall render such services to the firm as he is able, and without compensation, in the absence of special agreement to the contrary.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Partnership; Employé.]

In Bank. Certiorari by Eva L. Cooper to review the action of the Industrial Accident Commission in proceedings under the Workmen's Compensation Act to recover compensation for death of W. L. Cooper, in which relief was denied. Application dismissed, and order of the commission affirmed.

Willis I. Morrison, of Los Angeles, for petitioner. Schweitzer & Hutton, of Los Angeles, and Redman & Alexander, of San Francisco (Christopher M. Bradley, of San Francisco, of counsel), for respondents.

RICHARDS, Judge pro tem. This is a petition for a writ of certiorari by which we are asked to review the action of the Industrial Accident Commission in its order denying relief to the petitioner herein, who was the applicant before it. The facts of the case are undisputed and present but one question for our determination. The applicant, Eva L. Cooper, is the widow of one W. L. Cooper, deceased. Said W. L. Cooper was at one time the owner of certain mining claims located in the county of Inyo. In the month of October, 1916, he took part in the organization of a mining partnership formed for the purpose of taking over his said mining claims, of which partnership he then became, and up to his death continued to be, one of the members. Within a month or so after the formation of this partnership its superintendent made certain reports as to conditions at the mine, which led the members of the firm to request Mr. Cooper, who was a practical mining engineer, to go to the mine and resample it and verify certain of his former reports, upon the strength of which the property had been taken over by the partnership. It was agreed that his expenses on the trip should be paid by the firm, and also that he should be allowed $5 per day for his time, the latter amount to be paid out of the proceeds of certain shipments of ore which the firm was about to make. Cooper went to the mine pursuant to this arrangement, and while there was injured through the operation of a bucket tram owned and operated by the firm of which he was a member, from which injuries he died. His widow thereupon applied to the Industrial Accident Commission for relief against the partnership, and its insurer, the Ocean Accident & Guarantee Corporation. Upon the hearing the commission denied relief to the applicant upon the sole ground:

> "That at the time of his injury and death said W. L. Cooper was a member of said copartnership, and therefore was not an employé of such copartnership within the meaning of section 14 of the Workmen's Compensation, Insurance, and Safety Act, and this commission is without jurisdiction over the parties hereto."

This presents as the sole matter for review the following question:

> "Does a member of a partnership performing services for it under an agreement such as that here presented come within the terms of the Workmen's Compensation Act so as to entitle his widow to compensation from the firm of which he is a member, and from its insurer, against injuries to its employés? In other words, was the deceased an employé of the firm of which he was a member, within the intent and meaning of the Workmen's Compensation Act?"

We are constrained to hold that the Industrial Accident Commission was correct in its conclusion upon this subject. Ordinarily the relation between a partnership and its members performing services for it is not the relation of employer and employés. The definition of the term "partnership" as "an association of two or more persons for the purpose of carrying on business together and dividing its profits between them" implies that each of its members shall render such services to the firm as he is able, and without compensation, in the absence of special agreements to the contrary. In the rendition of such services the partner is acting in no sense in the capacity of a servant or employé subject to the direction, or it may be discharge, of his firm acting as his master or employer. This court has held that in the absence of a special agreement to the contrary, one partner may not recover against his firm or fellow partners for the value of any services he may have rendered to the partnership (Nevills v. Moore Mining Co., 135 Cal. 561, 67 Pac. 1054), and has further decided that even in the case of a contract for particular services at an agreed salary, an action at law was not maintainable by a partner thereon until there had been an accounting and settlement of the partnership affairs (Dukes v. Kellogg, 127 Cal. 563, 60 Pac. 44; Ross v. Cornell, 45 Cal. 133).

The Workmen's Compensation Act clearly does not contemplate such a mixed relation as that existing between partners, wherein each member of the partnership is at the same time principal and agent, master and servant, employer and employé; and wherein each, in any services he may render, whether under his general duty as a partner, or under a special agreement for some particular service, is working for himself as much as for his associates in carrying on the business of the firm. The obvious intent of the act was to substitute its procedure for the former method of settling disputes arising between those occupying the strict relationship of master and servant, or employer and employé, by means of actions for damages, with their pleas of negligent acts or omissions in the way of providing suitable places to work, or proper appliances and the like, and with their defenses of assumed risks, or of the negligence of fellow servants, or of contributory negligence, and with the uncertainties or inequities incident to jury trials, all elements of damage, defense, or consequence, which obviously could not arise out of the partnership relation.

The instant case illustrates this aptly. The decedent was fatally injured through the giving way of the standards of a bucket tram being operated at the time, by reason either of its improper construction or negligent operation. Had the decedent survived to sue for his injury, he could not recover against his firm or his associates upon the plea that the appliance was defectively constructed, for the reason that as a member of the firm he was as fully responsible for such defects as were his fellow members thereof; nor could he recover for the negligent operation of the appliance by the employés in charge of it, for they were his own employés as much as they were the employés of his fellow partners; nor, as to such employés, could he be said to be a fellow employé, without involving the legal aspects of the case in hopeless contradictions. In a word, the law relative to compensation as between master and servant, or employer and employé, for injuries suffered by the latter, contemplates two persons standing in this opposed relation, and not the anomaly of one person occupying the dual relation of master and servant, employer and employé, plaintiff and defendant, or person entitled to a judgment or award in his favor and person bound to pay a part thereof out of his own proportionate share of the partnership property and the balance, amounting possibly to the whole thereof, out of his own individual estate. Evidently the Workmen's Compensation Act did not contemplate these anomalies in its ample and detailed provisions for compensation to injured workmen and to those dependent upon them. We are cited to numerous cases by the appellant bearing upon the question of the power of a partner to make a contract of employment with his firm, but to no cases which hold that such a person when injured in the course of such service would be entitled to compensation under any of the various Workmen's Compensation Acts which have come into existence in this country and in England of recent years. On the other hand, our attention is directed by the respondent to the fact that the Workmen's Compensation Act of this state is derived from the English act of Parliament upon the same subject, and that said act has been there construed as inapplicable to a partner seeking compensation for injuries from the firm of which he is a member. In the case of Ellis v. Ellis Company, 7 W. C. C. 97, which was practically identical as to its facts with the case at bar, it was said:

"The question is whether the deceased can be considered as a 'workman' within the act, and the members of the partnership as his employers. The act is not applicable to such a case as the present, where the person injured is in the position of both employer and employed. An arrangement between partners such as we have here in which one partner agrees to do work for the partnership in respect of which he is to be paid what are called 'wages,' does not really create the relation of employers and employed. Such an arrangement is, in reality, nothing more than a mode of adjusting the accounts between the partners. It does not alter the fundamental position of each partner, which is that of a coadventurer with each member of the partnership. A person who is a partner cannot put himself into the position of not being a partner, or into the position of being a 'workman' being employed when he is really the person giving employment. The whole act depends upon the difference of the relation of employer and employed. Section 1 contemplates a relation between two parties, between an employer and the person whom he employs, and I do not think that one person can be both employer and employed. It is only necessary to analyze the position of the deceased to see that he cannot be a 'workman.' He was not a person in the employment of employers such as is contemplated by the act."

We are in accord with these views and adopt them as applicable to our local statute and to the instant case. It follows that the application for a writ should be dismissed and the order of the commission affirmed.

It is so ordered.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SHAW, J.; SLOSS, J.; MELVIN, J.

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177 Cal. 668

In re ALLEN'S ESTATE.

ALLEN v. ELLIOTT.

(S. F. 8368.)

(Supreme Court of California. March 5, 1918.)

1. WILLS 🔑52(5)—MENTAL CAPACITY—BURDEN OF PROOF.

The burden is on contestant to prove the existence of alleged delusions of testator.

2. WILLS 🔑55(3)—DELUSIONS—SUFFICIENCY OF EVIDENCE.

To prove the existence of alleged delusions of testator, contestant must show, not only that they had no existence in fact, but also that there was no evidence, however slight or inconclusive, of any fact upon which the belief could be founded.

3. WILLS 🔑53(5)—DELUSIONS—ADMISSIBILITY OF EVIDENCE.

In determining the issue of insane delusions, the jury might consider testator's nature and temperament, his advanced age, the circumstances under which statements by him were made, his habits of life, and the general conduct of contestant and her sister towards him.

4. WILLS 🔑55(3)—DELUSIONS—SUFFICIENCY OF EVIDENCE.

Evidence *held* insufficient to show testator was the victim of insane delusions when he made the will.

5. WILLS 🔑53(5)—DELUSIONS—EVIDENCE.

Where the belief of testator that contestant and her sister, testator's daughters, had large sums of money loaned out and in bank was the chief delusion alleged to have contributed to the making of the will, evidence of contestant's wealth was competent to show such belief was not a delusion, but founded in truth, and also as tending to show testator had, in fact, as declared by him, made ample provision for his daughters, since their needs, depending upon what they possessed, would be the measure of what constituted ample provision.

6. TRIAL 🔑45(1)—PRESENTATION OF OBJECTIONS—EVIDENCE.

Where in will contest answer was excluded to question as to what witness observed in testator's appearance, conversation, and acts, with reference to his being rational, because witness had not first stated, as provided by Code Civ. Proc. § 1870, whether he believed testator to have been of unsound mind, but counsel refused to reframe his question as thus suggested, and failed to clearly indicate to the court that the evidence sought was as to acts and conduct, he could not complain of the exclusion of such evidence, which, it not being made to appear that it was sought to establish the existence of insane delusions, could not be deemed prejudicial.

7. **Wills** 🔑54(3) — **Evidence** — **Testator's Declarations.**

Evidence of testator's declarations, made prior to the execution of the will, that he intended to leave his property to the beneficiaries under the will was admissible.

8. **Wills** 🔑54(2)—**Contest**—**Evidence.**

In a will contest, evidence that testator was opposed to the marriage of one of his daughters, which occurred after the execution of the will, was admissible; testator having left his property to nephews instead of his next of kin, consisting of such daughter, and her sister, contestant of the will.

9. **Witnesses** 🔑268(8) — **Cross-Examination**—**Inconsistent Statements.**

In will contest, where contestant, testator's daughter, testified he had been insane since 1897, it was proper cross-examination to show that, in action by deceased in his lifetime to set aside his deed to contestant and her sister, contestant had filed a verified answer, alleging that at the time of the execution of the deed, in 1909, he was sane and sound mentally.

10. **Witnesses** 🔑379(7) — **Cross-Examination**—**Inconsistent Statements.**

Where contestant's sister testified that testator, her father, had always been insane, witness' answer in suit by deceased in his lifetime to set aside deed to these daughters, wherein she adopted the answer of her sister, and confirmed the same "as fully as if she had originally joined therein," was admissible, since it could not be assumed that witness, in so adopting the answer of her sister, was unfamiliar with its contents.

11. **Wills** 🔑54(1)—**Contest**—**Admissibility of Evidence.**

In a will contest, involving the issue of testamentary capacity, the court properly permitted both parties great latitude in evidence as to the conduct, acts, and declarations of testator, both before and after executing the will.

12. **Appeal and Error** 🔑928(2)—**Presumptions**—**Instructions.**

On appeal it is assumed, in absence of contrary showing, that the jury were properly instructed as to the application of facts proved.

13. **Trial** 🔑62(2)—**Rebuttal Evidence.**

Where some witnesses for proponent, in testifying to testator's sanity, referred to specific acts in connection with the erection of a building by him subsequent to the making of the will, evidence offered by contestant, consisting of testimony of the architect for the building, as to the extent testator looked after its construction, was properly excluded as not being in rebuttal of any facts testified to by proponent's witnesses.

14. **Wills** 🔑52(5) — **Contest** — **Burden of Proof.**

It devolved upon contestant to prove, not only such delusions, but that the will was made as the result thereof.

Department 2. Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Application by John Elliott to probate will of Andrew Allen, to which Jane A. Allen filed contest. From adverse judgment, and an order admitting the will to probate, contestant appeals. Affirmed.

See, also, 169 Pac. 364.

E. K. Taylor, of Alameda, and P. J. Crosby, of Oakland, for appellant. McNair & Stoker, Elliott Johnson, and R. W. Palmer, all of San Francisco, for respondent.

VICTOR E. SHAW, Judge pro tem. Andrew Allen died January 20, 1916, at the age of 79 years, leaving a duly executed olographic will dated March 29, 1911, which John Elliott, therein named as executor, filed, with his petition to have the same probated. By the terms of the will deceased left his estate, consisting of real estate and improvements worth approximately $25,000, and subject to a mortgage of $11,000, to two nephews. His next of kin consisted of two daughters, Hannah J. Pearson and Jane A. Allen, for whom, he stated in the will, he had amply provided by deeds of gift and money. Jane A. Allen filed a contest of the will based upon the alleged ground that at the time of its execution by her father he was of unsound mind and without capacity to make a will. The issue as to this question was tried by a jury which returned a verdict that deceased was of sound mind when he executed the will, and in accordance with such verdict judgment was rendered against the contestant and an order made admitting the will to probate. The contestant appeals from this decree and order.

Appellant, while not claiming that deceased was insane in the broad sense of the term, insists that he was a victim of insane delusions, in the absence of which he would not have made the will whereby nothing was left to his daughters. In her brief appellant specifies a number of alleged delusions entertained by her father, among which was the fact that in his will and also in declarations made by him, he stated that he had amply provided for his daughters by gifts of property and money; that deceased believed that his daughters were conspiring against him; that there would be no one to care for him; that they were guilty of immoral acts; that he drew $7,000 from the bank, and went to Ireland on a visit of ten days, and on his return stated that he came back because it rained; that he was suspicious of his daughters and others; that he used abusive language toward them, and magnified innocent trifles into grave offenses.

[1-4] The burden was on contestant to prove the existence of the alleged delusions, and to do this it not only devolved upon her to show that they had no foundation in fact, but also that there was no evidence, however slight or inconclusive, of any fact upon which the belief could be founded. The alleged conduct and opinions of deceased in the instant case are very similar to the grounds upon which the husband contested the will of his wife in the case of Estate of Scott, 128 Cal. 57, 60 Pac. 527, wherein the question here involved was fully considered, and the court in discussing the sufficiency of the evidence to establish the existence of an insane delusion, among other things, said:

"The court, however, was not authorized to hold that she [the testatrix] was under an insane delusion in reference to these propositions [delusions], unless it was satisfied, from the evidence before it, not only that these charges against him were without any foundation in fact, but also that there was no evidence of any facts brought to her knowledge from which she might form a belief, however irrational or inconclusive it might be, in the existence of the acts or purposes with which she charged him, and, in addition thereto, that she did in fact believe that he was guilty thereof."

In American Seamen's Friend Soc. v. Hopper, 33 N. Y. 619, as touching a similar question, it was said:

> "On questions of testamentary capacity, courts should be careful not to confound perverse opinions and unreasonable prejudice with mental alienation."

To like effect is Smith v. Smith, 48 N. J. Eq. 566, 25 Atl. 11. In the determination of the question it was proper for the jury to consider Allen's nature and temperament, his advanced age, the circumstances under which the statements were made, his habits of life, and the general conduct of his daughters towards him. The typewritten transcript of the testimony touching the acts and conduct of the deceased and upon which the claim of appellant is made covers some 750 pages. No purpose could be subserved by an extended reference to it. Briefly stated, the evidence tends to prove that deceased, notwithstanding his advanced age, was strong and robust, both mentally and physically, possessed of a dominating nature, his anger easily aroused, and at times violent in language and severe in manner towards his daughters, whom, though possessed of considerable property, upwards of $20,000, of which their father had given them, not only refused to advise and confide in him as he requested them to do, but pursued a course of conduct well calculated to arouse his suspicion and create as to them a feeling of distrust as to their loyalty, and thus in his mind afford just ground for the belief that they were ungrateful and without affection for him. Feeling that his childless daughters, well advanced in life, were amply provided for, he not unnaturally, in view of all the circumstances, turned to the sons of a deceased brother, whom he had a few months before the making of the will visited in Ireland, and upon these bestowed the remainder of his property. We cannot say that the verdict is not justified by the evidence. On the contrary, had the respondent offered no evidence, the jury, upon that alone presented by contestant, might very properly have deemed it insufficient proof that testator was the victim of insane delusions when he made the will.

[5] Rulings of the court in admitting evidence as to the wealth of contestant are assigned as error. The belief entertained by Allen that his daughters had large sums of money loaned out and in bank was the chief delusion alleged to have contributed to the making of the will; hence evidence which tended to establish such fact was clearly competent in that its purpose was to show that such belief was not a delusion, but founded in truth. Moreover, such evidence was properly admissible as tending to show that he had in fact, as declared by him, made ample provision for his daughters in giving them the home ranch worth $20,000. Their needs, depending upon what they possessed, would be the measure of what constituted ample provision.

[6] Mr. Armstrong was called as a witness for contestant, and upon qualifying as an intimate acquaintance of deceased during a period of 45 years, was asked:

> "What, if any facts, did you observe in the conduct, appearance, conversation, or any other thing pertaining to Mr. Allen, during two years prior to the making of the will which would cause you to believe or infer that he was not entirely rational?"

—to which an objection was sustained, the court saying that if the witness was called as an intimate acquaintance for the purpose of testifying as to the testator's sanity, he must first, as provided in subdivision 10 of section 1870 of the Code of Civil Procedure, state whether he believed the testator to have been of unsound mind. Notwithstanding this suggestion, counsel for contestant refused to comply therewith, and again asked the following:

> "I will ask you * * * prior to March, 1911, what, if anything, did you observe in Mr. Allen with reference to his appearance, or rather observe in his appearance, conversation or acts, with reference to his being rational or irrational?"

—to which a like objection was sustained. The objection urged was to the form of the question, and the court clearly pointed out that counsel for contestant should, as provided by statute, first ascertain from the witness whether or not in his opinion Allen was of sound or unsound mind. Nevertheless, counsel refused to change the form of the questions, which were objectionable in that the inquiry was not directed to the mental condition of testator, but to acts with reference to whether he was rational or irrational. Since the court called counsel's attention to the fact that his questions were objectionable in form, it was his duty, if an opinion was desired, to reframe the questions in compliance with the suggestion made, or, if not, then have clearly indicated to the court that the evidence sought was as to acts and conduct. Not having done so, he is in no position to complain of the alleged error, which, since it was not made to appear that it was sought thereby to establish the existence of insane delusions, cannot be deemed prejudicial.

[7, 8] Objection urged to the ruling of the court in admitting evidence of testator's declarations made prior to the execution of the will that he intended to leave the property to his nephews is without merit (Cyc. vol. 40, p. 1026); and likewise without merit is the objection that the court committed error in permitting respondent to introduce

evidence showing that the testator was opposed to Hannah's marriage to Pearson, which occurred after the execution of the will.

[9, 10] At the trial contestant testified that her father had been insane since 1897. Thereupon, on cross-examination, it was made to appear that Allen had brought an action against his daughters to set aside the deed whereby he conveyed to them certain real estate, and that in said action contestant had filed a verified answer to the complaint, therein alleging that at the time of the execution of said deed, to wit, in March, 1909, her father was sane and sound mentally. We are unable to perceive any ground upon which to base the claim that the admission of such evidence was improper. If, for no other reason, it was clearly competent for the purpose of impeaching the witness. Her sister Hannah was also a party to the action to set aside the deed, and in connection with the answer of contestant so offered in evidence, proponent likewise offered the answer of Hannah A. Pearson, who, on the trial of the contest, testified that her father had always been insane, but in the answer referred to she adopted the answer of her sister, and confirmed the same "as fully as if she had originally joined therein." We cannot assume, as appellant insists, that Hannah in so adopting the answer of contestant was unacquainted with its contents.

[11, 12] Under the rulings of the court both parties to the controversy were permitted great latitude as to the conduct, acts, and declarations of the testator, both before and after executing the will. In these rulings there was no error, since "in will contests involving the question of testamentary capacity the evidence is permitted to take a wide range, covering a long space of time in each direction" (Cyc. vol. 40, p. 1023; Estate of Baker, 168 Pac. 881), and while such evidence is important only as it bears upon the condition of testator's mind at the very time of the execution of the will (Estate of Wilson, 117 Cal. 262, 49 Pac. 172, 711), we must assume, since the contrary is not shown, that the jury was properly instructed as to the application of the facts proved.

[13] We find no merit in appellant's contention that the court erred in denying her offer of rebuttal evidence. It appears that subsequent to the making of the will Allen caused to be erected upon a lot on O'Farrell street in San Francisco an apartment house costing some $25,000, executing a mortgage thereon for part of the money necessary to construct the building. Some of the witnesses for proponent in testifying to Allen's sanity referred to specific acts in connection with the erection of this building. It was sought by contestant to show by the architect who drew the plans for the building the extent to which Allen looked after its construction, and the court very properly held that the evidence offered was not in rebuttal of any facts testified to by proponent's witnesses.

[14] As stated, it devolved upon contestant to establish, not only the existence of the beliefs which it is alleged Allen entertained, but prove that there was no evidence, slight and inconclusive though it might be, which could have produced the belief, and, furthermore, if found that he was the victim of such alleged delusions, that the will made was the result thereof.

The judgment and order are affirmed.

I concur: MELVIN, J.

WILBUR, J. I concur in the foregoing opinion. With reference to what is said concerning an insane delusion I concur because of the fact that the question as to what constitutes an insane delusion has heretofore been treated by this court as a question of law, and the court has defined, as a matter of law, what constitutes an insane delusion. In this, I think, the court has been in error. An insane delusion is one that is the product of a disordered mind, produced because of the disorder. In other words, it is a symptom of a condition of mental disease. The question of whether or not a person is suffering from mental disease is a question of fact, to be determined in the light of increasing medical knowledge. To say that a person is not suffering from an insane delusion because his conduct in reference thereto does not measure up to a legal standard is, in my opinion, as fallacious as it would be to say that, as a matter of law, a man does not have syphilis if he does not have the symptoms which were recognized as indicia of the disease before the discovery of the Wassermann test, which, modern research has disclosed, practically demonstrates the existence or nonexistence of syphilis. Insanity is one of the least understood of the ailments which afflict humanity. It is a fertile field for investigation and happily is receiving that investigation at this time. If the legal definition of an insane delusion can be upheld at all on principle it is because of the fact that the courts regard other forms of insane delusions or of mental disease as too difficult of proof as a basis for decisions by courts and juries. In that view and in that view only, do I think that a legal definition of an insane delusion can be upheld on principle, and even in that case we ought not to close the door to such developments of modern research as may be able to make more certain proof of insanity. For illustration, the evidence in this case discloses that the decedent frequently spoke of his daughters as immoral. It is conceded that they were chaste and virtuous. It seems to me that, in determining whether or not this should be regarded as the product of a diseased mind, or the outbursts of an unreasonable, eccentric, and angry man, there should be a wider latitude than that given by the accepted definition of an insane delusion. Estate of Scott, supra. Dr. Ernest Dozier, who qualified as an expert in this case by testifying that he was doing special scientific investigation in human mental diseases at the Napa State Hospital, and had and continued to have for 2 years important medical supervision of a large number of insane persons, testified that the deceased was suffering from general paresis, was mentally unsound, and "harbored what seemed to me unsystematized delusions of persecution by all persons." "An unsystematized delusion is one that is composed of elements that are more or less fleeting and changeable and which do not cohere so as to constitute a definite opinion in the patient's mind." Wharton & Stille's Medical Jurisprudence, vol. 1, § 400. Some of the symptoms of paresis are thus stated by the foregoing authority:

> "General paresis often begins insidiously, and among its earliest symptoms are perversions of the moral faculties. These lead to all sorts of lapses, some trivial, but some quite otherwise. At first there is a change of character and disposition. The patient may have spells of despondency, then elation. He does odd and unusual things. He is * * * extravagant with money. * * * His morals suffer. * * * He may be restless and irregular in his habits. * * * In some cases the patients start off aimlessly on a journey, without enough money. * * * The mental faculties are variously impaired. The judgment is weakened, the common sense lost, the logical processes curiously at fault. The patient has queer and absurd impulses and propensities; he becomes boastful, indifferent to appearances. * * * The emotions, or affections, are impaired, and the patient loses his normal fondness and care for his wife and children. A close observer may sometimes detect the beginning of delusions, such as mark especially the second stage. Occasionally, in the very early stage, he is conscious of feeling ill; he recognizes something is going wrong with him." Section 890, Id.

The decisions in this state seem only to recognize the systematized delusions. Section 400, Id.; Estate of Scott, supra.

> "It is characteristic of monomania or paranoia, as distinct from most other forms of insanity, that the delusions are systematized. The one other form of insanity in which this feature is seen to anything like the same extent is melancholia; but melancholia is distinguished from monomania by the emotional depression. * * *" Wharton & Stille's Med. Jur. § 1028.
>
> "Persecutory delusions may occur in several varieties of insanity." Section 1026, Id.

Courts, no doubt, have been driven to the rigid rule above mentioned by the proneness of juries to attempt to make wills for decedents in accordance with their own ideas of what is just and proper, seizing upon incidents of eccentricity as a basis for such decisions. But where the question as to whether or not a person is insane arises on a trial for insanity in proceedings for commitment to an asylum, experience has shown that unexperienced jurors fly to the other extreme. In this case we have evidence which would have justified a finding of the jury either for or against the validity of the will.

For the reasons in the main opinion and upon all points of law discussed therein and for the reasons hereinbefore given in addition thereto I concur.

177 Cal. 642

PEOPLE v. MOONEY. (Cr. 2079.)

(Supreme Court of California. March 1, 1918.)

1. Homicide 🔑332(4)—Appeal—Credibility of Witnesses.
In homicide case it cannot be contended on appeal that a witness could not have seen certain happenings from where he was standing, as the credibility of the witness was for the jury.

2. Homicide 🔑332(2)—Review—Inconsistent Testimony.
No matter how inconsistent the testimony of a witness, or of two witnesses, for the state in a homicide case, a reviewing court cannot reject the testimony; the jury having the right to choose and act on the part it believes.

3. Homicide 🔑268—Alibi—Question for Jury.
Whether defendant in homicide case was at the scene of the crime *held*, under the evidence, a question for the jury.

4. Homicide 🔑173—Evidence—Admissibility—Materiality.
A warm, bloody ball bearing and a fragment of a newly fractured ball bearing, found at the scene of and soon after the explosion of a bomb, were properly admitted in evidence as tending to show the composition of the bomb.

5. Homicide 🔑174(6)—Evidence—Means of Committing Crime.
Where bomb contained three kinds of cartridges, firearms and cartridges found in the rooms of alleged perpetrators of an explosion in which persons were killed were admissible to show defendants had means at hand to commit the crime.

6. Criminal Law 🔑338(1)—Scope of Examination.
The tendency of modern decisions is to admit any evidence in a criminal case which may have tendency to illustrate or throw any light on the transaction in controversy, leaving its weight to the jury.

7. Homicide 🔑338(2)—Review—Harmless Error.
If it was error to incidentally admit in evidence a pistol found in defendant's room in a homicide case, the crime having been committed with a bomb, it could not be prejudicial.

8. Homicide 🔑174(6)—Evidence—Relevancy.
In homicide case, where crime was committed with bomb containing three kinds of cartridges, the jury were entitled to consider the quantity and fact of mixture of "22 long" and "22 short" cartridges in a can found in defendant's room, together with a 22 rifle in the room.

9. Homicide 🔑234(5)—Murder—Conspiracy—Sufficiency of Evidence.
Evidence *held* sufficient to establish a conspiracy between accused and another to murder with a bomb.

In Bank. Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Thomas J. Mooney was convicted of murder in the first degree, with penalty of death, and he appeals. Affirmed.

See, also, 166 Pac. 999; 167 Pac. 696.

W. Bourke Cockran, of New York City, and Maxwell McNutt and John G. Lawlor, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and C. M. Fickert, Dist. Atty., and Edward A. Cunha, Asst. Dist. Atty., both of San Francisco, for the People.

PER CURIAM. The defendant, Thomas J. Mooney, was convicted of the crime of murder in the first degree, the jury fixing the death penalty as punishment for said crime. After denial of his motion for a new trial by the trial judge the defendant was sentenced to be hanged. This appeal is from the judgment and from the order denying his motion for a new trial.

On July 22, 1916, a preparedness parade was in progress in San Francisco, thousands of patriotic citizens being participants therein. During its progress and while a portion of the parade was passing the corner of Steuart and Market streets a bomb was exploded, killing a number of people and wounding many more. One of the victims was Hetta Knapp, and the defendant was indicted for and convicted of her murder. Other persons were also charged with these murders, and one Warren K. Billings was convicted, prior to the trial of defendant Mooney. On appeal to the District Court of Appeal his conviction was affirmed, and he is now undergoing life imprisonment. People v. Billings (App.) 168 Pac. 396.

Pending this appeal a motion was made which purported to be a motion for a reversal. This motion was based, not upon the merits, but was founded primarily upon the fact that the Attorney General, believing from evidence which had been discovered after the conviction and after the order denying defendant's motion for a new trial that a new trial should be had, sought to stipulate with counsel for defendant for a reversal of the judgment and order. This motion was denied, and as it is important in this and in all cases to keep in mind the functions of the Supreme Court, we deem it proper to quote from the opinion pronounced upon the denial of that motion. People v. Mooney, 167 Pac. 696. In that opinion the following language was used:

> "By express provision of our Constitution, the jurisdiction of both the Supreme Court and the District Courts of Appeal in criminal cases is specially limited. As to the Supreme Court, 'appellate jurisdiction on appeal from the superior courts' is given 'on questions of law alone, in all criminal cases where judgment of death has been rendered.' Const. § 4, art. 6. This is our only jurisdiction. The provision means that an appeal in such cases is allowed solely for the purpose of obtaining the determination of this court as to whether there has been any error of law in the proceedings of the trial court. We have no other questions to determine, and may lawfully determine no other question. If we find no substantial error of law, we must affirm the judgment of the lower court. It is clear, too, that in the consideration of such an appeal, for this limited purpose, we are confined to the record sent to us from the court below. This was very clearly stated by this court in the first decision of the case of People v. Bowers, 18 Pac. 660, where it was sought to have this court take into consideration what purported to be the written confession of another that he was the guilty party, made after the taking of the appeal. The court said that, if the events occurred as stated in the brief of the appellant's counsel, the facts would entitle the defendant to a new trial on the ground of newly discovered evidence, if presented in time to the court below, but that they were not so presented, and could not be so presented, because they occurred pending appeal. Because it so clearly states what is obviously the law on this subject, we quote from the opinion: 'While it is admitted by counsel for appellant that ordinarily no argument could be made here upon facts occurring after appeal taken, it is urged that the evidence which has been discovered in this case "is of so grave a character, and points so strongly to the innocence of this defendant, that, however informally it may have come to the attention of the court, this or any other court of competent jurisdiction should say that he shall not be executed until it shall have been submitted, in common with other evidence in the case, to a jury of his country." But manifestly the court has no authority to consider these matters as thus presented. They are no part of the record sent to us from the court below, and there is no provision of law by which newly discovered evidence may be presented to this court in the first instance. The remedy in such cases rests with the executive. He alone can afford relief.' "

The cause is now before this court on the merits of the appeal, and we shall proceed to examine the record in accordance with our duty as outlined above and to consider the various assignments of error and the arguments thereon presented by counsel in the case for defendant and for the state of California.

Defendant's counsel at the outset freely admit that Hetta Knapp was the victim of a foul murder. Indeed, they introduced evidence for the avowed purpose of proving that the explosion was caused by a bomb, but not of the sort which, according to the evidence offered by the people, brought death to her. In other words, the only sort of explosive with which the prosecution sought to connect the defendant herein was concealed in a suitcase or valise deposited on the sidewalk near the southwest corner of Steuart and Market streets, while defendant's counsel sought to prove that the murders were perpetrated by means of a bomb hurled through the air and exploded upon contact with the sidewalk.

The appeal is based upon the alleged insufficiency of the evidence to support the verdict and upon asserted errors of law alleged to have been committed in the admission and exclusion of testimony.

The record shows without conflict that near the hour of 2 o'clock on July 22, 1916, there was in progress upon Market street, one of the principal thoroughfares of the city of San Francisco, a great procession known as the "Preparedness Parade." Thousands of persons, moved by patriotic impulses, participated in the parade, and other thousands gathered on Market street and other avenues upon the line of march to witness the pageant. Suddenly came the death-dealing explosion, and among the victims was Hetta Knapp, who was killed by a fragment from the bomb.

Before reviewing the evidence which, according to the contention of the Attorney General, connects the defendant with the perpetration of the crime, we will examine that upon which the prosecution depended to support the theory that the explosive was contained in a suitcase and operated by some sort of time device which took effect after the container had been deposited on the sidewalk near the line of a building at the corner of Steuart and Market streets, because defendant's counsel earnestly contend that the "suit case theory" was unsupported, while their theory of a thrown bomb was absolutely established. By testimony which we shall have occasion to treat more in detail in the course of this opinion a suit case was described as being in the possession of Mooney and of his codefendant, Billings, shortly before the explosion near the scene of the crime. Immediately after the explosion an indentation in the sidewalk and one in the wall of the building were evident. On the street and sidewalk were found cartridges, loose bullets, cartridge shells of three calibers, namely, 22, 32, and 38, pieces of four-inch wrought iron pipe and parts of a malleable iron cap of the same measure as the pipe. Some pieces of pipe were hurled several hundred feet. Across Steuart street, on the roof of a building, two pieces of brass wire were found. These, according to the testimony of an expert witness, were winders of alarm clocks, but could not have belonged to the same clock. Near the same place was discovered a ring, which, according to expert testimony, might have been the supporting ring of a clock. Some fragments of fiber of the sort used in the manufacture of cheap suit cases, as well as some small pieces of leather, were picked up near the situs of the explosion, and that which appeared to be the handle of a cheap suit case was found shortly after the explosion on the opposite side of the street, while on the roof of a building across the street small pieces of a valise frame were discovered. A ball bearing five-eighths of an inch in diameter and part of another ball bearing of the same size were found on the day of the murder in Steuart street. In the bodies of some of the victims were bullets of 32 and 22 caliber. A piece of a cartridge shell was found in the body of one of the persons who were killed, and fragments of pipe were in the bodies of other victims. Other pieces of pipe fell near witnesses who produced these particles. It was argued, and we think with reason, that these pieces of pipe formed part of the container of the explosive material used in the manufacture of the bomb. At the trial there were produced a 22-caliber rifle, some cartridges to fit it, a pistol loaded with 32-caliber cartridges and some ball bearings, which, according to the testimony, had been found in the room occupied by Billings. In Mooney's home, according to the testimony, were found a pistol and 38 and 32 caliber cartridges.

Appellant's counsel say that, granting for argument's sake that Billings placed a suit case at about the place where the explosion subsequently occurred, and that thereafter no suit case was found, but fragments of one were discovered, there is no evidence that the suit case contained the explosive or that it was detonated by means of a time device. With this contention we cannot agree. All of the circumstances outlined above point to a corroboration of the theory of the prosecution. Mrs. Kennedy, a witness called by the prosecution, testified that just before the explosion occurred she saw a suit case on the sidewalk against the wall of the building. It seemed to be larger than the ordinary suit case which a traveler usually carries on a journey. It was noticed by the witness two or three minutes before the explosion, and it occupied the place where the hole or depression in the sidewalk caused by the said explosion afterwards appeared.

T. K. Stateler, general agent of the Northern Pacific Railway, was participating in the parade with the Grand Army of the Republic. This organization moved out of Steuart street to join the parade, but before the old soldiers marched out of Steuart street Mr. Stateler, according to his sworn testimony, saw a suit case exactly at the place afterwards indented by the force of the explosion. He said that his attention was directed to it because he was tired and he thought of sitting upon the suit case while waiting for his post to move, but finally he selected another place to sit because he would not like to have any one use his own suit case for a seat. He estimated the time which elapsed before leaving Steuart street to move with his command as about 10 minutes. He had marched about 200 feet down Market street when he heard the explosion.

James McDougall, a lad of 13 years of age, was in the parade carrying a streamer attached to the banner of the First California Volunteers. At the time of the explosion this regiment was going out of Steuart street into Market street. About 10 minutes before marching the lad saw, as he testified, a suit case at the place where afterwards he observed the hole made by the explosion. He thought it was "kind of funny that a suit case would be there that day of the parade." He described it as being of the usual length, but somewhat wider than the ordinary suit case, and light brown in color.

It will thus be seen that the physical facts as described by the witnesses support a conclusion that the explosive was fired from within a suit case or valise, and if the testimony tending to establish such facts was credited by the jurors (as undoubtedly it must have been), it formed a sufficient basis for the verdict. But in addition to the physical facts disclosed by the testimony and the exhibits there was testimony connecting the defendant with the possession of a suit case shortly before the explosion and tending to show conduct on his part indicative of a consciousness that the said suit case contained something the possession of which made him apprehensive of detection by the police.

One of the witnesses, John MacDonald, testified that he arrived at the southeast corner of Steuart and Market streets about 20 minutes to 2 o'clock p. m. He stood 12 or 15 feet off of Market street on Steuart. Shortly after he took this station he saw Warren K. Billings, Mooney's codefendant, coming on Steuart street toward Market street from the direction of Mission street. According to this witness, Billings carried a suit case which he placed upon the sidewalk against the wall of the building near the corner. Asked to describe the actions of Billings as he approached the corner, the witness said:

> "Well, he was carrying the suit case and his head was working on a pivot, and he looked all excited as if he was worrying about something. That is what called my attention to him first."

After depositing his burden on the sidewalk, Billings walked to the corner and pushed open the door of a saloon. At that instant Thomas J. Mooney, the defendant, came out of the saloon, and then he and Billings stood on the sidewalk talking. Mooney pulled out his watch, looked at it, and looked towards the Ferry Building at the eastern extremity of Market street. Then, according to this witness, Billings left his companion, and was soon lost to MacDonald's sight in the crowd. MacDonald's attention was then, he said, called back to Mooney, who took out his watch again, put his hand to his face as if in study, and "looked alongside the building." He then turned, passed through the crowd, and was lost to the sight of the witness. MacDonald also testified that the suit case was placed upon the exact spot which was afterwards indented by the explosion. Witness said that the suit case was left by Billings "about 2 o'clock." After Mooney went away, as the witness testified, the latter walked very slowly down Market street to the Alameda Coffee House, about 150 feet distant, and upon his arrival there he heard the explosion.

Another witness, F. C. Oxman, who stated that he was a cattle dealer, residing in Eastern Oregon, also testified regarding the happenings at and near the scene of the explosion. He said that as he stood at the corner of Steuart and Market streets about 15 minutes of 2 o'clock he saw an automobile driven by Israel Weinberg, in which Mooney, his wife, Rena Mooney, and Billings were passengers; that the defendant was on the front seat holding a suit case on the running board; that Billings jumped excitedly and rapidly from the rear seat; that he took the suit case from Mooney; that another man whom witness did not identify also jumped from the rear seat and came onto the sidewalk near the place where Oxman was standing; that this man took the suit case from Billings; and that then Billings and the other man walked along Steuart street in a direction away from Market street. Mooney, he said, stood near him, and seemed to be watching the other two men. He testified that Mooney seemed very excited, and by his manner attracted his (Oxman's) attention; that after Billings and his companion had gone some distance the former took the suit case and set it down on the walk by the side of the building; that they then returned and went in the door of the building —he was not sure whether all of them did so or not; that directly they came out, and Mooney said:

> "Give it to him and let him go; we must get away from here; the bulls will be after us."

Further testifying, Oxman said that Billings gave something to the other man, who then departed; that Billings first and then Mooney went to Weinberg's automobile; that Mooney, after Billings left him, looked at his watch, glanced over to the place where the suit case was, and then followed Billings to the motor car. The vehicle then turned into Steuart street and went up that street.

[1] It is argued by counsel for defendant that MacDonald could not have seen the people and their movements described by him because of the crowd between him and the opposite side of the street. While such an argument may be properly addressed to a jury, it has no place here. Whether or not the witness was telling the truth was a matter peculiarly for the jury.

[2] But counsel insist that the stories of these two witnesses are so inconsistent that they could not possibly have been testifying about the same persons. Their stories, counsel say, are self-destructive, and therefore, a verdict based in part upon their testimony should be set aside. Even if their stories were vitally contradictory, it would not follow that this court could disturb the judgment. Inconsistencies in the details of statements of witnesses may be looked for. Truthful witnesses may be expected to agree substantially, but to differ circumstantially, in their attempts to describe the same occurrence. Even inconsistencies in the different parts of the testimony of a witness would not justify a court of review in rejecting all of his story after a jury had received and acted upon a part of it. As Mr. Justice Henshaw said in delivering the opinion of this court in People v. Durrant, 116 Cal. 179–200, 48 Pac. 75, 79:

> "If a witness should absolutely discredit his own testimony by swearing to opposite statements so that one or the other must be false, under our laws his testimony is not of necessity to be rejected. It is still evidence in the case. Under such circumstances the jury must receive and weigh it. They are bound to look upon it with suspicion and distrust, and may reject it. But, upon the other hand, they may as they determine accept as true one or the other of the contradictory asseverations. Thus, upon a review of the evidence by this tribunal, we may not examine with minuteness claims that witnesses are discredited, or that their testimony is unworthy of belief, or look to see whether some other conclusion might not have been warranted by the evidence. Blythe v. Ayers, 102 Cal. 254 [36 Pac. 522]. 'Ad questionem juris respondent judices, ad questionem facti respondent juratores;' and than this no maxim of the old law has been more carefully preserved in its integrity under our system."

But we do not see that the stories of these witnesses are so utterly incompatible as counsel would have us find them. It is quite within the bounds of reason that both saw parts of the same circumstances and occurrences but that Oxman saw more than the other witness could observe from the place which he occupied. But we cannot tell what may have been the exact mental processes of the jurors. For all we know they may have rejected all of Oxman's testimony and may have acted entirely upon that of MacDonald; or the reverse may have been true; or they may have credited parts only of the testimony of each witness. All that this court may do is to determine whether or not there is sufficient evidence of any sort to support the verdict, and we cannot escape the conclusion that it is amply supported.

While Oxman and MacDonald were the only witnesses who stated that they saw Mooney at Steuart and Market streets near the time of the murders, there was other testimony which, if the jurors believed it, established the relationship of Mooney and Billings. In this case, as in the case of People v. Billings, witnesses testified that they saw Billings with a suit case at 721 Market street less than four-fifths of a mile from the junction of Market and Steuart streets shortly before his arrival at the scene of the crime. Miss Sadie Edeau said that she saw Billings on the roof of the building at 721 Market street. He had a suit case in his hand and was leaning over the edge of the building. Witness, as she said, was standing on the sidewalk, and after seeing Billings she moved to a place in front of the Kamm Building nearby, and while there saw Mooney and his wife coming from the direction of 721 Market street. She stated that the Mooneys rushed into the entrance to the Kamm Building, and he placed something for his wife to sit upon; that at that time Billings was talking as he stood near the edge of the sidewalk to police officer Moore, whom the witness did not then know; that then Billings walked over and met Mooney near the middle of the sidewalk; and that then Billings and the Mooneys walked eastward towards the ferry and in the direction of Steuart street. Then she saw Israel Weinberg get into an automobile which stood near the place where Billings and the police officer had been standing. He drove away towards the east.

Herbert A. Wade, principal of a government school in Hawaii, testified that he was in the vicinity of 721 Market street on the afternoon of July 22, 1916; that while he was looking into a showcase containing an exhibit of a dental office, Warren K. Billings passed him, and went up the steps into the office; that Billings had a suit case; that afterwards witness saw a man and a woman there, but could not identify them as the Mooneys.

Police Officer Earl R. Moore as a witness told the jury of seeing Billings in front of 721 Market street shortly before the parade. Moore was clearing the street of automobiles in preparation for the procession. One car was standing near the curb, and the officer sounded its horn in an effort to attract the attention of the owner. Finally Billings walked out to the sidewalk, and in response to an inquiry said that he did not own the automobile, but that the owner would be there "in a minute." At this juncture duty called the policeman away, and when he returned the car had disappeared.

Mrs. Nellie Edeau substantially corroborated the testimony of her daughter, Miss Sadie Edeau, and said that after Mr. and Mrs. Mooney joined Billings she heard the latter say: "We have to make the ferry before two o'clock."

Peter Vidovich told of a visit to the office of a dentist at 721 Market street on the afternoon of July 22, 1916, and of there meeting Billings as the latter was going up the stairway. Billings, he said, had a suit case. He described it as resembling a drummer's sample case. By the testimony of George H. Speed, who described himself as the "secretary of the I. W. W.," the prosecution sought to establish the fact of communication between Billings and Mooney on the 19th of July, three days before the commission of the murders. He testified, that, on that day, he carried a note from Billings to Mooney, who said he would meet the writer at the "Blast" office. The "Blast," as was developed on the cross-examination of Detective Sergeant Proll, was an anarchistic paper.

[3] It will be seen from the review of testimony given above that both the manner of placing the deadly bomb and the defendant's guilty connection therewith find abundant support in the evidence. The defense introduced evidence tending to contradict the showing of the use of a bomb concealed in a suit case and also that of the presence of the defendant near the scene of the crime, but, as the jury resolved this conflict of testimony against the defendant, we may not disturb the verdict. No principle of law is more firmly established than this.

Appellant's counsel, while conceding, as of course they must, that where conflicting testimony is given upon any matter pertinent to the questions at issue in a trial, this court is powerless to set aside the verdict of a jury, nevertheless contend that the showing of Mooney's absence from the corner of Steuart and Market streets at the time when the suit case was left there is so complete as to amount to a demonstration, and that therefore this court should reverse the judgment and order from which defendant has appealed. In this behalf they call our attention to the testimony of a witness for the people, Capt. Matheson of the San Francisco police department, who, speaking of the time of the explosion, testified as follows:

> "It was at six minutes past two. I happened to look at the clock in the Ferry Building, and I looked at the clock in the saloon which had stopped at the time of the explosion."

Mr. and Mrs. Mooney both testified that they spent all of the time after the head of the procession came in view and until the parade had passed on the roof of the Eilers building at 975 Market street, except a few moments during which the defendant went to his wife's studio in the building to get a newspaper. There was testimony which, if believed by the jurors, would have corroborated this account. Certain pictures were introduced in evidence. These were the work of a young man who photographed the people on the roof of the Eilers Building. Some of the photographs showed defendant at that place, which was more than 6,000 feet from the corner of Steuart, and Market streets and more than 7,000 feet if a journey were made between the two places by way of Mission street, which is parallel with Market street. These pictures also show a clock on a building near by, and, according to the time indicated, Mrs. Mooney was on the roof at 2 minutes of 2 o'clock, and she and her husband were there at 1 minute after 2 and at 4 minutes after 2. Assuming that the clocks involved in the testimony were correct, we cannot see that the alibi is, as counsel for defendant contend, scientifically established. All of the testimony regarding the time when the suit case was placed on the sidewalk merely approximated the hour. The length of time during which the suit case was seen by the witnesses who testified that they observed it was estimated by them, and we cannot say that within the estimates as given, if they were taken as substantially correct by the jury, the defendant could not have proceeded by automobile from the scene of the purposed explosion to the Eilers Building and to the roof before the operation of a time device to detonate the bomb. All of these matters pertaining to the alleged alibi were before the jury. It was for the jurors to say from the evidence whether or not any real alibi was established.

[4] Certain errors are asserted to exist by appellant's counsel. These are based upon the admission of certain evidence. A ball bearing found in Steuart street by witness Ormston was properly admitted. It was found, as the witness testified, very soon after the tragedy in the immediate vicinity of the explosion, and it had blood on it and was warm. These circumstances would justify a conclusion that it had formed a part of the bomb. The fragment of a ball bearing found by witness Airola was also admissible. It was picked up about 15 minutes after the explosion, and the fractured part was bright as if the break were very recent. This would indicate that a great force had been applied to the metal very recently, and the jurors would be but following the simplest logic if they found it to have been one of the fragments of the bomb.

[5-7] The firearms and cartridges found in the room occupied by Billings and the cartridges found in defendant's room should have been admitted, as they were. The cartridges found in Mooney's room were of the kind and caliber of those picked up afterwards at the scene of the explosion. They indicated possession by the defendant of the means for the perpetration of the crime. All of the other alleged errors have been discussed in People v. Billings, and we again adopt the ruling of the District Court of Appeal and the part of the opinion relating thereto as follows:

> "The fact that the cartridges found in the room of the defendant after the commission of the crime were of the same character and caliber of those found in the bodies of the victims of the explosion was admissible as tending in a measure to show that the defendant had the means at hand to commit the crime charged against him, in the manner and by the means which it was shown were employed to commit the crime. 1 Michie on Homicide, pp. 851, 855, 857. 859; 21 Cyc. 945.
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> "While it is true that no ball bearings were found in the bodies of the victims of the explosion, nevertheless the ball bearings admitted in evidence were found, immediately after the explosion, in the midst of other things which, when considered in connection with all of the circumstances shown in evidence concerning the character of the explosion and its effect, apparently constituted a part of the bomb, and were therefore admissible as tending in some degree to show what were the constituent elements of the bomb. In this connection it may be noted that 'the tendency of modern decisions is to admit any evidence which may have a tendency to illustrate or throw any light on the transaction in controversy, or give any weight in determining the issue, leaving the strength of such tendency or the amount of such weight to be determined by the jury.' Moody v. Peirano, supra [4 Cal. App. 411, 88 Pac. 380].
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> "The presence in evidence of the pistol found in the defendant's room came in as a mere incident to the testimony which showed the result of the search of defendant's room, and, conceding that it was improperly admitted in evidence, we cannot conceive how it could have prejudiced the defendant."

[8] The evidence at the trial was to the effect that the cartridges found in the room occupied by Billings were contained in a tin can. The bullets were of the caliber known as "22 short" and "22 long," similar to those

found near the place of the murder. The can was almost half filled with these cartridges, and the two kinds were mixed together. There was a piece of paper around the top of the can. The jurors were of course, entitled to consider the quantity and the manner of assembling these cartridges as indicating whether they might have been acquired for use in the manufacture of a bomb or for the small rifle which was also found in Billings' room.

[9] There was testimony sufficient, if credited by the jury, to establish a conspiracy between Billings and Mooney to commit the crime.

From the record before us it appears that the defendant was confronted by testimony from many sources which fully supports the verdict found by the jury. He was defended with great ability in the superior court, and he was similarly represented in this court. We cannot find that he was deprived of any right, statutory or constitutional, or that any material error of law was committed calling for a reversal of the judgment or an abrogation of the order denying his motion for a new trial.

The judgment and order are affirmed.

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36 Cal. App. 40

NEAL v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA.

(Civ. 1817.)

(District Court of Appeal, Third District, California. Jan. 24, 1918.)

Master and Servant 🔑417(3)—Workmen's Compensation Act—Certiorari—Time for Filing.

Where order of Industrial Commission denying petition for rehearing was made and entered December 22d, an application for certiorari to appellate court to review such order, filed by the clerk January 24th following, came too late, and writ will be denied, in view of Workmen's Compensation Insurance and Safety Act (St. 1917, p. 875) § 67a, providing that within 30 days after the application for a rehearing is denied any party affected may apply to the Supreme Court or District Court of Appeal for writ of certiorari or review, for the purpose of having the lawfulness of the rehearing inquired into and determined.

Application by E. E. Neal for a writ of certiorari against the Industrial Accident Commission of the State of California. Denied.

E. E. Neal, in pro. per.

PER CURIAM. The petitioner in the above-entitled case seeks a writ of certiorari to review the proceedings wherein on his application to the respondent above named for a rehearing, his petition was denied. It appears from the petition herein that the order denying the rehearing of which petitioner makes complaint was made and entered December 22, 1917. Section 67a of the Workmen's Compensation Insurance and Safety Act of 1917 (Stats. 1917, p. 875) provides that:

> "Within thirty days after the application for a rehearing is denied, or, if the application is granted, within thirty days after the rendition of the decision on the rehearing, any party affected thereby may apply to the Supreme Court of this state, or to the District Court of Appeal of the appellate district in which such person resides, for a writ of certiorari or review, * * * for the purpose of having the lawfulness of the original order, rule, regulation, decision or award, or the order, rule, regulation, decision or award on rehearing inquired into and determined."

The petition was received at the office of the clerk of this court and was filed on January 24, 1918. The application for the writ comes too late, and the writ is therefore denied.

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36 Cal. App. 88

PEOPLE v. SMITH. (Cr. 713.)

(District Court of Appeal, First District, California. Jan. 28, 1918. Rehearing Denied by Supreme Court March 28, 1918.)

1. Weapons 🔑2 — Carrying Concealed — Statute—Constitutionality.

St. 1917, p. 221, § 3, providing that every person who carried in any municipal corporation any pistol, revolver, or other firearm concealed upon his person without license, shall be guilty of a misdemeanor, and guilty of a felony if previously convicted of any felony, or any crime made punishable by the act, is a reasonable police regulation.

2. Constitutional Law 🔑208(1) — Carrying Concealed Weapons—Class Legislation.

St. 1917, p. 221, § 3, is not objectionable as class legislation, since it operates uniformly on all persons in the same category; there being reasonable basis for the classification.

3. Constitutional Law 🔑203 — Carrying Concealed Weapons — "Ex Post Facto" Statute.

St. 1917, p. 221, § 3, is not objectionable, as ex post facto, on account of the provision prescribing a heavier penalty for one previously convicted.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ex Post Facto.]

4. Weapons 🔑2 — Carrying Concealed — Subject for State Legislation.

The subject of carrying weapons is not purely a municipal affair; the prevention and the punishment of crime being always a proper subject for state legislation.

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Charles Smith was convicted of a violation of St. 1917, p. 221, relating to and regulating the carrying, possession, sale, or other disposition of firearms capable of being concealed on the person, etc., and he appeals. Judgment affirmed.

R. M. Royce, of Oakland, for appellant.
U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

LENNON, P. J. The defendant was charged with the violation of section 3 of chapter 145 of the Statutes of 1917. The information also charged him with a prior conviction of grand larceny. Upon his arraignment the defendant pleaded guilty of the crime charged, and admitted the prior conviction. The indeterminate sentence provided by law was thereupon imposed, directing that the defendant be taken and confined in the state prison at San Quentin for a period not to exceed five years.

[1] This is an appeal from the judgment in which the only question raised is as to the constitutionality of the section of the statute under which defendant was charged and convicted. That section reads:

> "Every person who carries in any city, city and county, town or municipal corporation of this state any pistol, revolver, or other firearm concealed upon his person, without having a license to carry such firearm as hereinafter provided in section six of this act, shall be guilty of a misdemeanor, and if he has been convicted previously of any felony, or of any crime made punishable by this act, he is guilty of a felony." Stats. 1917, p. 221.

The section in question is a reasonable police regulation. Ex parte Cheney, 90 Cal. 617, 27 Pac. 436; Ex parte Luening, 3 Cal. App. 76, 84 Pac. 445.

[2] While the statute provides a heavier penalty for one who has been previously convicted of a felony than for one who has suffered no prior conviction, nevertheless it operates uniformly upon all persons in the same category, and there is a reasonable basis for the classification. Therefore it is not objectionable as class legislation.

[3] Nor does the provision prescribing a heavier penalty for one previously convicted of a felony render the law ex post facto. "A law is not objectionable, as ex post facto, which, in providing for the punishment of future offenses, authorizes the offender's conduct in the past to be taken into the account, and the punishment to be graduated accordingly." Ex parte Gutierrez, 45 Cal. 429.

[4] The objection that the subject of carrying weapons is purely a municipal affair is not well taken. The prevention and punishment of crime is always a proper subject for state legislation.

Judgment affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

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36 Cal. App. 114

PEOPLE v. ELGAR. (Cr. 566.)

(District Court of Appeal, Second District, California. Jan. 31, 1918.)

1. Criminal Law 🔑371(9) — Evidence — Subsequent Act.

In a prosecution for rape, evidence of a subsequent act was admissible to show the lascivious disposition of defendant toward the prosecuting witness, and the consequent probability of the commission of the prior act.

2. Criminal Law 🔑823(1)—Instruction—Date of Offense.

In a prosecution for rape committed May 6th, there being evidence of two acts, committed then and May 14th, the instruction that it was not incumbent on the prosecution to prove the exact time and place of the offense, it being sufficient that the prosecution establish its commission beyond a reasonable doubt at any time within three years prior to the filing of information August 8th, was erroneous, though the court told the jury that if they believed that defendant on or about May 6th did willfully, unlawfully, and feloniously have and accomplish an act of sexual intercourse with and upon the person of the prosecuting witness, they should find him guilty as charged.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Jim Elgar was convicted of rape, and from the judgment, and an order denying his motion for new trial, he appeals. Reversed, and cause remanded.

T. A. Wells, S. M. Johnstone and M. C. Atchison, all of Los Angeles, for appellant. U. S. Webb, Atty. Gen., Robert M. Clarke, Deputy Atty. Gen., and Robert B. Camarillo, of Los Angeles, for the People.

WORKS, Judge pro tem. The appellant was convicted of the crime of rape, and was sentenced to not less than 50 years in the state prison. The appeal is from the judgment and from an order denying a motion for a new trial.

[1, 2] There is evidence in the record which tends to show that the appellant committed two acts of rape upon the prosecuting witness, one about May 6th, the other about May 14th, both in 1917. The information charges that the act was committed on or about the 6th day of May, 1917, and the district attorney told the jury, near the commencement of the trial, that he selected the act of May 6th, or thereabouts, as the one upon which he would ask for a conviction. This statement was made in connection with a remark of the court showing the reason for the admission of evidence as to the act of May 14th. Evidence of that act was of course admissible to show the lascivious disposition of the appellant toward the prosecuting witness and the consequent probability of the commission of the act of May 6th (People v. Koller, 142 Cal. 621, 76 Pac. 500); but the court instructed the jury that:

> "It is not incumbent upon the prosecution to prove the exact time and place when the offense, for which the defendant is being tried, occurred; it is sufficient if the prosecution established the commission of said crime, beyond a reasonable doubt, at any time within three years prior to the filing of the information in this case, which information was filed in this court on the 8th day of August, 1917."

This instruction was erroneous. Its subject-matter comes directly within the strictures passed upon a similar instruction in People v. Williams, 133 Cal. 165, 168, 65 Pac. 323, 324 (and see, also, People v. Harlan, 29 Cal. App. 600, 156 Pac. 980), although in that case there was evidence of many illicit acts:

> "A verdict of guilty could have been rendered under such an instruction, although no two jurors were convinced beyond a reasonable

doubt, or at all, of the truth of the charge, as to any one of these separate offenses. Even worse than that was possible. As to every specific offense which there was an attempt to prove, and which could be met by proof, the defendant may have established his defense, and yet upon the general evidence of continuous crime, which, in the nature of things, he could only meet by his personal denial, he may have been convicted. And how could he defend when he was not informed as to what particular offense, out of hundreds testified to by the prosecutrix, he was to be tried? * * * In this case, as well as in any other, the prosecution must charge a specific offense, and the conviction, if one is had, must depend upon the proof of that offense alone. Other incidents are important only as tending to prove the one specific offense for the alleged commission of which defendant is on trial."

It is true that in this case the court told the jury, in another instruction:

"If you believe * * * that the said Jim Elgar, on or about the 6th day of May, 1917, * * * did willfully, unlawfully, and feloniously have and accomplish an act of sexual intercourse with and upon the person of one Clementina Elgar, * * * you should find him guilty as charged in the information."

That, however, does not materially help the situation. The mention of May 6th in the instruction just quoted did not eliminate the damage done by the other instruction, in which the jury was plainly told, without mention of dates, however, that they might convict appellant of the commission of the crime charged to have been committed on May 6th if they believed from the evidence that he had committed one on either May 6th or May 14th.

There are other errors shown by the record, but as they pertain to questions which are not likely to come before the court on a new trial, we do not deem it necessary specifically to mention them.

The judgment and order are reversed, and the cause remanded.

We concur: CONREY, P. J.; JAMES, J.

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36 Cal. App. 68

STANSBURY v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.

(Civ. 2446.)

(District Court of Appeal, Second District, California. Jan. 26, 1918.)

MASTER AND SERVANT ⊂⊃373 — WORKMEN'S COMPENSATION—"COURSE OF EMPLOYMENT."

An employé injured while repairing a clamshell dredge which his employer intended to sell was not injured in the course of his employer's business of leasing road-making machines.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

Original application by Charles Stansbury for a writ of review to annul an award to W. J. Husong under the Workmen's Compensation Act, made by the Industrial Accident Commission of the State of California. Award annulled.

Hocker & Austin, of Los Angeles, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

WORKS, Judge pro tem. The respondent Industrial Accident Commission allowed compensation to W. J. Husong for an injury received while he was in the employ of petitioner, and petitioner now asks that the award be annulled. It is conceded that the employment was casual. It is also contended by petitioner that the injury did not occur in the usual course of his business. The commission found that petitioner "was in the business of leasing certain road-making machinery and outfit, and that it was necessary and in the usual course of said business to keep the said machinery and outfit in repair; that the work and employment of the applicant at the time of his injury was the repairing of such machinery, and was therefore in the usual course of the business of the employer."

The finding that petitioner was engaged in the business of leasing road-making machinery and outfit is amply supported by the evidence, but the finding that the applicant was injured while making repairs on machinery used in that business finds no support whatever in it. In addition to the machinery used in the business, the petitioner had in his possession a certain clamshell dredge, which he had acquired from a contractor who had been using it in harbor work. It was in no sense road-making machinery or equipment. This dredge petitioner was about to lease to another, with an option to purchase the same, but some repairs were necessary upon it before it could go out. The applicant for compensation was employed to make these repairs, and was injured while prosecuting the labor. The work being performed by the applicant was no more nearly in the course of the employer's business of leasing road-making machinery than if it had been the work of shoeing a horse or repairing a mowing machine owned by the employer. The case is directly within the rule laid down in Maryland Casualty Co. v. Pillsbury, 172 Cal. 748, 158 Pac. 1031.

The award is annulled.

We concur: CONREY, P. J.; JAMES, J.

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36 Cal. App. 90

GORDON v. PERKINS et al. (Civ. 2272.)

(District Court of Appeal, First District, California. Jan. 30, 1918.)

1. APPEAL AND ERROR ⊂⊃1015(5)—REVIEW—QUESTIONS OF FACT — DENIAL OF NEW TRIAL.

Where motion for new trial on the ground that the jury rendered a quotient verdict was denied, the finding that such verdict was not determined by a resort to chance will not be disturbed on appeal; the evidence thereon being conflicting.

2. DAMAGES 🔑108—MEASURE OF DAMAGES—DAMAGE TO REAL PROPERTY.

In an action for damages to a small parcel of real property composing part of a larger tract, defendant cannot complain that the damage was measured by the amount of damage to the portion destroyed, and not the depreciation of the entire tract.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by John Gordon against Charles R. Perkins and others. Judgment for plaintiff, and defendants appeal. Affirmed.

J. A. Pettis, of Ft. Bragg, and Preston & Preston and M. H. Iversen, all of Ukiah, for appellants. Robert Duncan, of Ukiah, for respondent.

KERRIGAN, J. This is an appeal from a judgment against defendants in an action wherein plaintiff sought to recover damages for injuries to certain real property committed by the defendants. Such of the facts as are necessary to an understanding of the points herein discussed will be stated in the course of the opinion.

In his brief the plaintiff makes a preliminary motion to dismiss the appeal upon the ground that the notice to the clerk to prepare the transcript on appeal was not given within the time specified in section 953a of the Code of Civil Procedure after notice of the entry of judgment. As to that motion the conclusion we have reached on the merits of the appeal renders unnecessary a consideration of that question.

[1] The first point presented for a reversal of the judgment is that the trial court erred in denying the motion for a new trial made on the ground of the misconduct of the jury; the defendants claiming that the jury determined the amount of its verdict by a resort to chance.

According to the affidavits filed by the defendants on said motion, the verdict of the jury was reached by each juror specifying a sum to which he believed the plaintiff entitled (a maximum of $1,000 having first been agreed upon), dividing the aggregate of the figures thus obtained by 12, and adopting the quotient as the amount of the verdict. Assuming that a verdict reached in this manner is one found by chance, and will be set aside (Dixon v. Pluns, 98 Cal. 384, 33 Pac. 268, 20 L. R. A. 698, 35 Am. St. Rep. 180; People v. Richards, 1 Cal. App. 566, 82 Pac. 691), still in the present case, according to the affidavits filed by the plaintiff on the motion, it appears that after the amount of the proposed verdict was ascertained in the manner stated the jurors deliberated and consulted among themselves, and as a result of such subsequent deliberation decided, independent of the agreement that had been made concerning the manner of reaching the verdict, that the sum so ascertained represented in their opinion the amount of damages to which the plaintiff was in fact entitled. The record therefore presents a conflict of evidence on the question of whether the verdict was determined by a resort to chance; and the court having found on such conflict in favor of the plaintiff, the action of the court will not be disturbed on appeal. Dixon v. Pluns, 101 Cal. 511, 35 Pac. 1030; McDonnell v. Pescadero Stage Co., 120 Cal. 479, 52 Pac. 725.

[2] Passing to the next point made by the defendants, the plaintiff in this action claims damages for injury to a small portion of a quarter section of land belonging to him caused by the defendants. It appears that the defendants, acting for the state fish and game commission, went upon the land of the plaintiff and removed a dam which obstructed the free movement of migratory fish up and down a stream flowing through said land. At the trial plaintiff, over the objection of the defendants, introduced evidence tending to show the amount of damage to the portion of the land permanently injured. Defendants here argue, as they did in the trial court, that the true measure of damages in a case like this is the amount of the damage to the whole tract. Doubtless in a case where it is shown that the injury to a portion of the property has depreciated the market value of the entire tract the correct measure of damages is that stated by the defendants, but in the present case no such question is presented, the plaintiff claiming damages for injury merely to the portion destroyed, and that, we think, is the least to which he is entitled. We can conceive of no similar case where the damage to the whole would be less than that to a portion; and, if this be true, how can the defendants be heard to complain?

What we have said in discussing the last point disposes of other contentions of the defendants concerning certain of the instructions to the jury. The instructions as a whole fairly state the law applicable to the facts of the case.

Judgment affirmed.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

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36 Cal. App. 41

PEOPLE v. WAGNER. (Cr. 412.)

(District Court of Appeal, Third District, California. Jan. 25, 1918.)

1. CRIMINAL LAW 🔑1131(3)—APPEAL—FAILURE TO APPEAR—FAILURE TO FILE BRIEF—ELECTION OF ATTORNEY GENERAL.

Where a criminal appeal was placed on the calendar of the January term, 1918, of the appellate court, and, when the cause was in its regular order called for hearing, neither of the two attorneys of record of defendant appeared orally to argue the appeals, and there was not, and is not now, a brief filed by such attorneys in support of the appeals, though the transcripts containing the record on appeal were filed August 3, 1917, and the attorneys for defendant duly notified by the clerk of the appellate court that the case would be called for argument and submission Monday, January 14th, the Attorney General could move on notice to dismiss the appeals or submit the cause for decision on the record.

2. CRIMINAL LAW ⚷511(6)—CORROBORATION OF ACCOMPLICES—STATUTE.

In a prosecution for larceny of rope, tents, and other articles, testimony of the wife of the person to whose premises defendants had the stolen property hauled from the premises of the owner that she saw defendant at her home at about 9 o'clock of the night of the larceny, heard him ask her husband to go to the place where the stolen articles had been left by him, and haul them home, and saw the rope, tents, etc., at her home the following day, was sufficient corroboration of the testimony of an accomplice to satisfy the demands of Pen. Code, § 1111.

3. LARCENY ⚷55 — SUFFICIENCY OF EVIDENCE.

In a prosecution for larceny of rope, tents, and other articles, evidence *held* to support verdict of guilty.

Appeal from Superior Court of Sacramento County; Malcolm C. Glenn, Judge.

Harry Wagner was convicted of grand larceny, and from the judgment and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

George E. Foote, of Sacramento, and P. J. Wilkie, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was by an information charged with and by a jury convicted of the crime of grand larceny, in the superior court of Sacramento county, and has appealed to this court from the judgment of conviction and the order denying his motion for a new trial.

[1] The case was placed on the calendar of the January, 1918, term of this court, and when the cause was in its regular order called for hearing neither of the two attorneys of record of the defendant appeared orally to argue the appeals, nor was there then, or is there now, a brief filed by said attorneys in support of the appeals, although the transcripts containing the record on appeal were filed on the 3d day of August, 1917, and the attorneys for the defendant duly notified by the clerk of this court that the case would be called for argument and submission on Monday, January 14, 1918. Under this state of the record there was either one of two courses only to be pursued by the Attorney General, viz.: To move, upon notice, to dismiss the appeals; (2) the submission of the cause for decision upon the record. People v. Magri, 32 Cal. App. 536, 163 Pac. 503; People v. Coates, 32 Cal. App. 533, 163 Pac. 502; People v. Maschini, 33 Cal. App. 424, 165 Pac. 546. The Attorney General elected to adopt the latter course; hence we have been required to examine the record to ascertain whether upon the face thereof there are errors compelling a reversal.

The defendant and three other parties were jointly charged with the larceny of a quantity of rope, a number of tents, and other articles, of the aggregate value of over $200 and the personal property of one Charles Ross. The crime was committed in the month of January, 1917, in the city of Sacramento.

[2, 3] The evidence need not be set out herein in detail. It is sufficient to say with respect to the proofs that there is ample testimony to support the conclusion of the jury that the defendant and at least one of the other men jointly charged with him stole the articles described in the information on a night in the said month of January, and had them hauled from the premises of the owner to the home of one Gilfillen, who owns an express wagon and carries on an express business, and that said articles were kept at Gilfillen's residence for several days, when the defendant and one of his codefendants, one Cummings, had them removed to another place in Sacramento. Two of the witnesses introduced by the people to support the prosecution were codefendants of the accused. Upon the close of the people's case the defendant, through his attorneys, moved the court to advise the jury to acquit on the ground that the testimony of the said witnesses, one of whom was confessedly an accomplice of the defendant in the commission of the crime, had not been corroborated as required by section 1111 of the Penal Code. The court denied the motion and properly so. The testimony of Mrs. Gilfillen that she saw the defendant at her home at about 9 o'clock of the night of the larceny, heard him ask her husband to go to the place where the stolen articles had been left by him (Wagner) and haul them to his (Gilfillen's) home, and saw the rope, tents, etc., at her home the following day, itself constituted sufficient corroboration of the testimony of the accomplices to satisfy the demands of the statute in that respect. There was, however, other corroboration of the accomplices in the testimony of another witness, who declared, under oath, that a few days after the goods were stolen he packed them at the request of Wagner and one of his confederates. Our conclusion is that the verdict is sufficiently supported by competent evidence.

We have examined the court's charge, and in it we have found no error. It presented to the jury in clear language all the principles of law pertinent to the case as made by the information and the evidence.

Nor have we discovered any error prejudicial to the rights of the accused in the rulings of the court touching the admissibility of evidence.

The case seems to have been well and fairly tried, and the verdict, so far as we are capable of judging from the bare record, is just.

The judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

36 Cal. App. 61

NELSON et ux. v. COLTON et al. (Civ. 1794.)

(District Court of Appeal, Third District, California. Jan. 26, 1918.)

1. VENDOR AND PURCHASER ⚷176—ACREAGE—DEFICIENCY—REDUCTION OF PRICE.

Evidence *held* sufficient to sustain a finding that land was purchased without regard to acreage, and that grantees did not rely on any statement of grantor as to acreage.

2. APPEAL AND ERROR ⚷1010(1)—FINDINGS OF COURT—REVIEW.

Where findings are supported by evidence which is not upon its face unbelievable, they cannot be disturbed upon review.

3. FRAUDS, STATUTE OF ⚷116(5)—AUTHORITY OF AGENT—NECESSITY OF WRITING.

That an agent to sell land had no written authority to sell land as required by Civ. Code, § 1624, subd. 5, is a matter between the vendor and the agent alone, and does not concern the purchaser.

4. DEEDS ⚷58(2)—DELIVERY OF DEED.

If purchaser of land employs attorney of vendor to take care of his part of the transaction, he can make him trustee to receive the deed so as to pass title to him immediately upon delivery to the attorney, although he gives the attorney no authority to accept delivery.

5. DEEDS ⚷62—DELIVERY OF DEED TO UNAUTHORIZED AGENT—RATIFICATION BY ACTION.

Where purchaser of land sued to reduce price of land on account of shortage in acreage, he ratified any unauthorized acts of another in accepting and recording the deed for him.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Carl A. Nelson and Jennie Nelson, his wife, against B. F. Colton, O. G. Hopkins, and Fred J. Harris. Judgment for defendants, and plaintiffs appeal. Affirmed.

C. A. S. Frost and Francis V. Keesling, both of San Francisco, and S. Luke Howe and Downey, Pullen & Downey, all of Sacramento, for appellants. Fred J. Harris, O. G. Hopkins, and Thomas B. Leeper, all of Sacramento, for respondents.

HART, J. This is an appeal by the plaintiffs from a judgment rendered and entered against them and in favor of the defendants.

The controversy leading to the action arose over a sale of a tract of land in Sacramento county by the defendants to the plaintiff Carl A. Nelson. The claim of the plaintiffs is that, in the negotiations resulting in the sale, the defendant B. F. Colton falsely represented to the plaintiffs that the land in question embraced at least 263 acres; a survey of the land after the sale having disclosed that the tract sold contains 240.52 acres only. The purchase price of the property sold was $40,000, and the principal object of the action is to secure an abatement of the purchase price "in the sum of $152 for each acre of shortage in the quantity of said land, less than 263 acres," to secure a reformation of the promissory note given by the plaintiffs to the defendants for the balance of the purchase price of the land and the trust deed given by the plaintiffs to secure the payment of said note, and to enjoin the defendants from selling or offering for sale the real property described in said trust deed for the purpose of satisfying said note.

The complaint charges that, before the sale was consummated and while the plaintiff was negotiating for the purchase of the land, the defendant B. F. Colton, for the purpose of inducing the said plaintiff to purchase said tract of land, represented to said plaintiff that said tract contained 275 acres; that "thereafter, and at the time of the delivery of the deed hereinafter mentioned, defendant Colton represented to plaintiffs that said tract actually contained about 263 acres, instead of 275 acres, as he had theretofore stated." It is further alleged:

> "Said statement was made for the purpose of deceiving plaintiffs and of thereby inducing plaintiffs to purchase said tract, and did deceive and did thereby induce plaintiffs to purchase it. Plaintiffs thereupon purchased said tract, relying upon said representation, and believing it to be true, and that said tract did contain about 263 acres."

It is alleged that said tract of land never at any time contained 263 acres or more than 240.52 acres, and that, when representing to the plaintiffs that the said tract contained 263 acres, the said defendant Colton "well knew said statement to be untrue, and that said tract of land did not contain more than 240.52 acres." The complaint further alleges that the actual value of said tract, as well as the value thereof agreed upon by the plaintiffs and the defendant Colton at the time of said sale, was $152.09 per acre.

The defendants, replying to the complaint, admit and deny certain of the averments of said pleading, and then set up the following affirmative defense:

> "That plaintiffs bought said land as a tract; that quantity was not a material consideration or part of said transaction; that defendants viewed said tract of land several times and walked over and upon the same several times; that defendant Colton correctly pointed out the boundaries of said tract to plaintiffs; that plaintiffs had full knowledge of the boundaries of said tract and full knowledge of the size of said tract; that plaintiffs had as good an opportunity as did defendant Colton to learn the exact acreage in said tract; that plaintiffs did not buy said tract by the acre, but bought the same as a tract, as it was inclosed by its boundaries; that the agreed price of said tract of land was $40,000 for the tract as a whole; that plaintiffs bought said tract as they saw it; that they relied upon their own observation and did not rely upon any representation made by defendant Colton as to the number of acres in said tract."

The findings briefly are: That it was not a part of the agreement of sale that the purchase price of $40,000 was to be based upon the number of acres embraced in the tract sold; that said Colton informed the plaintiffs that it would take $40,000 to buy said place, regardless of the number of acres in said tract, and that he informed the plaintiffs that he would not take any less amount than $40,000 for said tract; that said tract was bought and sold as a tract and as an entirety and not by the acre; that the buyer of said land was upon the same and the boundaries thereof were correctly pointed out to said buyer on three different dates prior to said sale; that the said parties never agreed that the purchase price of said land should be $152.09 per acre, or for any price per acre; that the description contained in the deed to said property is the correct description of said land, the boundaries of said land being correctly set forth and described therein, and that the plaintiffs received from said sale "and now are in the possession of all the land that defendant Colton sold to plaintiffs"; that, prior to making the contract of sale, plaintiffs informed one Thomas Jenkins that they were about to purchase said land for $40,000, and asked said Jenkins if in his opinion said place was worth that sum, and whether he would advise them to pay said sum therefor, and that said Jenkins thereupon informed plaintiffs that said place was worth $40,000, and advised plaintiffs to pay said sum therefor; that plaintiffs relied upon the advice so given by said Jenkins and acted thereon; that the defendant Colton made no fraudulent representations to plaintiffs, nor were plaintiffs influenced to purchase the tract by reason of any fraudulent representations made to them by said Colton; that plaintiffs, upon learning of the shortage of acres in said tract, did not offer to rescind said contract and restore the same to said Colton, nor have they at any time since learning of such shortage in the number of acres in said tract offered to rescind or offered to restore said land to said Colton.

The judgment is assailed solely upon the ground that the findings do not derive sufficient support from the evidence. The facts are:

That in the month of September, 1913, one A. J. Crawford, a real estate dealer in the city of San Francisco, having previously been informed that the defendant Colton desired to sell his farm—the land in question—went to said farm for the purpose of seeing and interviewing Colton with the view of securing a contract with him authorizing him (Crawford) to sell the land. Crawford on that occasion met Colton and his wife, apprised them of the purpose of his visit, and proposed to them the agreement referred to. Colton said to Crawford that sometimes he felt that he would like to sell the place and at other times he did not feel so disposed. After considerable negotiation, however, Colton, on the 31st day of December, 1913, gave Crawford verbal authority to sell the place, together with the improvements and the personal property on the farm, for the sum of $40,000. Crawford, having known the plaintiff Carl A. Nelson for about a year before the authority to sell the Colton place was given him, and knowing that Nelson desired to purchase some farming land, called on the latter and submitted the Colton proposition to him. Crawford and Nelson visited and inspected the land in question on three different occasions prior to the 15th day of January, 1914. Crawford, testifying as a witness for the plaintiffs, said:

> "Mr. Nelson asked me, I think, on two different occasions when I was out on the ranch, if I thought there were 275 acres in that tract; I told him I did not know, I presumed so, somewhere near it; the man that lived there ought to know about the acreage that he had. I did not know; I could not tell you what was there —did not make any difference, acreage, the acres; I was selling the place for $40,000 and some horses and implements."

Crawford said that the first time he visited the land with Carl A. Nelson he pointed out to the latter the boundaries of the land.

> "I showed him where the land lay and the fences around it. * * * We next visited the land on the 11th [of January, 1914]. At that time Mrs. Nelson and my wife accompanied us. Mr. Nelson and I walked out in the field around the barn, barnyard, and around the buildings. * * * I think Mr. Nelson asked me if I thought there were 275 acres in the place. I told him I thought there were. I stated the place had not been surveyed; I had no means of knowing. Mr. Nelson said he guessed there was enough land there. I told him it didn't make any difference as to the number of acres—that it took $40,000 to buy the property. I told Mr. Nelson Mr. Colton thought there were 275 acres in the place, but that it had not been surveyed, but that it did not make any material difference as to the acres, that the price was $40,000 just as it was, with the improvements."

On the 14th day of January, 1914, Carl A. Nelson informed Crawford that he would take the land on the terms stated and on the following morning he and Crawford left San Francisco for Sacramento for the purpose of completing the deal. Arriving at the latter place, Nelson and his wife executed and delivered to Crawford a written agreement of purchase, and at the same time made to Crawford a payment of $1,000 of the first or cash payment which was to be made upon the execution of the deed. Crawford further testified:

> "When we were there [Sacramento] Mr. Nelson called up Tom Jenkins, who at that time was supervisor there; asked him if he knew the Colton ranch. I was at the Land Hotel at the time he called him up. Mr. Jenkins told Mr. Nelson he knew the place. Mr. Nelson asked Mr. Jenkins what he thought about the place and Mr. Jenkins told Mr. Nelson it was a good ranch. Mr. Nelson told him he was thinking about taking it and was going to pay $40,000 for it and wanted to know if Mr. Jenkins thought it was worth that. As I understood, he said that it was. Mr. Nelson told me he said so, and as near as I can understand the phone."

It appeared that Attorney Busick, of Sacramento, was the attorney of the defendant Colton. After the conversation over the telephone between Nelson and Jenkins, above narrated, Crawford and Nelson went to Busick's office. Nelson had urgent business in San Francisco and was required to leave for that city that day, and he left the matter, so far as he was concerned, to be attended to by Judge Busick, saying to the latter that "he could take care of his business, too," and at the same time paying the attorney a fee. Thereafter Judge Busick drew up the deed from Colton and his wife to the Nelsons and a trust deed from the latter and his wife to the defendants Harris and Hopkins, as trustees, to secure the payment of the unpaid balance of the purchase price of the land in question. These instruments were recorded in the office of the county recorder of Sacramento county, on the 22d day of January, 1914, at the request of the said Busick, the balance of the first payment ($8,000) having been paid by Nelson to Judge Busick.

The defendant Colton testified that he first met Crawford about the 28th day of December, 1913, at his farm. Crawford called to ask whether he desired to sell the farm and Colton replied in the affirmative. Colton then told Crawford that the land had never been surveyed, but that he was of the opinion that it contained from 263 to 275 acres. Colton then made an oral agreement with Crawford whereby the latter was given authority to sell the farm as it stood—improvements and certain personal property—for the sum of $40,000. For his services in making the sale, Crawford's commission was to be governed by the number of acres in the tract, to be later ascertained by a survey thereof.

Colton testified that he met Carl A. Nelson for the first time at the land in question, on one of the early days of the month of January, 1914. At that time he told Nelson that he did not know precisely how many acres the tract contained, but that he believed it embraced from 263 to 275 acres. He then pointed out the boundaries of the land to Nelson. He further testified that the land was originally bought by himself and brother, and the same jointly conveyed to them; the deed reciting that the tract contained 269 acres. He said, though, that the land had always been assessed as a tract containing 263 acres, and that he had always paid the taxes on that number of acres.

Mrs. Colton, wife of the defendant of that name, testified to the payment by Nelson of the sum of $7,000 to her husband upon the execution of the deeds referred to above; said sum being the balance due on the first payment. She also testified that Attorney Busick prepared the deeds; that she and her husband executed the one conveying the land to Nelson; and that she delivered said deed to said Busick, with instructions that he deliver the same to Nelson.

The plaintiff Carl Nelson said that, prior to the purchase, Crawford had told him that there were about 275 acres in the tract; that subsequently Crawford told him that a survey of the land had been made and it was found to contain only 263 acres. The witness said that, in making the deal, he figured on the basis of 263 acres. He said that Colton had told him that he had paid taxes on 263 acres. The deed from the Coltons to Nelson recited that the tract contained "263 acres, more or less."

The agreement between Colton and Crawford as to the latter's compensation for negotiating the sale of the land was to be whatever he could get for the land in excess of $135.50 per acre. In other words, Colton wanted to net that sum per acre on the sale. On the 18th day of January, and after Nelson had agreed to buy the land and had made a payment of $1,000 on the bargain, as evidence of good faith, Colton had the land surveyed for the purpose of ascertaining the exact number of acres it contained, and thus arrive at the amount of Crawford's compensation. The survey was made, and thus it was ascertained that there were in the tract 240.52 acres only. Not satisfied with the first survey, Colton caused the land to be resurveyed; the result as to the number of acres being approximately the same. Colton testified that he expected to receive something like $37,000 net for the land, and that, being greatly disappointed over the result of the survey and the amount he was to receive beyond the compensation to be paid to Crawford, he told both the latter and Nelson that he "wanted to back out of the thing—that I would give $100 and back out."

[1] The foregoing involves a statement substantially of all the testimony, and it must be plainly manifest therefrom that the court was warranted in finding, as it did find, that at no time, until the survey of the tract was made at the instance of Colton himself, as above shown, did the latter know precisely how many acres the tract contained; that until such survey he was of the opinion that it contained at least 263 acres. That Colton honestly believed that the tract contained more than the number of acres that the survey disclosed is shown, not only by the fact that he had always paid taxes on the basis of 263 acres but also by the fact that he was so disappointed in the shortage of acres as so disclosed that he offered to pay Crawford and Nelson $100 to rescind the agreement of sale. It does not appear that Nelson concerned himself sufficiently about the number of acres in the tract before the sale to ask for a survey of the land. Colton had expressed to him the opinion, he testified, that there were about 275 acres in the tract; but he was willing to assume that it embraced only 263 acres, presumably because Colton had told him that on that number of acres he had paid taxes. So far as this transaction is concerned, it does not appear

that he intended to take steps necessary to the ascertainment of the precise quantity of land in the tract, and it is probable that no controversy would ever have arisen upon that point had Colton himself not caused a survey to be made. As to the good faith of Colton, it is to be observed that it is hardly reasonable to suppose that, had he known or had reason to believe that the tract contained less than 263 acres he would have entered into an agreement with Crawford with respect to the latter's compensation for effecting a sale which would have necessitated a survey of the land to ascertain its precise quantity. Indeed, that Colton himself must have been, as he declared, greatly surprised and disappointed when he learned that the actual quantity of land in the tract had fallen far short of what he believed it to be is well supported by the consideration that the shortage resulted in a corresponding reduction of the amount that he expected to net on the sale. It made several thousands of dollars difference to him.

But we may cast aside further consideration of the allegations and claim of fraud in Colton's representation as to the number of acres in the tract as wholly immaterial, for there is, as we have shown, evidence sufficient to support the finding that the land and certain personal property thereon were sold without regard to the number of acres in the tract. The plaintiffs' own witness Crawford so testified, and his testimony upon that proposition was corroborated by that of Colton. The fact, therefore, if it was a fact, that Colton did not reveal to Nelson the result of the survey of the land made after the contract of purchase was entered into by Nelson, and the further fact that Colton received a payment on the purchase price with knowledge of the shortage of acres, as shown by such survey, are of no material consequence in this controversy. And, for the same reason, it is of no material importance that the land is described in the deed of the Coltons by metes and bounds and as containing "263 acres, more or less." In other words, in view of the finding (upon sufficient evidence, as we have seen) that "it was no part of said contract or agreement that said purchase price of $40,000 was to be based upon the fact that there were about 263 acres in said tract" and that "defendant Colton informed plaintiffs that it would take $40,000 to buy said place, regardless of the number of acres in said tract," the fact that the acreage was found upon a survey of the tract to be less than the parties believed when the sale was made, and the further fact that the deed from the Coltons to the plaintiffs described the land as containing more acreage than it actually embodied, present considerations which can justly exert no influence on the decision of this case.

[2] This court cannot repudiate findings educed from evidence sufficient to warrant or support them. To the contrary, where findings derive support from evidence which is not upon its face unbelievable, the facts found must be accepted by a reviewing court as having been proved. In this case, therefore, there being nothing inherently improbable in the testimony upon which the findings are evidently founded, the facts found must be accepted as the established facts of the controversy. This is only the statement of an obvious and elementary rule of law. The result is that we are required to accept it as the established fact in this case that the contract of sale and purchase was not based upon the number of acres in the tract, but that the agreement was that the land was to be sold and was so sold to Nelson for the sum of $40,000.00 as an entirety or without regard to the number of acres that it contained.

It follows that the authorities cited by learned counsel for the plaintiffs upon the question of the alleged fraud and misrepresentations of the defendant Colton as to the quantity of land of which the tract consists, and upon the proposition that from the fact that the tract is farm land the presumption follows that "acreage is material," have no application to this case.

[3] The point is made that the sale was void for the reason that Crawford's authority to sell the land was not in writing, as required in such cases by section 1624, subd. 5, of the Civil Code. In its application to this case, there is clearly no force in the point. Whether Crawford was legally authorized to make a binding contract for the sale of the land, was a matter entirely between him and Colton, the owner of the land. The latter has not questioned Crawford's authority or act in that regard. On the contrary, he ratified all that Crawford did under his verbal authority by conveying the land to Nelson. Moreover, the act of Nelson in agreeing to purchase and in purchasing the land very obviously showed that he then had no objection, or reason to make any, to Crawford's alleged want of legal authority to make the sale, even if he were in any position to make a valid objection thereto.

[4, 5] It is next urged that Judge Busick was without authority to accept delivery of the Colton deed for the plaintiffs, and it is hence argued that there never was a delivery of said deed and, therefore, there was no legal conveyance of the land to the Nelsons.

Carl A. Nelson, it will be remembered, called at Busick's law offices with Crawford, knowing that Busick was to represent the Coltons in the transaction, and employed the lawyer to attend to his part of the transaction. Precisely how far Busick's authority to act for the plaintiffs in the transaction extended, the testimony does not show. Nor is it important that the limit of Busick's authority should be shown, so far as the present point is concerned. Mrs. Colton, one of the grantors, testified that, after she and her husband had signed and acknowledged their deed to the Nelsons, she left the instrument with Judge Busick to hand over to Mr. Nelson and that she instructed him so to deliver it. This amounted to a delivery, so far as the grantors were concerned, and, although not necessarily bound by Busick's act in accepting delivery of the deed if they did not authorize him to do so, and did not desire to be so bound, the Nelsons, as they appeared to have done, could nevertheless treat Busick as their trustee, in which case full title would pass to the Nelsons the moment of the delivery to Busick. Bury v. Young, 98 Cal. 451, 33 Pac. 338, 35 Am. St. Rep. 186; Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300; Crozer v. White, 9 Cal. App. 612, 621, 100 Pac. 130. But it seems to be the position of the appellants that, because Busick, in the place of immediately making a physical delivery of the instrument to the Nelsons, first caused the deed, with the deed of trust by the Nelsons to secure the payment of the unpaid balance on the purchase price, to be filed for recordation in the office of the county recorder, there was not a delivery to the Nelsons. But the point, even if under other conceivable circumstances tenable, is without force in its application to this case. The Nelsons do not claim in this action that they did not acquire title to the land in a valid way or that the title thereto is not in them. To the contrary, the very theory of this action here is that they are the owners of the land, and presupposes that the conveyance by which title was vested in them conformed to the law as to all the formal and other requisites of a conveyance of real property. Moreover, assuming that Busick was not authorized to bind them by his act of accepting delivery of the deed, and was not authorized to cause it to be recorded before delivering it into their physical possession, and that there was for those reasons or either of them no delivery either in fact or in law, still the fact remains that the Nelsons did accept title to the land and thereby ratified every unauthorized act of Busick in connection with the transaction, so far as they were concerned therein.

There are some other points made and many cases cited on all the points discussed in the briefs, but the findings which have herein been specially considered are so well buttressed by the evidence and so clearly decisive of the case in favor of the defendants that it is deemed entirely unnecessary to consider the points not already noticed or to examine herein the cases referred to.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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36 Cal. App. 94

BROWN v. LEMON COVE DITCH CO.

(Civ. 1779.)

(District Court of Appeal, Third District, California. Jan. 31, 1918.)

1. APPEAL AND ERROR 🔑1002—VERDICT ON CONFLICTING EVIDENCE.

Verdict based on conflicting evidence will not be disturbed.

2. MASTER AND SERVANT 🔑235(2) — DEATH OF SERVANT—CONTRIBUTORY NEGLIGENCE—DUTIES OF SERVANT.

Where the employé of a ditch company had charge of its flume, it being a part of his duty to keep it in repair, and he being authorized to obtain tools or material required, so that if any defect existed it was the employé's fault, and not imputable to the ditch company, the latter was not liable to the employé's administratrix for his death from the defect.

3. MASTER AND SERVANT 🔑236(4)—DEATH OF SERVANT—CONTRIBUTORY NEGLIGENCE.

The employé of a ditch company, in charge of its flume 30 inches wide, 17 or 18 inches deep, with cross-pieces 3 feet apart made out of boards 2 inches by 4, the flume being about 11 feet from the ground, was guilty of negligence contributing to his death in a fall from the flume where he attempted to walk along the flume which had no board extending along its length and over the cross-pieces, he being a man of advanced age and excessive weight.

4. EVIDENCE 🔑472(5) — OPINION — FACT IN ISSUE.

In an action for death of the employé of a ditch company in a fall from its flume, where the theory on which the case was tried required the jury to find as a material fact whether a board was on top of the flume just prior to the accident, to permit a witness to state that it looked to him that it was so situated, and that deceased had stepped on the board in such a way as to cause it to slip, was equivalent to a ruling that he might declare that it appeared to him that the ditch company was not negligent as claimed in not maintaining a proper passageway along the flume, and such opinion of the witness was inadmissible.

5. TRIAL 🔑96—MOTION TO STRIKE ANSWER —FAILURE TO SPECIFY PART.

Where plaintiff, in her motion to strike out a witness' answer as unresponsive, did not specify the particular portion of the answer, a part of which was not objectionable, that she desired eliminated, the ruling denying the motion was technically justifiable.

6. TRIAL 🔑91—MOTION TO STRIKE TESTIMONY—OBJECTION TO TESTIMONY.

Where motion was made to strike out an answer, somewhat of the nature of an opinion of the witness, but responsive to the question, to which no objection was made, the objection to the testimony was too late.

7. TRIAL 🔑105(1)—INCOMPETENT TESTIMONY —ELUCIDATION.

The fact that no motion was made to have a witness' answer on cross-examination stricken out did not warrant further effort on redirect to elucidate such answer, which was incompetent as hearsay.

8. TRIAL 🔑29(2)—REMARK OF COURT—OPINION ON WEIGHT OF EVIDENCE.

In an administratrix's action for death of a servant, where plaintiff was asked about a conversation between deceased and his employer's superintendent, the purpose being to show a promise to furnish running boards on the flume where the servant was killed, and, on objection, after some discussion between counsel, the court said that it would not be competent until they proved that there were no running boards at the point where the servant fell, such remark, though unfortunate, was not erroneous, as the court had in view only the order of proof; and if defendant believed that the suggestion of the court might be interpreted as an expression of opinion on the credibility of any witness or the weight of the evidence, she should have specifically objected.

9. MASTER AND SERVANT 🔑270(8)—DEATH OF SERVANT—EVIDENCE—IMMATERIALITY.

In an administratrix's action against a ditch company for death of its servant in a fall from its flume, it being apparent that the absence of boards at other points of the flume did not contribute to the fall and death, testimony as to the condition of the flume at other points was properly excluded as immaterial.

10. APPEAL AND ERROR 🔑1058(3) — HARMLESS ERROR—EVIDENCE.

In such action, ruling excluding testimony of a witness as to the condition of the flume at other points was harmless where other witnesses testified without objection that boards were missing at other points, the matter was admitted by some of the ditch company's witnesses, and there was no evidence to the contrary.

11. TRIAL 🔑46(2)—SHOWING OF PURPOSE OF QUESTION.

In an action for death of a servant, plaintiff administratrix should have stated her purpose in asking a witness what was the state of his feelings toward the administratrix, representative of the deceased servant's estate; it not being apparent to the trial court at the moment that the purpose was to show that the witness was not friendly to the administratrix.

12. APPEAL AND ERROR 🔑969 — VISITING SCENE OF ACCIDENT—DISCRETION OF COURT —STATUTE.

Under Code Civ. Proc. § 610, committing to the discretion of the court the matter whether the jury shall visit the scene of an accident in suit, the appellate court could not predicate error on the refusal of the request of an administratrix suing her decedent's employer for his death to have the jury visit the scene of the accident.

13. MASTER AND SERVANT 🔑356—COMPARATIVE NEGLIGENCE—REPEAL.

The Roseberry Act (St. 1911, p. 796), affirming the doctrine of comparative negligence, was repealed by the Workmen's Compensation Act (St. 1913, p. 279), which does not recognize the doctrine.

14. MASTER AND SERVANT 🔑352 — INJURIES TO SERVANT — COMPARATIVE NEGLIGENCE — WORKMEN'S COMPENSATION ACT.

Under Workmen's Compensation Act, repealing the doctrine of comparative negligence, administratrix of servant killed in service, to recover from the corporation employer for the death at common law, must show gross negligence and willful disregard of the life, limb, or bodily safety of the servant on the part of an elective officer of the corporation, and the action cannot be maintained if the accident was due to the servant's contributory negligence.

15. TRIAL 🔑252(11)—INSTRUCTION—SUPPORT BY EVIDENCE.

In an action for death of a servant in a fall from a flume, though no witness could swear positively that there were boards or a board on the top of the flume, but it was a fair inference from the testimony of certain witnesses that the flume was so supplied, there was evidentiary support for the hypothesis suggested by an instruction as to the presence of boards.

16. TRIAL 🔑253(9) — INSTRUCTIONS — CONFLICT.

In an action for death of a servant, an instruction which would have nullified another instruction and evidence as to contributory negligence, and the asserted condition that the deceased servant had complete charge of the flume from which he fell and was killed, was properly refused.

17. TRIAL 🔑253(4)—INSTRUCTION—IGNORING ISSUES.

In an action for death of a servant, instruction requiring a verdict for plaintiff, regardless of the servant's contributory negligence, was properly refused.

18. ESTOPPEL 🔑98(3)—PERSONS AFFECTED.

If the employé of a ditch company agreed to keep the flume, from which he fell and was killed, in safe condition, he would be estopped from urging his want of authority as an excuse for his failure to attempt at least to comply with his agreement, and his administratrix is in no better position.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Rennie C. Brown, as administratrix of the estate of Marcellus Brown, deceased, against the Lemon Cove Ditch Company, a corporation. From judgment for defendant, plaintiff appeals. Affirmed.

J. C. Thomas, of Oakland, and Edwards & Smith, of Dinuba, for appellant. Farnsworth & McClure, of Visalia, for respondent.

BURNETT, J. The action was for damages for the death of one Marcellus Brown, alleged to have been caused by the negligence of the defendant. The trial was by a jury, the verdict was in favor of said defendant, and from the judgment entered thereon the appeal has been taken.

The particular ground of complaint is declared in the following allegations:

"That the defendant is now, and was at all times herein mentioned, the owner and in possession of certain flume, conduit, or structure built of wood, used, owned and operated by the said defendant for irrigating purposes. That on or about the 4th of March, 1914, the deceased, Marcellus Brown, while regularly employed by the aforesaid defendant, and while caring for and attending the aforesaid flume of the defendant pursuant to the performance of his duties while in the actual employ of the said defendant, came to his death on the day last aforesaid, by falling from the said flume or conduit; the said fall being the proximate cause of the death of the said deceased. That the fall was sustained through and by reason of the negligence of the defendant in failing to make, build, prepare, or provide a proper walk, footpath, or passage over and upon said flume for the use of the said deceased, and by requiring the said deceased to, and the said deceased did, inspect, repair, pass over, and traverse the said flume without any walk or passageway safe and suitable upon which the deceased might or could walk or travel during the performance of his duties as aforesaid. That the said deceased * * * had prior to the said accident * * * called the attention of the said defendant to the defective and dangerous walkway, to wit, two weeks before said accident causing his death, and the said defendant then and there, upon its attention having been called thereto, and the deceased having pointed out the dangers thereto attached to the said defendant, and the said defendant promised to make and prepare a proper walkway over and upon the said flume, and the deceased relying upon the said promises of the said defendant continued to, as aforesaid, perform the duties as a servant of the said de-

> fendant. That the said defendant though promising to, as aforesaid, utterly failed to make, erect, contrive, or place upon the said flume, a proper walkway by which deceased could pass over."

[1, 2] Plaintiff seems to have regarded the case as governed by the general law of negligence, and it was tried upon that theory. In accordance with this view the verdict of the jury is amply justified upon several grounds. In the first place, there is substantial evidence to support the theory that the "walkway" at the point where the accident occurred was in a proper and safe condition. The testimony to that effect is quoted in the brief of respondent, but we can see no good in reproducing it. Granting that plaintiff introduced some evidence to show that said "walkway" at said point was defective and dangerous, the most that we can say in his favor is that the evidence as to defendant's negligence was substantially conflicting. Again, the showing is strong to the point that the deceased had charge of said flume, that it was a part of his duty to keep it in repair, that he was authorized to obtain whatever tools or material might be required for that purpose, and that he actually did perform such work. The jury could properly accept this as the real situation, and, doing so, it would be their duty to find that if any defect existed it was entirely the fault of the deceased, and not imputable at all to respondent. The principle of law applicable to such condition is stated and discussed in Duffy v. Hobbs, Walls & Co., 166 Cal. 210, 135 Pac. 1093, L. R. A. 1916F, 806, and Peterson v. Beck, 27 Cal. App. 571, 150 Pac. 788.

[3] Futhermore upon the theory, which is earnestly contended for by appellant, that at the point where deceased fell from the flume there was no board extending along the length of the flume and over the cross-pieces, it probably should be held that he was chargeable with such carelessness, and with such recklessness in regard to his own safety, as would prevent a recovery under the doctrine of contributory negligence, there being no claim by appellant that such defense may not be made, as alleged in the answer. To see how unmistakable appears the great carelessness of the deceased, if we accept said theory, we may recall these facts: The flume was 30 inches wide and 17 or 18 inches deep, with cross-pieces or taps across it about 3 feet apart made out of boards 2 inches thick by 4 inches wide, and at the place where deceased fell the flume was about 11 feet from the ground. According to the testimony for appellant the deceased knew that the way was unsafe, and he had complained of it. Nevertheless he deliberately attempts to make the dangerous passage with the situation aggravated by the circumstance of his age and of his excessive weight. That his adventure under such circumstances manifested in no slight degree the want of ordinary care can hardly be disputed. His conduct would seem to constitute a greater departure from the course of common prudence exacted of every individual than that exposed and discussed in Brett v. Frank & Co., 162 Cal. 735, 124 Pac. 437.

Treating this action, therefore, as subject to the general law of negligence, it is extremely doubtful whether a verdict for the plaintiff would be supported. However, we may waive the question whether the verdict, regardless of any errors that may have been committed, could legally have been rendered for the plaintiff, and proceed to pay some attention to the specifications of the alleged mistakes of the trial court.

[4, 5] The witness, Z. L. Brown, was asked this question:

> "But at the place where he fell you do not know whether there was a board or not?"

He answered:

> "I do not know whether he knocked this one off on his fall; that it tilted with him, or it had been off before; but from appearances to me, it looked like that he had partly slipped on and had stepped on the end, and it had tilted with him and pitched off with him."

Then followed:

> "Q. You do not know anything about that; you are just guessing at it?
>
> "The Court: The witness has answered.
>
> "Mr. Thomas: I move that that part of the answer be stricken out, as not responsive to the question."

The motion was denied. It is no doubt true, as stated in Healy v. Visalia, etc., R. R. Co., 101 Cal. 585, 36 Pac. 125, that "the border line between fact and opinion is often very indistinct, and the statement of a fact is frequently only an opinion of the witness," but the theory upon which the case was tried required of the jury to find as a material fact in the case whether said board was on top of the flume just prior to the accident, and to permit the witness to state his opinion that it was so situated was equivalent to a ruling that he might declare that it appeared to him that defendant was not negligent in the respect claimed by the plaintiff. It appears to us, without citing the authorities, that the opinion of the witness was not admissible and that portion of his answer might very properly have been stricken out. However, the motion was made simply upon the ground that it was not responsive to the question, and appellant did not specify the particular portion that he desired eliminated. Hence the ruling was technically justifiable.

[6] The second complaint as to the rulings of the court involves the denial of a motion to strike out an answer somewhat of the nature of an opinion, but it was responsive to the question to which no objection was made. The objection was therefore too late.

[7] On cross-examination of Z. L. Brown he was asked what the walk boards were used for, and after answering the question he volunteered a statement as to a conversation which he had with his brother, the deceased.

No objection was made to it, but on redirect examination appellant attempted unsuccessfully in face of an objection to have the witness state definitely when this conversation took place. The matter was purely hearsay and not relating to the subject involved in the question of respondent, and the fact that no motion was made to have the answer stricken out did not warrant any further effort to elucidate the incompetent testimony. Besides, the witness had stated when the conversation occurred and its repetition would have accomplished no good.

[8] The plaintiff was asked about a conversation between the deceased and J. E. Pogue, superintendent of respondent, the purpose being to show a promise to furnish running boards, and, an objection being made, after some discussion between counsel, the court said:

> "It would not be competent until you prove that there were no running boards at the point where he fell."

Complaint is made of this remark as an invasion of the province of the jury in that it amounted to a declaration by the court that no such proof had been offered, whereas it is contended that a witness had already testified to that effect. No doubt the expression was somewhat unfortunate, but we think from the context and the language used that the court had in view only the order of proof, and that it was so understood by the jury. If appellant believed that the suggestion of the court might be interpreted by the jury as an expression of opinion on the credibility of any witness or the weight of the evidence he should have specifically objected in order that the court might obviate any such result. Moreover, we find in the instructions a clear statement as to the right and duty of the jury to pass upon these considerations, and an unmistakable disclaimer of any right or disposition by the judge to decide or to express any opinion upon any question of fact. Under the circumstance, said remark could have resulted in no harm.

[9, 10] It is contended that the court was in error in refusing to allow a certain witness to testify as to the condition of the flume at other points than the one where the deceased fell, it being declared by the trial judge:

> "So far as the condition of the flume at other points it is immaterial in this case. No matter what the condition was at other points, that would not cause the accident."

Generally speaking, no doubt, there must be some causal connection between the accident and the negligence to permit evidence of the latter, and since it is apparent that the absence of boards at other points did not contribute to the fall and death of the deceased, it would seem that the ruling was correct. But assuming that such evidence was admissible to show willful and wanton negligence on the part of respondent, it is sufficient to say that no such issue was tendered by the complaint. Besides, several witnesses testified without objection that boards were missing at other points, it was admitted by some of the witnesses for the defendant, and there was no evidence to the contrary. The ruling then, at any rate, was without prejudice. Indeed, the defense as to the boards was that they were properly supplied at the place of the accident, and that the whole matter was under the control and direction of decedent. There are several other similar rulings of which complaint is made, but they do not require special notice.

[11] The court might properly have allowed the witness Pogue to answer the question:

> "Just or what is the state of your feelings towards Rennie Brown, representative of the estate of this man?"

However, it was probably not apparent to the court at the moment that the purpose of appellant was to show that the witness was not friendly to the plaintiff, and appellant should have stated what he had in view in asking the question. The record shows simply that the witness was recalled for one question, that it was propounded and an objection made upon the general grounds and sustained by the court. Besides, the ruling is not argued, it simply being noted in the brief of appellant, and we may dismiss it without further comment.

[12] We cannot say that there was error in the refusal of the request to have the jury visit the scene of the accident. Under section 610 of the Code of Civil Procedure this is committed to the discretion of the court, and we find no abuse of that discretion. Indeed, the practice is a dangerous one, as is well known to the profession, and from an examination of the record herein we are satisfied that nothing would have been gained had the request been granted.

As to the instructions, it is claimed that the two, No. 12 and No. 30, are contradictory and irreconcilable. But appellant is entirely at fault in this contention. The former is based upon the theory that it was the duty of defendant to keep the flume in a safe condition, and the latter that the decedent was charged with that responsibility. There was evidence to support either theory, and said instructions announced the principle of law applicable to either situation.

[13, 14] We can see no error in the following instruction:

> "If a person's own want of ordinary care is the proximate cause of his injury or death, this is contributory negligence on his part, and no damages can be recovered from another person for such injury or death, even though the negligence of such other person may also have been a cause of the injury or death, and therefore if it appears from the evidence in this case that deceased, Marcellus Brown, in walking along said flume, negligently and carelessly (from lack of ordinary care) made a misstep and fell, which fall resulted in his death, and that the proximate cause of his death was due to want of ordinary care on his part, then plaintiff cannot recover in this action and your verdict must be for the defendant."

The contention of appellant as to this instruction is that it ignores the doctrine of "comparative negligence," as provided in what is known as the Roseberry Act of 1911. But that law was repealed by the Workmen's Compensation Act of 1913, and the accident herein occurred after the latter statute became operative. The said Compensation Act does not recognize the doctrine of "comparative negligence." Indeed, that statute provides that the remedy provided therein shall be the exclusive remedy for the securing of damages against an employer for the death of or injuries to the employé, except "that when the injury was caused by the employer's gross negligence or willful misconduct, and such act or failure to act causing such injury was the personal act or failure to act on the part of the employer himself, or if the employer be a partnership on the part of one of the partners, or if a corporation, on the part of an elective officer or officers thereof, and such act or failure to act indicated a willful disregard of the life, limb, or bodily safety of employés, any such injured employé may, at his option, either claim compensation under this act or maintain an action at law for damages." The plaintiff chose the latter alternative, and it is therefore plain that in order to prevail he must have shown "gross negligence" and "willful disregard of the life, limb, or bodily safety of the employé" on the part of an elective officer of the corporation, and we think it equally plain that his action would be defeated by the fact that the accident was due to the contributory negligence of the deceased. It may be added that the instruction is not in conflict with the doctrine of comparative negligence, since it contemplates a condition wherein there could be no slight negligence on the part of the deceased.

[15] The only objection made to instruction No. 32 is that there is no evidence in the record that there were boards or a board on top of the flume at the particular place where Mr. Brown fell. Appellant is mistaken in that contention. It is true no one could swear positively that such was the case, but it is a fair inference from the testimony of certain witnesses that the flume was so supplied at that point, and it could not be said that there was no support for the hypothesis suggested by said instruction.

[16] Appellant complains of the action of the court in refusing certain instructions prepared by him. The first of these was properly rejected because it instructed the jury to find for the plaintiff if they believed the flume was not properly supplied with running boards by the superintendent of respondent. It would have nullified the instruction and evidence as to contributory negligence and the asserted condition that the deceased had complete charge of the flume.

The instruction directing the jury that they could not assume that it was the duty of the deceased to provide the runway simply because he was the foreman might well have been given, but it was sufficiently covered by other instructions, particularly the one defining the duty of the "foreman" and also of the "superintendent."

[17] The instruction proposed reciting the duty of the employer was properly refused because requiring a verdict for the plaintiff, regardless of the contributory negligence of decedent. As far as the instruction embodied a correct principle of law, it was covered by the charge given by the court.

[18] There was no error in refusing this instruction:

> "You are instructed that an officer of a corporation has no authority to delegate special powers conferred upon him which involves the exercise of judgment or discretion, unless he is expressly authorized to do so, and the burden of showing such authority is upon the party alleging such delegation."

The said principle, although unobjectionable in some cases, has no application here. The deceased, if he agreed to perform said duty, would be estopped from urging his want of authority as an excuse for his failure to attempt at least to comply with his agreement, and his administrator would be in no better position. Besides, if the superintendent had no power to delegate such authority, the corporation might ratify the act, and it may be further said that the authority in controversy did not involve judgment and discretion, the purchase and placing upon a flume of walking boards being a very simple matter and not requiring any special skill.

The last refusal complained of does not involve prejudicial error. As to the duty of the superintendent, it is covered by the instructions given, and, like some other instructions proposed, it ignored the doctrine of contributory negligence, and, besides, it directed a verdict for the plaintiff if the jury believed that the defendant was chargeable with the want of ordinary care, whereas, as we have seen, it was necessary to show gross negligence.

Another important point made by respondent is that the complaint fails to show that plaintiff was entitled to any relief in this action. The position is taken in view of the peculiar provision of the Workmen's Compensation Act to which we have already referred. There is force in the contention, but we need not consider it, as we are satisfied that for the reasons already stated, the judgment should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

36 Cal. App. 80

PARKINSON v. LANGDON et al.

(Civ. 1661.)

(District Court of Appeal, Third District, California. Jan. 28, 1918.)

1. Landlord and Tenant 🔑331(2)—Breach of Lease—Profits—Statute.

Where plaintiff leased land to defendants, they to plant it to beans and to share the crop with plaintiff in certain proportions for defendants' breach and failure to plant, under Civ. Code, § 3300, providing that for the breach of an obligation arising from contract, the measure of damages is the amount which will compensate the party aggrieved for all the detriment proximately caused, or which, in the ordinary course of things, would be likely to result, plaintiff could recover the profits which would ordinarily and naturally in the usual course of things have been derived from defendants' performance of their contract.

2. Landlord and Tenant 🔑331(6)—Breach of Sublease—Relation of Sublessor to Lessor—Immateriality.

The relation of plaintiff to his lessor was immaterial in plaintiff's action against his own lessees for breach of their contract to plant the land to beans and share the crop.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by J. B. Parkinson against C. H. Langdon and another. From judgment for plaintiff, defendants appeal. Affirmed.

Elliot & Atkinson, of Sacramento, for appellants. White, Miller, Needham & Harber, of Sacramento, for respondent.

CHIPMAN, P. J. It is alleged in the complaint: That on May 29, 1915, plaintiff and defendants entered into a contract of lease whereby defendants as tenants of plaintiff agreed, among other things, to cultivate and farm to beans for the proper cropping season of 1915, and in a good and farmerlike manner certain lands and, among others, a portion described as part of section 8, township 9 north, range 4 east, containing 40 acres, more or less, which was "to be staked out and designated by plaintiff as provided in said contract of lease." That plaintiff, shortly after the execution of said contract, "did stake off and designate the 40 acres of said section 8 to be included in and to be the 40 acres subject to said contract," and that about May 29, 1915, plaintiff put defendants in possession of said 40-acre tract pursuant to said contract. That said 40 acres was fertile land capable of producing profitable crops of beans, and that "a good, abundant, and profitable crop of beans could have been easily grown and produced thereon during the cropping season of 1915, which season extends from about June 1st to September 25th of the year." That plaintiff has duly performed all the conditions and covenants undertaken by him to be performed. That about June 15, 1915, the said contract was by mutual consent of the parties thereto "modified so that it was understood and agreed that plaintiff's share of the bean crop for the season of 1915 to be grown and produced by defendants on said 40 acres in said section 8 should be only 45 per cent. of the crop instead of 50 per cent., as specified in said original agreement, but said original agreement was not in any other respect changed or modified." It is then alleged: That defendants did not plant said 40 acres of land or attempt to plant upon the same any crop of beans or any crop whatever, "and did not at the proper season, or at any time, or at all, till and cultivate said land, or any part thereof, in a good and farmerlike manner, or in any manner whatever, or at all," and did not in any manner prepare said land for the planting and raising of a crop of beans, or any crop, during said season, and did not plant the said land to beans or to any crop whatever, but "allowed the proper time and season for the plowing of said ground and for the planting and sowing of a crop of beans thereon, and for the cultivation of said crop, to go by; and defendants wholly failed, neglected, and refused to cultivate said 40 acres, or to raise, or attempt to raise, and produce any crop whatever thereon." That had defendants "at the proper time and in the proper manner prepared said land for the planting of a crop thereon, and had sown and planted said 40 acres to beans, and had at the proper season and in a good and farmerlike manner tilled and cultivated said crop and otherwise performed the covenants and conditions of said contract to be performed by them, said 40 acres of land would have produced and yielded for the bean-cropping season of 1915 a large, abundant, profitable, bounteous, and valuable crop, and that plaintiff's share thereof, pursuant to the terms of said contract, would have been no less than 450 sacks of beans, of the value of $1,620, in which sum plaintiff has been damaged by defendants because of their failure to perform their contract aforesaid, and by reason of their neglect, failure, and refusal to comply with the conditions thereof, and to plant and cultivate, grow, and harvest a crop of beans on said 40 acres of land pursuant to the terms of said contract."

Among the provisions of said contract of lease, it was provided that the land was to be used for the purpose of raising a crop of beans thereon, and for no other purpose, unless agreed upon between the parties; that the defendants "shall till and cultivate in a good and farmerlike manner all of the said premises which are susceptible of profitable tillage and cultivation, and, in proper season, shall sow and plant the same in the crop above specified, and shall furnish the necessary seed therefor of clean and sound quality, and, in the proper season, shall harvest the said crop, and immediately upon harvesting thereof shall deliver to the owner in the field, and without expense to the owner, except that the owner shall provide sufficient sacks to contain his share of the crops, a full fifty-hundreths (.50) share, quantity and quality considered, of all of the crop harvested on the aforesaid section 8."

In their answer defendants admit the execution of the contract as alleged, with its subsequent modification as alleged, but deny that the plaintiffs staked off the 40 acres as alleged in the complaint, and deny that it is rich and fertile land capable of profitable tillage and cultivation for the production of profitable or any crops of beans, and deny that a profitable crop of beans could have been easily or otherwise grown on said land during the cropping season of 1915 or otherwise; deny that plaintiff put the defendants in possession of the said lands; admit as to said 40 acres the defendants did not plant or raise or grow or cultivate a crop of beans or any crops thereon during the cropping season of 1915, and allege that "without fault on their part, by reason of the overflowed and flooded condition of said land at all times during the proper season for the cultivation of the same in 1915, it was impossible to profitably or otherwise cultivate said 40 acres of land to beans or to put in or grow any crops thereon during the cropping season of 1915."

The cause was tried by the court without a jury. The court found, among other things: "That said 40 acres was and is land capable and susceptible of profitable tillage and cultivation, and capable of producing a profitable crop of beans, and that a profitable crop of beans could have been grown and produced thereon during the cropping season of 1915 by compliance with the terms of said lease. That plaintiff duly performed and complied with all the conditions and covenants of the said contract of lease on his part to be performed and complied with." That defendants did not, nor did either of them, plant or attempt to plant or grow or cultivate a crop of beans on said land during the season of 1915, and no crop was produced thereon during that season. "That plaintiff has not received, nor will he receive, any rental or rent whatever from said land for the bean-cropping season of 1915. The court further finds that if defendants had farmed in a good and farmerlike manner the land above described, and had sown and planted the said 40 acres to beans, and had at the proper time tilled and cultivated said crops, said 40 acres would have produced and yielded for the bean-cropping season of 1915 a profitable crop of beans," and that said land "would have produced a valuable and profitable crop of beans of an average yield of not less than ten 100-pound sacks per acre," and would have brought 3½ cents per pound delivered in the field, and the plaintiff's share thereof would have been $630 at the time for delivery thereof to plaintiff.

Judgment was entered accordingly in favor of plaintiff for the sum of $630, with interest and costs. Defendants appeal from the judgment, and bring the record here under the alternative method.

Appellants challenge the sufficiency of the evidence to sustain the findings as to the quantity of beans the land would have produced had it been cultivated in accordance with the terms of said lease. Plaintiff's evidence consisted, in part, of the testimony of witnesses who were familiar with bean growing as a branch of farming and with this particular 40 acres of land; its adaptability to raising beans; its condition in respect of moisture, and other factors affecting the practicability of planting beans in time to mature a crop during the season of 1915. They also testified that they were acquainted with the land immediately adjoining the land in question and in the immediate neighborhood of like quality surrounded with like conditions, and the yield of beans grown on such land with proper cultivation during the cropping season of 1915. They also testified to the quantity of beans the land in question would have produced in 1915 had it been properly prepared, planted to beans, and cared for in a farmerlike manner. So far as we can discover, the testimony went to every fact necessary to show that this 40-acre tract was good bean land; that it could have been planted to beans in time to have matured the crop, and would have produced the quantity found by the court had defendants complied with the terms of their contract. It is true there was conflict in respect of some of the material facts, but the trial court resolved whatever doubt may have been created by such conflict, and with its decision on the facts we cannot interfere.

Appellants contend that the court adopted an erroneous measure of damages, and should have limited the damage to the rental value of the land, thus presenting the pivotal question in the case. Section 3300 of the Civil Code provides that:

> "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom."

No hard and fast rule can be formulated by which it may be determined with invariable certainty to what cases or class of cases the Code section applies, and under what circumstances it may be said that the detriment caused by the breach of a contract was "proximately caused" by the breach, or was of such a character as "in the ordinary course of things would be likely to result therefrom." The application of the rule depends much upon the facts in the given case. In the case of Friend & Terry L. Co. v. Miller, 67 Cal. 464, 8 Pac. 40, plaintiff sued to recover for lumber sold and delivered to defendant by plaintiff. Defendant introduced evidence tending to show that he contracted with plaintiff for certain piles and lumber to be used in pursuance of a contract with the drainage commissioners, which he had agreed to finish within a given time, all of which was known to plaintiff, who agreed to furnish the same when required. Defendant then offered to prove that plaintiff failed to furnish the piles in time, whereby he was delayed in the completion of his contract and failed to realize the money therefor, which he would otherwise have received from the state through the drainage commission. Said the court:

> "By the delay of the latter in delivering the piles defendant suffered loss, was compelled to pay for the use of a pile driver, lost his time, and sustained other expenses which he proved, and as the verdict was for less by $700 than the amount claimed and proved by plaintiff, we may reasonably infer defendant was allowed a deduction on account of the damages thus sustained. He sought, but was prevented from proving, the loss he sustained by failure to collect the money due him from the state."

The court held that the failure of plaintiff to deliver the piles in time was the remote cause of defendant's failure to receive payment from the state, and the reason for so holding was thus stated:

> "This is not a loss 'which in the ordinary course of things would be likely to result' from a failure to deliver under the contract. It was damages which could not well have been contemplated by the parties when they entered into the contract."

But as to the other damages claimed, the statute afforded a rule of compensation. In further explanation, the court said:

> "The failure of defendant to secure compensation from the state was a result brought about by the interposition of other agencies, dependent upon independent causes over which plaintiff and defendant had no control, and could not have contemplated. It was a loss which * * * was too remote to have been contemplated."

This decision had its counterpart, as was pointed out in the opinion, in a case cited at section 254 of Field on Damages, where the contract was to furnish a threshing machine to a farmer within three weeks, knowing it was needed at the time agreed, and after reasonable efforts to secure the crop, the plaintiff's wheat was injured by the necessary delay in saving it and in consequence of a rain; the farmer sustained further damage from a fall in the market price of wheat before it could be kiln-dried and got ready for sale. He was held entitled to recover the loss by the injury to the wheat, but not to the change in the market, as the former might well have been in the contemplation of the parties, but not the latter.

The rule is thus stated in 8 Ruling Case Law, 505:

> "As in the case of damages for breach of contract generally, a recovery may be had for loss of profits when, and only when, the loss is such as might naturally be expected to follow the breach. Profits which would ordinarily, naturally, and in the usual course of things have been derived from performance, and the loss of which flows directly and naturally from the breach of the contract itself, may be recovered, since they are naturally incident to the contract, and may be fairly supposed to have been within the contemplation of the parties when it was made."

The line of distinction between profits which are remote, consequential, or not within the contemplation of the parties, and those which are proximate and absolute and certain, and within the contemplation of the parties, "seems to rest in the question whether they are to arise directly out of the contract in question or its subject-matter, and to constitute the immediate fruits of the contract, or whether they are to result from collateral engagements or enterprises. Where the profit to be made was the inducement to the contract, such profit is the measure of damages. So a recovery may be had for the loss of profits which are the direct and immediate fruits of the contract itself. Such profits are not to be regarded as consequential, remote, or speculative in character, but are regarded as part and parcel of the contract itself, entering into and constituting a portion of its very elements, something stipulated for, and the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation." Id.

[1] The foregoing is about as satisfactory an explanation of the philosophy of the rule as we can find in the books, and, it seems to us, furnishes a safe guide to a solution of the question here. The contract plainly shows that the land was to be planted to a specific crop, and none other. Both parties understood this and contracted with reference to that understanding. Plaintiff's compensation was to be measured by an agreed per centum of this specific crop, and not otherwise. Given, land suitable for growing beans; condition of soil, climate, moisture, etc., favorable to the production of a profitable crop, and nothing supervening to prevent such result except the failure of the contracting party to do what his contract required of him, it seems to us we have a clear case where the loss to the lessor "is such as might naturally be expected to follow from the breach," and that he would be entitled to the "profits which would ordinarily and naturally, and in the usual course of things, have been derived from performance," and furnishes an instance where "the loss flows directly and naturally from the breach of the contract itself," and is recoverable, since the loss is "naturally incident to the contract, and may be fairly supposed to have been within the contemplation of the parties when it was made."

In Rice v. Whitmore, 74 Cal. 619, 16 Pac. 501, 5 Am. St. Rep. 479, defendant had leased certain land to plaintiff on which the latter was to sow grain, paying one-fourth of the grain raised as rental. Defendant failed to give plaintiff possession of the land, and plaintiff recovered the value of a crop that might have been raised on the land by an average farmer during the term, less the cost of raising it. In the case of

Allen v. Los Molinos Water Co., 25 Cal. App. 208, 143 Pac. 253, defendant was under contract to furnish plaintiff water for irrigating his crop of potatoes. Defendant failed to keep its contract, and plaintiff lost his crop. It was held that under section 3300, Civil Code, the measure of damages was the market value of the potatoes, at the selling place, which would have been produced had defendant kept its contract, less the expense of growing and marketing the crop. Similarly held in a similar case—Chambers v. Belmore Land & Water Co., 33 Cal. App. 78, 164 Pac. 404, applying the rule as stated in Teller v. Bay, 151 Cal. 209, 90 Pac. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779. A somewhat analogous case is Holt Manufacturing Co. v. Thornton, 136 Cal. 232, 68 Pac. 708. There the contract was to commence harvesting the wheat on the 5th of July, whereas the plaintiff did not begin the work until the 15th. Plaintiff sued for services, and defendant counterclaimed that by reason of plaintiff's delay in commencing the work the wheat was shelled out and lost to defendant. Plaintiff claimed that the loss was too remote and speculative to be considered as the result of its breach. It was held otherwise. Said the court:

> "This loss was not speculative or remote; and although it was, no doubt, somewhat difficult to fix the amount of the loss with great accuracy, still there was ample evidence to show an amount of damage exceeding that found by the jury. It has often been held that damages may be recovered for the destruction of merely immature growing crops, although there was no absolute certainty that they would ever mature; for 'he who breaks the contract cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of damages' "—citing Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62.

[2] Error is alleged in refusing to allow defendants to show in the cross-examination of plaintiff, when called as a witness, that plaintiff was a subtenant of the owner of the land, and was released by his lessor from payment of rent. The relation of plaintiff to his lessor was immaterial. Holt Manufacturing Co. v. Thornton, supra.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

36 Cal. App. 93

PEOPLE v. JACOBS. (Cr. 411.)

(District Court of Appeal, Third District, California. Jan. 31, 1918. Rehearing Denied by Supreme Court, April 1, 1918.)

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Albert Jacobs was convicted of the infamous crime against nature, and appeals. Affirmed.

Charles E. Davis, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. The whole record in this case has been examined with care, and it appears that no error whatever was committed. The offense of the infamous crime against nature was charged in the information with legal sufficiency, the trial was fairly conducted in every way, the instructions to the jury were complete and accurate, and the testimony as to guilt was overwhelming and conclusive; there being two unimpeached witnesses to the overt act and no adverse showing being made by the defendant.

The judgment and the order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(177 Cal. 715)

WILLIAMSON v. INDUSTRIAL ACCIDENT COMMISSION. (S. F. 8471.)

(Supreme Court of California. March 12, 1918.)

MASTER AND SERVANT ⟹375(1)—WORKMEN'S COMPENSATION—ACTS BEYOND SCOPE OF EMPLOYMENT.

Where a woman employed as chambermaid and assistant in rooming hotel, when the janitor was sick, and without her employer's knowledge or consent, went into a light well to clean it, fell, and was killed, her kin were entitled to no compensation, since she acted beyond the scope of her employment, in attempting duties which only a young and active man could perform.

In Bank. Proceeding by Martha M. Landis and W. S. Prosser, as guardian ad litem of Rachel Love Prosser, for compensation for the death of Harriet Anne Prosser, opposed by Mary E. Williamson, employer. To review award of compensation, the employer petitions for writ of review. Award annulled.

Eugene F. Conlin, of San Francisco, for petitioner. Chris M. Bradley, of San Francisco, for respondent.

PER CURIAM. Application for a writ of review. The petitioner was the proprietress of a rooming house known as Hotel Merritt, in Oakland, Cal., and had in her employ as a chambermaid Mrs. Harriet Anne Prosser, on and prior to October 3, 1916. Mrs. Prosser was married, but had been in the employ of the petitioner for about three months prior to the above date, occupying one of the rooms on the premises; her husband in the meantime being away in Oregon looking for work. The hotel was small and was kept in order by the proprietress, Mrs. Prosser, and a janitor. The general duties of Mrs. Prosser were to make the beds, sweep, dust, and keep tidy the bedrooms. At times she answered the telephone, and occasionally assisted the clerk. The janitor's duties were to take care of the halls, general toilets, and bathrooms, and generally to keep in order the exterior parts of the premises. There was a light well attached to the premises upon which the windows of some of the hotel rooms opened, and which also furnished light to other tenants of the building. The janitor of the hotel was accustomed to keep the light well in order and clear of litter, although there was no provision in the lease requiring this to be done by the lessee. For some time prior to the accident which cost Mrs. Prosser her life, the janitor had been ill and unable to fully attend to his duties in this regard. Litter had gathered in the light well, which the janitor had been instructed to clear away, but which he had been unable to do because of

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

his illness. One day shortly before the accident, the owner of the building, being there in the absence of the proprietress of the hotel, noticed the litter in the light well, and suggested to Mrs. Prosser that it would look better cleaned up, and she promised him that she would clean it. Two or three days later, in the absence of the proprietress, and without any knowledge or sanction on her part, Mrs. Prosser told the clerk she was going to clean the light well. He told her that it was not her work and advised her not to do it. She, however, persisted, saying that she had promised the owner, and climbed out of one of the windows for that purpose, when she fell a distance of about nine feet to the bottom of the light well, receiving injuries from which she died.

The application for compensation before the commission was made by Mrs. Martha M. Landis, a sister of Mrs. Prosser, and by W. S. Prosser, the husband of the deceased, as guardian ad litem of Rachel Love Prosser, a minor child. Rachel Love Prosser was not related to the decedent or her husband, but was an illegitimate child of one who had been a friend and inmate of the home of the Prossers when they lived in Pittsburgh, Pa., some five years previously. The child had been taken by the Prossers at its birth, had been given their name and nurture from that time forth as fully as though it was their own child, although they had not gone through the form of adoption. It had lived in their home while they had a home, but at the time of the injury and death of Mrs. Prosser, and for some time prior thereto had been cared for in the home of Mrs. Prosser's sister, Mrs. Martha M. Landis, in Sutter county, Cal., who was being paid by Mrs. Prosser from $10 to $15 per month for her temporary care of the child. The husband of Mrs. Prosser also contributed some small amounts irregularly for the same purpose. The parents of the child were known, but did not live in California, and never in any way assisted in the care of the child. Upon the showing of the foregoing facts, the commission made an award in favor of the applicant, whereby Mrs. Martha M. Landis was given the sum of $52 to repay her for the funeral expenses of the deceased, and was further awarded a total sum of $1,589.45, as trustee for Rachel Love Prosser, payable in weekly installments until the whole of said sum should be paid. Upon petition for a rehearing the commission affirmed this award, whereupon the petitioner herein applied to this court for a writ of review.

The first question presented for our consideration is as to whether the injury and death of Mrs. Prosser was by accident arising out of and in the course of her employment. The immediate act which she was attempting to do at the time of her fall and injury was not one which the emergencies of the situation required to be done at once. On the other hand, it was, as the record, and especially the exhibits, abundantly show, a dangerous act and one which ordinarily a woman would not be expected to undertake at all, even if the doing of it lay within the range of her general duties, nor could it be expected that an employer would reasonably command or contemplate the doing of such an act by a woman employed in the capacity of a chambermaid. It is conceded by the respondent herein that in attempting to do said act the decedent did step aside from the sphere of her specific employment and was thus beyond its scope, but it is contended that since the act which she was undertaking to do was undertaken out of loyalty to the interests of her employer and for the latter's benefit, the statute should be construed so liberally as to allow compensation for the injury sustained in attempting to perform it. We think, however, it would be an unwarranted extension of the statute to give it application to acts done without the knowledge or consent of the employer, which, however commendable from the viewpoint of loyalty to one's employer, are not only outside of the employé's specific employment and duty, but which are in themselves of such a hazardous character as that the employé ought not to be reasonably expected or required to do them, except as a matter of immediate necessity or emergency, even though they might be within the scope of the employment.

This is such an identical case. Even if the deceased had been the janitress in charge of the building generally she could not reasonably be expected to do the thing she was essaying to do, for it was peculiarly the work of a man, and it might even be said of a young and active man, to climb out of a window, find a precarious footing upon a narrow ledge between three or four feet below it, and thence descend by a lean-to step-ladder to the bottom of a light well nearly nine feet below the point of exit from the window. We think the attempted doing of this act by the deceased, admittedly outside the range of her designated duties, was also so clearly beyond the scope of her employment as to require no further discussion. We are cited to cases which it is insisted support both sides of the foregoing contention. A review of these would be unprofitable, since none of them present an approximately parallel situation, and since also, in proceedings of this character, each case as a rule, at least in the formative period of the law relating to industrial accident cases, must be decided upon its own peculiar state of facts. The foregoing views render unnecessary a consideration of the other questions presented upon this proceeding.

It is ordered that the petition be upheld, and the award of the commission be, and the same is hereby, annulled.

177 Cal. 719

L. E. WHITE LUMBER CO. v. MENDOCINO COUNTY. (S. F. 7875.)

(Supreme Court of California. March 12, 1918.)

1. Pleading 🔑8(11)—Illegality of Taxes—Allegation—Sufficiency.

In suit for recovery of taxes paid by mistake, complaint *held* radically defective in failing to allege sufficiently that the assessments were illegal, the mere conclusion that plaintiff has no interest, and that the United States has complete title to the land, being insufficient to contradict the allegations showing an assessable interest.

2. Taxation 🔑62—Taxable Property and Land.

Taxable property in land is not limited to the title in fee, but may include any usufructuary interest, or even a mere right of possession, it not being necessary that an assessable interest be a complete equitable title.

3. Taxation 🔑57 — Property Taxable — Title in Dispute.

That title to land is in dispute does not exempt the land or interests therein from taxation.

Department 2. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by the L. E. White Lumber Company against the County of Mendocino. Judgment for defendant, and plaintiff appeals. Affirmed.

M. H. Iversen and Preston & Preston, all of Ukiah, for appellant. Hale McCowen, Jr., Dist. Atty., of Ukiah, for respondent.

MELVIN, J. Judgment was given against plaintiff after the court had sustained the demurrer to its second amended complaint without leave to amend.

The suit was one for the return of taxes paid during a number of years by plaintiff to the proper authorities of the county of Mendocino. By the plaintiff's pleading it appears that F. A. Hyde and F. A. Hyde & Co., prior to May 8, 1903, selected certain enumerated lands in Mendocino county with forest lieu base under the act of Congress of June 3, 1897, and proper certificates for the lands so selected were issued by the government of the United States; that the claim of F. A. Hyde and F. A. Hyde & Co. to a portion of said land was canceled by order of the Commissioner of the General Land Office of the United States, and homestead entries were allowed on said portion by persons other than the original selectors and the plaintiff; that the parts of the lands included in the original selection, certificates to which were not canceled by the Commissioner's order, have been involved in litigation ever since the original selection was made; that plaintiff acquired, and since the 8th of May, 1903, has held, an undivided two-thirds interest in all of the title of every sort acquired by the original selectors; and that from and including the year 1904 to and including the year 1910 plaintiff was assessed for and paid taxes on an undivided two-thirds interest in the lands. These payments, as it is averred further, were made "under the erroneous and mistaken belief that the said certificates so issued by the United States for the said lands conveyed the equitable title to the plaintiff, and that such lands were then and there taxable to the plaintiff." Plaintiff also denied actual or constructive possession of the lands or any part of them at any time. The pleading further recites that on February 1, 1912, plaintiff filed with the clerk of the supervisors of Mendocino county a verified claim for the refunding of said taxes paid for the fiscal years 1904 to 1910, amounting to $2,062.21; that of this amount the sum of $1,022.36 was paid within three years prior to the filing of plaintiff's claim, and that the board of supervisors of Mendocino county allowed on plaintiff's claim only $209.57 for taxes for the fiscal years 1908, 1909, and 1910 on the lands as to which certificates of selection had been canceled by the Commissioner. By averment of a second cause of action plaintiff set up a payment of $244.40 for the first installment of taxes for the fiscal year 1911; a similar demand for repayment; and an allowance by the board of supervisors for $38.80 for the same reason which caused the other allowance. Both causes of action set out the fact that plaintiff had applied to the proper authorities of the United States for acceptance and approval of the selections excepting the lands regarding which the certificate had been annulled but (to quote directly from the pleading) "the said United States has refused and now refuses to approve the said selections on any of said lands or to issue patents therefor, on the ground that the said selections are in litigation, and it cannot be determined by the said authorities whether or not they will finally approve said selections or cancel the same."

[1] The demurerr of defendant pleaded insufficiency of facts averred and the bar of section 3804 of the Political Code. Undoubtedly the bar of the statute was effective against all except the taxes paid within three years of the filing of the verified claim with the board of supervisors. Section 3804, Pol. Code. But we need not discuss the effect of this limitation because the complaint is radically defective in its falure to allege sufficiently that the assessments were illegal. It is true that the pleading set forth a statement that plaintiff has never been in the actual or constructive possession of the lands, and that the property belongs to the United States of America. It also contains averments that the land is in litigation, and that the proper authorities refused to approve the selections or to issue patents for any of the lands. But this is not equivalent to a statement of facts showing that plaintiff is without assessable interest in the property.

[2] Undoubtedly the lands of the govern-

ment are exempt from the burdens of taxation, and while it is true that the pleading before us contains an averment of a conclusion that the general government owns the property it also sets forth the issuance by the government of "proper certificates" for the selected lands to plaintiff's predecessors. The sort of property in land which is taxable under our laws is not limited to the title in fee. It may include any usufructuary interest or even a mere right of possession. State of California v. Moore, 12 Cal. 56. An assessable interest need not be a complete equitable title. By the act of June 4, 1897, under which the selections were made by plaintiff's predecessors the United States government made a continuing offer to exchange lands outside of a forest reservation for those held by settlers within a reservation. The exchange could be initiated by the surrender to the land office on the part of the settler of his patent or deed to the base land and the selection of realty in lieu of that relinquished. Roughton v. Knight, 156 Cal. 123, 103 Pac. 844. Respondent's theory is that in all of the selections made by appellant in which it met the terms of the offer to trade it acquired an equitable interest subject to assessment. In this behalf respondent quotes as follows from Witherspoon v. Duncan, 71 U. S. (4 Wall.) 210–218, 18 L. Ed. 339:

> "The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who has the equitable title."

We quite agree with respondent that under this authority appellant has pleaded an assessable interest, and has failed to contradict such allegation by the mere conclusion set forth in the complaint that it has no interest, and that the United States has complete title to the assessed property.

The case of Witherspoon v. Duncan, cited above, is in many of its aspects similar to the one at bar. In that case the Supreme Court of the United States was considering an effort made to set aside a tax title arising from a failure to pay taxes levied by the state of Arkansas after a certificate of entry had been issued by the Land Office, but before a patent had been obtained. The Supreme Court held that after a certificate of entry had been obtained the lands could in no just sense be regarded as public because if they were subject to sale the government had no power to revoke the entry and withhold the patent. In the opinion of the court delivered by Mr. Justice Davis the following language was used:

> "As the patent emanates directly from the President, it necessarily happens that years elapse, before, in the regular course of business in the General Land Office, it can issue; and if the right to tax was in abeyance during this time, it would work a great hardship to the state; for the purchaser, as soon as he gets his certificate of entry, is protected in his proprietary interest, can take possession, and make valuable and lasting improvements, which it would be difficult to separate from the freehold for the purpose of taxation. If it was the purpose of the acts of Congress, by which the new states were admitted into the Union, to prohibit taxation until the patent was granted, the national authority would never have suffered, without questioning it, the universal exercise of the power to tax on the basis of the original entry."

Summing up, the learned justice said:

> "The power to tax exists as soon as the ownership is changed, and this is effected when the entry is made on the terms and in the modes allowed by law."

[3] The complaint contains the allegation that the lands are and ever since the selections of its predecessors have been in litigation, but there is no allegation regarding the details nor the merits of the controversy or controversies involved. The mere fact that the title is in dispute does not exempt the land from taxation. Herrick v. Sargent, 140 Iowa, 590, 117 N. W. 751, 132 Am. St. Rep. 281; Northern Pacific Railroad Co. v. Patterson, 154 U. S. 130–133, 14 Sup. Ct. 977, 978 (38 L. Ed. 934). In the latter case the rule was thus stated by Mr. Chief Justice Fuller, who delivered the court's opinion:

> "If the legal or equitable title to the lands or any of them was in the plaintiff, then it was liable for the taxes on all or some of them, and the mere fact that the title might be in controversy would not appear in itself to furnish sufficient reason why plaintiff should not determine whether the lands or some of them were worth paying taxes on or not."

These authorities sufficiently support the ruling of the court in sustaining the demurrer. It is true that according to the authority of Durham v. Hussman, 88 Iowa, 29, 55 N. W. 11, which on appeal is reported in 165 U. S., at page 144, 17 Sup. Ct. 253, 41 L. Ed. 664, an intending purchaser from the government does not acquire an equitable interest in property until he has done all that is required of him. But in the present case there is no pleading to the effect that the holder of the certificate issued by the Land Office has not complied with all the legal requirements entitling it to a patent. In Durham v. Hussman it appeared that the Commissioner of the Land Office had actually suspended all proceedings under the entry, and had canceled the bounty land warrant under which the location had been made before the levy of the state tax upon which the unsuccessful litigant sought to found his alleged tax title.

Appellant cites Allen v. Pedro, 136 Cal. 1, 68 Pac. 99, Roberts v. Gebhart, 104 Cal. 67, 37 Pac. 782, and Slade v. County of Butte, 14 Cal. App. 453, 112 Pac. 485, to support the contention that until the Secretary of the Interior approves the selection, the legal and equitable title are both in the United States and are not taxable. But it is to be remembered that in each of these cases the certificates of purchase were issued by the state of California for lands which belonged to the United States, but which had never been confirmed to the state. In the case at bar the certificates had been issued by the representative of the general government, the holder of the fee.

The case of Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, 23 Sup. Ct. 692, 47 L. Ed. 1064, is not in point to establish the asserted principle that no taxable title nor equity arises until the application of the selector of lieu lands has been confirmed by the Secretary of the Interior. It was merely held in that case that the complainant did not have a complete equitable title which would entitle it to maintain an action enjoining another from interfering with its possession of the land involved.

Our conclusion, based upon the foregoing discussion, renders unnecessary any analysis of the other questions raised in the briefs. The judgment is affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

177 Cal. 719

SPOTTON v. SUPERIOR COURT et al.
(S. F. 8674.)

(Supreme Court of California. March 13, 1918.)

1. Appeal and Error 🔑345(1)—Mandamus 🔑10—Mandate to Compel Settlement of Bill of Exceptions.

Where judgment was entered December 16th and order denying defendant's motion for a new trial entered February 10th following, an appeal, taken March 13th, from final judgment came too late, in view of Code Civ. Proc. § 939, requiring appeal within 30 days after entry of order denying a motion for new trial, and mandate will not issue to compel settlement of bill of exceptions to be used on such appeal, as such writ will not issue to enforce a mere abstract right which would be of no benefit to applicant.

2. Appeal and Error 🔑346(1)—Extension of Time for Appeal—Pendency of Motion.

The pendency of a motion under Code Civ. Proc. §§ 663, 663a, for setting aside judgment and entering another and different judgment on findings of fact would not extend the time for appeal from judgment.

In Bank. Application for writ of mandate by E. K. Spotton against the Superior Court, etc., to compel settlement of a bill of exceptions to be used on appeal from final judgment. Denied.

C. R. Baender, of San Francisco, for petitioner.

PER CURIAM. [1, 2] This is an application for a writ of mandate to compel the settlement of a bill of exceptions to be used on appeal from final judgment. Unless there is an appeal on which the bill of exceptions can be used, mandate will not issue, for such a writ will not issue where it would be of no benefit to the applicant, or to enforce a mere abstract right, unattended by any substantial benefit to the petitioner. Gay v. Torrance, 145 Cal. 147, 78 Pac. 540. The only appeal as to which it is suggested that the bill of exceptions could be used is an alleged appeal from a final judgment. The learned judge of the trial court concluded that this attempted appeal was not taken within the time allowed by law, and we are satisfied that he was right in so concluding. The final judgment was entered December 16, 1916. An order denying petitioner's motion for a new trial was entered February 10, 1917. The time for appeal from the judgment was limited to 30 days after entry in the trial court of such order of denial. Section 939, Code Civ. Proc. The appeal was not taken until March 13, 1917, which was one day too late. Petitioner's claim is that the time was further extended by the pendency of a motion made under sections 663 and 663a of the Code of Civil Procedure for the setting aside of the judgment and the entry of another and different judgment on the findings of fact. This motion was not decided until some time in March, 1917. Such a motion is not a proceeding on motion for new trial, and the pendency of such a motion is altogether immaterial in determining the time within which an appeal must be taken. That question is determined in clear and unambiguous terms by the provisions of section 939 of the Code of Civil Procedure, and the proceeding on motion for new trial therein referred to is the proceeding covered by sections 656 to 660 of the Code of Civil Procedure. Our law gives a separate appeal from an order made by the court on the motion referred to in sections 663 and 663a of the Code of Civil Procedure.

The application for a writ of mandate is denied.

177 Cal. 721

Ex parte HORR. (Cr. 2148.)

(Supreme Court of California. March 14, 1918.)

1. Criminal Law 🔑1011—Habeas Corpus 🔑30(1)—Certiorari—Grounds—Errors.

Any error in refusing transfer to another department of the court for bias and prejudice of the judge is not a matter going to the court's jurisdiction, so as to allow its consideration on application for writ of habeas corpus or certiorari.

2. Criminal Law 🔑1011—Habeas Corpus 🔑25(1) — Certiorari — Grounds — Insufficient Evidence.

That evidence was insufficient to prove the charge is not available on application for writ of habeas corpus or certiorari.

In Bank. Application by Alexander Horr for writs of habeas corpus and certiorari. Denied.

Charlotte F. Jones, of Seattle, Wash., for petitioner.

PER CURIAM. In our opinion the petition does not show any good ground for the issuance of either a writ of habeas corpus or a writ of certiorari. To our minds the ordinance of the city and county of San Francisco here involved is not violative of any provision of either state or federal Constitution and is a valid enactment.

[1, 2] The complaint in the police court stated facts sufficiently showing a public offense in view of the provisions of said ordinance. The claim that the police court erred in refusing to grant a transfer to another department of that court because of the alleged bias and prejudice of the police judge is not a matter going to the jurisdiction of the court and cannot be considered on this application. The claim that the evidence given on the trial was not sufficient to prove the charge is also a matter not available to petitioner on such an application as this, and the same appears to be true as to all other claims made in support of the application.

The application is denied.

177 Cal. 697

VEREIN et ux. v. FREY. (L. A. 4174.)

(Supreme Court of California. March 12, 1918.)

1. PRINCIPAL AND AGENT 🔑23(1)—EVIDENCE OF RELATION—SUFFICIENCY.

In action to cancel contract for loan, evidence *held* to support finding that person negotiating it was agent of plaintiffs, and not defendant.

2. TRIAL 🔑395(1)—FINDINGS—RESPONSE TO ISSUES.

In action to cancel contract for loan procured through an agent, a finding that he was plaintiff's agent was equivalent to finding that he was not defendant's agent.

Department 2. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by A. Verein and wife against Charles Frey. From a judgment for defendant, and order denying new trial, plaintiffs appeal. Affirmed.

Bischoff & Thompson, of Escondido, for appellants. Theron Stevens and J. R. Gilliland, both of San Diego, for respondent.

MELVIN, J. Plaintiffs appeal from a judgment and from an order denying their motion for a new trial.

There is very little difference between the parties to the litigation regarding the facts. Plaintiffs applied to one Engelman, a loan agent, for money to erect a house on their land. The application was in writing and contained, among other things, the following language:

> "You are hereby authorized to procure this loan from any person or company and apply so much of the proceeds of said loan as is needed to remove any existing incumbrances, and to pay for the certificate of title, recording fees, insurance, or any necessary expenses in closing the loan."

Thereafter Engelman arranged with Charles Frey to advance $1,200 on a note for $1,250, supported by a mortgage. Such a note and mortgage were executed by plaintiffs, delivered to Engelman and by him transmitted to Frey, and pursuant to agreement $600 was then paid to Engelman. Subsequently the balance of the $1,200, in various sums as Engelman reported the need for funds to pay bills due on the house under construction on the premises, was paid. Plaintiffs asserted that they had received only $500, which they offered to restore, and they asked for a cancellation of their contract with defendant. The court decided that the payment by the defendant of the several sums which aggregate $1,200 to P. J. Engelman constituted a payment to the plaintiffs of the full consideration for the execution of the note and mortgage.

[1] Plaintiffs attack the finding that in all matters relating to the loan and receiving payment thereon Engelman acted as the duly authorized agent of plaintiffs. There can be no doubt of the correctness of this finding. In addition to the writing quoted above, there was testimony on the part of the plaintiff A. Verein that he never saw defendant during the progress of the building and that he knew Engelman was handling the money. True, he says, he objected to that arrangement, yet confessedly the $500, for repayment of which he admits himself bound, was paid by Engelman in settling bills of those who had performed labor and furnished materials for the building on the land of plaintiffs. Not only the writing, but the entire course of conduct on the part of Verein supported the court's finding and conclusion regarding Engelman's agency.

[2] Complaint is made by appellants that there was no finding by the court responsive to the evidence tending to show that Engelman was the agent of Frey. No such issue was raised by the pleading, but, if it had been raised, no finding on that matter would have been necessary, because the court found on evidence duly supporting such finding that Engelman was the agent of plaintiffs—an equivalent to a finding that he was not Frey's agent.

The judgment and order are affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

(36 Cal. App. 44)

PANTER v. NATIONAL SURETY CO.

(Civ. 2111.)

(District Court of Appeal, First District, California. Jan. 25, 1918. Rehearing Denied by Supreme Court March 25, 1918.)

1. PLEADING 🔑129(2)—ADMISSION — FAILURE TO DENY.

In an action on a surety company's bond executed to protect plaintiff against the damages resulting from an injunction which had been issued in a prior action against him, defendant's failure to deny the allegation that the bond was such an undertaking was an admission that it was given in consideration of a pre-existing injunction, and such fact need not be further proved or found.

2. PLEADING 🔑310—MATTERS OF SUBSTANCE—NECESSITY TO ALLEGE—EXHIBIT.

Recital of the consideration in the bond in suit, though the bond was attached to and made part of the complaint, did not, as matter of pleading, control the specific allegations of the complaint as to the actual consideration for the bond, since matters of substance must be alleged directly, not by way of recital or reference, much less by exhibits merely attached to the pleading.

3. PLEADING 🔑406(7) — ESSENTIAL ALLEGATIONS—RECITALS OF EXHIBIT.

In the absence of a special demurrer for uncertainty, direct and essential allegations in a complaint will not be modified, controlled, or defeated by the recitals of an instrument attached to the complaint.

4. INJUNCTION 🔑252(4) — INTEREST—EXPENSES IN SUIT—STATUTE.

Under Civ. Code, § 3287, providing that every person entitled to recover damages certain or capable of being made certain by calculation, etc., is entitled to recover interest from the day the right to recover is vested in him, in an action on a bond to secure plaintiff against damages resulting from an injunction issued in a prior action against him, judgment for plaintiff properly provided for interest on allowances for counsel fees and expenses incidental and necessary to plaintiff's successful endeavor to secure dissolution of the injunction; the several items of expense not being uncertain or incapable of being made certain by calculation.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Frank Panter against the National Surety Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Metson, Drew & McKenzie and R. G. Hudson, all of San Francisco, for appellant. Morrison, Dunne & Brobeck, of San Francisco (R. L. McWilliams, of Burlingame, of counsel), for respondent.

LENNON, P. J. This is an appeal from a judgment in favor of plaintiff in an action to recover damages upon a bond given by the defendant National Surety Company.

The facts of the case briefly stated are these: On December 21, 1910, a prior action was instituted in the superior court of Mendocino county by one Jacobs against Frank Panter, the plaintiff here, and others, in which action, on the said 21st day of December, 1910, the court issued an order of injunction, restraining the defendants there from the commission of certain acts, and prohibiting the Crocker National Bank from paying or crediting to the account of Frank Panter, the plaintiff here, any moneys or stock then in its hands or thereafter to be received by virtue of a certain contract. Thereafter, on January 11, 1911, the defendant National Surety Company executed its undertaking in the sum of $2,500, which purported to be obligated to protect the plaintiff here from any damages resulting to him by reason of the issuance of an injunction in that action. After the service of the injunction on the bank, Panter demanded of it payment to him of the sum of $35,544.57, the amount which it had in its possession credited to his account. In compliance with the writ the bank refused payment. The cause was transferred to the superior court of Shasta county, and the injunction of December 21, 1910, was there dissolved on April 4, 1911.

In the present action upon the bond, judgment was rendered and entered for plaintiff Frank Panter in the sum of $1,576.05, being $750 paid to counsel for securing a dissolution of the injunction, $252.43 interest on that sum from date of its payment to January 27, 1916, at 7 per cent., $36.20 expenses of Panter for two trips necessary and incidental to the securing of the dissolution of the writ, and $12.19 interest thereon, and the sum of $525.23 as the reasonable value of the use of the sum of $32,544.57 from January 12, 1911, to April 4, 1911.

The principal point presented upon this appeal is that the bond in suit was without consideration. This contention is based on recitals in the bond, which was attached to and made a part of the plaintiff's amended complaint. The recitals referred to are that:

> "Whereas the above-named plaintiff had commenced or is about to commence an action * * * against the above-named defendants, and is about to apply for an injunction in said action against said defendants: * * * Now, therefore, the undersigned, National Surety Company, a corporation, * * * in consideration of the premises, and of the issuing of said injunction, does hereby undertake in the sum of $2.500 and promise to the effect that in case said injunction shall issue, the said plaintiff will pay to the said parties enjoined, such damages, not exceeding the sum of $2,500 as such parties may sustain by reason of said injunction. * * *"

The bond was approved and filed on the 11th day of January, 1911, three weeks after the issuance of the injunction out of which the alleged damages arose. It is contended that the undertaking, having been given after the issuance of the writ, could not, in the face of the recitals above quoted, be considered as having been given in consideration of the issuance of the writ, and that, inasmuch as the record does not show that any writ was subsequently issued, it must be held that the undertaking was executed without consideration.

[1] This contention is answered by the

pleadings in the case. The defendant neither denied, nor attempted to deny, the allegations of the plaintiff's amended complaint, to the effect that the bond in suit was an undertaking executed by the corporation defendant to protect the plaintiff herein against the damages resulting from an injunction which had been issued in the prior action. The failure to deny that allegation was an admission that the bond in suit was given in consideration of a pre-existing injunction. And it is the rule that a fact admitted by the pleadings need not be further proved or found.

[2] The recital of the consideration in the bond, even though the bond was attached to and made a part of the complaint, did not as a matter of pleading control and prevail over the specific allegations of the complaint as to what was the actual consideration for the bond. This is so because it is the rule that:

> "Matters of substance must be alleged in direct terms, and not by way of recital or reference, much less by exhibits merely attached to the pleading. Whatever is an essential element to a cause of action must be presented by a distinct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint." Burkett v. Griffith, 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151; Mayor v. Signoret, 50 Cal. 298; Hibernia Savings & Loan Society v. Thornton, 117 Cal. 481, 49 Pac. 573; Ahlers v. Smiley, 11 Cal. App. 343, 104 Pac. 997.

[3] The converse of this rule must be that, in the absence of a special demurrer for uncertainty, direct and essential allegations in a complaint will not be modified, controlled, or defeated by the recitals of an instrument attached to the complaint. Hibernia Savings & Loan Soc. v. Thornton, supra; Blasingame v. Home Ins. Co., 75 Cal. 633, 17 Pac. 925; San Francisco Sulphur Co. v. Ætna Indemnity Co., 11 Cal. App. 695, 106 Pac. 111. No demurrer was interposed to the amended complaint in the present action.

[4] It is contended that the judgment is erroneous in so far as it provides for interest on the allowances for counsel fees and expenses incidental and necessary to the plaintiff's successful endeavor to secure the dissolution of the writ of injunction. The sufficiency of the evidence to support the trial court's finding of plaintiff's expenditures in this behalf is not assailed nor is it contended that the several items of expense referred to were not properly assessed as damages, nor that the amounts so found to have been expended by the plaintiff were uncertain or incapable of being made certain by calculation. It is the rule that:

> "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt." Civ. Code, § 3287.

The judgment appealed from is affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

PER CURIAM. The foregoing affirmance of the judgment after a consideration of the case upon its merits disposes of the necessity of discussing and deciding the motion to dismiss the appeal.

36 Cal. App. 120

HOUGH et al. v. FERGUSON et ux.

(Civ. 2306.)

(District Court of Appeal, First District, California. Feb. , 1918. Rehearing Denied March 4, 1918. Denied by Supreme Court April 1, 1918.)

1. APPEAL AND ERROR 🔑1071(3)—HARMLESS ERROR—FINDINGS AGAINST EVIDENCE.

Where appellant could not have had judgment had a finding been the other way, the fact that such finding was against the weight of evidence was no ground for reversal, since it was not prejudicial.

2. VENDOR AND PURCHASER 🔑44—FRAUD—RIGHTS OF PARTIES—EVIDENCE.

In suit to foreclose purchase-money mortgage, where defendants set up fraud inducing purchase, evidence *held* to sustain judgment for plaintiffs.

3. VENDOR AND PURCHASER 🔑43(1)—FRAUD—RIGHTS OF PARTIES.

Where purchasers, after obtaining notice and knowledge of alleged fraudulent representations, applied for extension of time to make payments, they were thereby precluded from raising question of fraud.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Suit by W. W. Hough and others against George A. Ferguson and wife, wherein defendants filed a cross-complaint. Decree for plaintiffs, and defendants appeal. Affirmed.

Henry Hawson, of Fresno, and John A. Wall, of Mariposa, for appellants. Barnard & Watters and Harris & Hayhurst, all of Fresno, for respondents.

BEASLY, Judge pro tem. [1] This is an action to foreclose a mortgage. In April, 1912, the plaintiffs were the owners of the 893 acres of land in Fresno county on which they seek to foreclose. They exchanged this land with defendants for land in San Bernardino county, and as a part of the transaction took from the defendants this mortgage. This action was begun over 18 months after the mortgage was given. The defendants filed a cross-complaint, in which they allege that they were defrauded by the plaintiffs in said exchange of lands. The trial court found against the defendants on all of the issues made by the cross-complaint, and these findings are attacked on the ground that they are not sustained by the evidence. Conceding that this criticism is just as to some of the findings, still, as was said in McCreery v. Wells, 94 Cal. 485, 29 Pac. 877:

> "A finding against evidence is not always ground for reversal. Thus it is not prejudicial error to make a finding against evidence in a case where the appellant could not have recovered judgment even if the finding had been the other way."

We think the principle there announced is to be given application to this case. Examining the record with this rule in mind, the following circumstances are disclosed thereby:

[2, 3] The fraudulent misrepresentations by which the defendants claim they were induced to make the exchange of properties consisted of statements as to the productivity of the soil of the Fresno county tract, and in particular a statement that a certain designated part of it was subirrigated by seepage from the San Joaquin river which forms one of its boundaries. The court found that Hough, who was charged with making these misrepresentations, did not do so; and it cannot be said that the evidence taken as a whole is not susceptible of this construction; in fact, it seems to us that the trial court was fully justified in so finding. There is other evidence to which the court could hardly have given any other meaning than that embodied in the findings which support the judgment. For example, the court found that both defendants examined this property at length and with great care before the trade was made, and that they were not hindered in any way while doing so. The court also found that the defendants lived on the property for many months, and, being in default in their payments on the mortgage, applied to plaintiffs for and received extensions of time on such payments. By so doing, after they had been put upon notice of the alleged fraudulent character of the representations which induced them to enter into the transaction, they were precluded from later raising the question of fraud. Bearing on this point is the fact that among the misrepresentations charged were those as to the fertility and character of the land received by the defendants in the exchange. Their testimony shows that immediately upon taking possession of the property, and within less than one month after the deal was closed, they began plowing the land, and discovered that it was dry, porous, sandy, and of poor quality; indeed, that it was so devoid of moisture that they could not plow. This fact alone should have put them upon inquiry as to the truth of the main misrepresentation upon which they claim to have relied, namely, that the lands were subirrigated from the waters of San Joaquin river. There seems, indeed, to have been no excuse for not instituting their inquiry at this time. The only one which they attempt to offer is that Hough, upon his attention being called to this condition of the land, informed them that it was a very dry year and that they must wait for subirrigation until a dry creek, known as Sand creek, running through the property, should flow. So flimsy an excuse for so important a condition would have caused any reasonable person, situated as the defendants claim they were, to make an immediate investigation as to the truth of the matter; and this is still more apparent when we consider that the defendants (who it should be mentioned were husband and wife) emphatically testified that their sole purpose in leaving San Bernardino county to come to Fresno county was to secure land which would need no irrigation whatever. There was much other evidence, a portion of which was that one of the sons of the defendants was employed in the office of the real estate agent with whom Hough had listed his property and who showed the property to the defendants; that another son looked the property over carefully before the exchange was made; that during the negotiations the defendants discussed with Hough the possibility of securing water from the well of a neighbor for irrigation; that Mrs. Ferguson made independent inquiries and received independent advice from other people than Hough before she closed the deal. Of course, much of this evidence was contradicted; but it seems to us not only that the judgment is sustained by this evidence, but that the trial court could hardly have reached any other conclusion in the case.

Judgment affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

36 Cal. App. 119

WINKLER et al. v. SIERRA PARK CO. et al. (Civ. 2134.)

(District Court of Appeal, Second District, California. Feb 2, 1918.)

COSTS ⚷260(1)—FRIVOLOUS APPEAL — DAMAGES.

Where the appeal is frivolous and without merit, damages, in addition to their costs, will be adjudged to respondents.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Max Louis Winkler and Susie Winkler against the Sierra Park Company, a corporation, the Janss Investment Company, a corporation, and the Janss Company, a corporation. From a judgment for plaintiffs, and an order denying motion for new trial, defendants appeal. Affirmed.

John W. Luter and Randall & Bartlett, all of Los Angeles, for appellants. Porter & Sutton, of Los Angeles, for respondents.

PER CURIAM. The appeal in this case purports to have been taken from the judgment entered in favor of the plaintiffs and from an order denying the motion of defendants for a new trial. The transcript of the record was filed in this court on July 3, 1916. Thereafter the appeal, on motion duly made, was dismissed as to the Janss Company. No brief has been filed on behalf of appellants and no appearance was made by the appealing parties at the time set for oral argument. We are of the opinion that the appeal taken herein is frivolous and without merit.

The judgment and order are affirmed. In addition to the costs incurred by them, the respondents shall have and recover from appellants the sum of $75 as damages.

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36 Cal. App. 48

CITY OF REDDING v. SHASTA COUNTY.

(Civ. 1790.)

(District Court of Appeal, Third District, California. Jan. 25, 1918. Rehearing Denied March 25, 1918.)

Bridges ⚷10(1) — Construction — Rights of City—Liability of County.

In view of Pol. Code, § 2713, requiring counties whose lines are crossed by bridges to pay costs of construction in the proportions previously agreed upon, the succeeding section 2714, which requires bridges located in two road districts to be repaired by aid of both districts, and authorizes bridges crossing line between cities and road districts to be constructed at joint expense, does not require a county, wherein a road connects with a bridge built by a city in an adjoining county, to pay half or any part of the cost, when its supervisors expressly refused to participate in building the bridge, since such refusal was a determination against its necessity as to the county, and the city's determination of necessity as to the city did not conclude the county.

Appeal from Superior Court, Shasta County; Wm. M. Finch, Judge.

Action by the City of Redding against the County of Shasta. Judgment for defendant after plaintiff refused to amend, demurrers to the complaint having been sustained, and plaintiff appeals. Affirmed.

Braynard & Kimball, of Redding, for appellant. O. M. Chenowith, of Redding, and A. M. McCoy, of Red Bluff, for respondent.

CHIPMAN, P. J. In the first cause of action it is alleged:

> That defendant is indebted to plaintiff in the sum of $28,235.53 "for money paid out and expended by said plaintiff for the use and benefit of said defendant in the construction of a concrete bridge over and across the Sacramento river at Reid's ferry and in said city of Redding and in said county of Shasta, and which said bridge crosses the line between said city of Redding and road district No. 4 of said county of Shasta, and which said bridge connects and is a part of the public highway leading from and within said city of Redding on the south bank of said Sacramento river to the public highway in road district No. 4 of said county of Shasta, leading from the north bank of said Sacramento river to the towns of Kennett, Buckeye, Baird, in said Shasta county, and to other parts of said Shasta county, for the purpose of transportation of persons and property and as a means of communication and for promoting the convenience of the public; that the building and construction of said bridge as a part of and so connecting said public highway was necessary and essential for the use and convenience of the inhabitants of said city of Redding and of the inhabitants of said county of Shasta and of the public in general."

It is then alleged by proper averments that plaintiff duly presented its said claim to defendant for allowance, and the same was rejected.

For a second cause of action it is alleged that on June 9, 1913, plaintiff duly and regularly determined that the public interest and the public necessity of the plaintiff and its inhabitants for the purpose of transportation of persons and property and as a means of communication and for promoting the convenience of the public demanded the acquisition and construction of a certain municipal improvement and public utility, namely, "a public free bridge over and across the Sacramento river at Reid's ferry in said city of Redding and in said county of Shasta, by resolution duly passed and adopted by said board of trustees at a regular adjourned meeting thereof held in said city of Redding on said 9th day of June, 1913, a copy of which said resolution is hereunto attached, marked Exhibit B, and made a part of this complaint." It was stated in said resolution:

> "That the board of trustees of said city of Redding hereby determines that the public interest and the public necessity of said city of Redding, and the inhabitants thereof, for the purpose of transportation of persons and property, and as a means of communication, and promoting the convenience of the public, demand the acquisition and construction of a certain municipal improvement and public utility," to wit, the public free bridge hereinbefore referred to; "the total cost of said improvement and public utility being hereby estimated at the sum of $60,000."

It was further determined that the cost of said improvement "will be too great to be paid out of the ordinary annual income and revenue of said municipality," and the ordinance provided for the calling of a special election to submit the question of incurring said indebtedness to the electors of the said city of Redding. It is then alleged:

> That prior to the passage of said resolution, to wit, on January 8, 1913, plaintiff, by its board of trustees, "conferred with said defendant, by and through its board of supervisors, at the chambers of said supervisors in said city of Redding, for the purpose and object of determining the proportion of the cost of constructing said bridge to be paid by said plaintiff and said defendant, and that it was impossible by conference or otherwise to determine the same for the reason that said defendant by and through its said board of supervisors then and there refused to participate in the erection or construction of said bridge or to contribute or agree to contribute any part of the cost of erecting or constructing the said bridge."

It further appears from the complaint:

> That said proposed bridge and the said bridge as constructed crosses the line between the said city of Redding and road district No. 4 of said county of Shasta, "and connects and is a part

of the public highway leading from and within said city of Redding on the south bank of said Sacramento river to the public highway in road district No. 4 of said county of Shasta, leading from the north bank of said Sacramento river to the town of Kennett, Buckeye, and Baird, in said Shasta county, and to other parts of said Shasta county, for the purpose of transportation of persons and property and as a means of communication and for promoting the convenience of the public."

It is then alleged that in April, 1914, plaintiff duly adopted plans and specifications for the building of said bridge, and thereafter, and on June 6th, duly and regularly entered into a contract in writing with the Chico Construction Company for the building of said bridge, which said bridge was fully completed on April 5, 1915, and was thrown open to the public for use on August 15, 1915, and ever since has been and now is used by the public as a public free bridge across the Sacramento river at Reid's ferry "as a means of communication and for promoting the convenience of the public, and ever since said last-mentioned time the said county of Shasta and the inhabitants thereof have enjoyed and now enjoy all of the benefits of said bridge"; that the construction of said bridge "as a part of and so connecting said public highway was necessary and essential for the use and convenience of the inhabitants" of said city and county, and the public in general; that the cost of the construction of said bridge was the sum of $56,471.06, "which has been fully paid by plaintiff, and the proportionate share of said defendant of said costs of the construction of said bridge was and is the sum of $28,235.53"; that on September 7, 1915, plaintiff by its board of trustees and by resolution duly passed, determined the indebtedness due from defendant to plaintiff for the construction of said bridge to be the said sum of $28,235.53.

Averments follow showing that the plaintiff duly prepared its demand for the allowance of said claim and presented the same to defendant for payment at a regular session of the said board of supervisors, and that the said board, by vote duly made and entered, rejected and disallowed the said claim and the whole thereof, and the same is owing and unpaid from said defendant to plaintiff.

A general and special demurrer to the complaint was sustained, granting plaintiff ten days to amend. Plaintiff declined to amend the complaint, and thereupon judgment was entered in favor of the defendant that plaintiff take nothing by its action, and that defendant have judgment for its costs. Plaintiff appeals from the judgment.

We find embodied in respondent's brief the written opinion of his honor Judge Wm. Finch, who presided at the trial. In support of his findings the learned judge discusses at considerable length the questions arising under the second cause of action. He disposes of the first count by the following brief statement:

> "The first-asserted cause of action is attempted to be alleged in the form of the common counts for the sum of $28,235.53, averred to have been paid out and expended by the plaintiff for the use and benefit of the defendant. This alleged cause of action is defective in that it is not averred that the alleged moneys were paid out at the request of the defendant, and the demurrer thereto should be sustained.
>
> "'It is generally necessary, except in the count for money had and received and the count upon an account stated to allege that the consideration of the debt was performed at the defendant's request.' 2 Ency. Pl. & Pr. 1004. 'In order to enable one who has paid money to the use of another to maintain the count for money paid, the money paid must be alleged and shown to have been paid upon the request, express or implied, of the defendant.' 2 Ency. Pl. & Pr. 1012. 'In a declaration upon a promise on a consideration which is past, it is necessary to allege that the act performed or sum paid was performed or paid at the request of defendant, unless where a beneficial consideration and a request are necessarily implied from the moral obligation under which defendant was placed.' 5 C. J. 1397.
>
> "Since it is alleged that the supervisors 'refused to participate in the erection or construction of said bridge or to contribute or agree to contribute any part of the cost of erecting or constructing the said bridge'; it would seem that the plaintiff will be unable to so amend its complaint as to state a cause of action, but a court cannot assume that the facts may not be different from those alleged, and therefore the plaintiff will be given ten days within which to amend its complaint if so advised."

As before stated, plaintiff declined to amend its complaint, and judgment followed for defendant. Plaintiff's counsel argue with apparent confidence that a cause of action was stated in the first count whatever may be said of the second cause of action, and hence it was error to sustain the demurrer on both counts. Their position as stated in their reply brief is that, "regardless of any statute on the subject, the county of Shasta is liable to the city of Redding upon quasi contract for one-half of the cost of the construction of the bridge," relying upon the cases of Hunt v. City of San Francisco, 11 Cal. 250, and Brown v. Board of Education, 103 Cal. 531, 37 Pac. 503. Special reliance is placed upon City of Clinton v. Hickman County, 160 Ky. 687, 170 S. W. 11, a case decided by the Kentucky Court of Appeals. More fully stated, the contention of plaintiff is as follows:

> "Having been furnished by the city with a full opportunity to join in the erection of this boundary bridge in order to discharge the joint duty of the county and the city to keep this public highway open across the Sacramento river for the use of the public, and the allegation that such bridge was a public necessity and necessary for the convenience of the public being admitted on this demurrer, the county is estopped from claiming that the bridge was not built by the joint action of the county and the city. Thus, on this demurrer, the facts are that the bridge was a public necessity in order to keep open a public highway across a boundary stream, and that the county refused to participate in its erection. By refusing to participate in the erection of the bridge, the county waived any right to insist upon the bridge being jointly constructed, and cannot now evade its just liability by claiming that the bridge was not joint-

ly constructed. Under these circumstances a beneficial consideration and a request are necessarily implied from the moral obligation under which the county was placed when the bridge was completed and thrown open to the public by the city."

When and under what circumstances an implied liability of one municipality to another municipality will arise opens a field of discussion which we do not think it necessary to explore. The facts in the case, we assume, are as fully shown in the second cause of action as they can be. Unless plaintiff can recover under the facts there shown and admitted by the demurrer, plaintiff cannot recover at all. Hence we deem it unnecessary to further consider the sufficiency of the first count. Plaintiff's case must stand or fall upon the facts alleged in its second cause of action.

We find ourselves in accord with the views expressed by the learned trial judge upon the second cause of action, and will take the liberty of quoting them:

"This is an action brought by the city of Redding to recover from Shasta county the sum of $28,235.53 alleged to be due as the county's proportionate share of the cost of a bridge across the Sacramento river. The river forms the boundary line between the city and road district No. 4.

"Some three years ago the city trustees duly determined that the public interest and necessity of the city demanded the construction of a free bridge across the river. The trustees thereupon conferred with the supervisors of the county with the object of securing the co-operation of the latter in the construction of a bridge by the city and county jointly. The supervisors refused to participate in the construction of the bridge or to contribute towards the cost thereof. The trustees then proceeded to construct the bridge at the expense of the city, and have brought this action to recover from the county one-half of such expense.

"The plaintiff claims the right to enforce contribution under the provisions of section 2714 of the Political Code, which reads as follows: 'If the road overseer of one district, after five days' notice from the overseer of an adjoining district to aid in the repair of a bridge in which each are interested, fails so to aid, the one giving notice may make the necessary repairs and must be allowed a pro rata compensation therefor by the board of supervisors out of the road fund of the defaulting district. Bridges crossing the line or lines between cities or towns and road districts, or between cities or towns, may be constructed and maintained by the cities or towns and from the road fund of the road district or by the cities or towns into which such bridges extend. Any such bridge may be constructed by contract let as provided by law by either city or town or by the county into which such bridge extends or wherein such bridge is located, and any such city, town or county may contribute toward the cost and expense of the construction or maintenance of such bridge by the appropriation for such purpose of any funds in the treasury of such city, town or county not otherwise appropriated, upon such terms and conditions as may be prescribed by ordinance or resolution of the governing body of such city, town or county, aiding in the construction or maintenance of such bridge: Provided, that if the proportion to be paid by any such city, town or county cannot be otherwise determined, the cost of construction or maintenance of any such bridge shall be borne equally by the city or town and from the road fund of the road district or by the cities or towns into which such bridge extends. The proceeds of any bonds heretofore or hereafter authorized by the voters of any such city, town or county for the acquisition, construction or completion of any such bridge, or any portion thereof, may be expended or contributed as herein provided.'

"Counsel for the plaintiff contend that the terms of the statute must be construed as mandatory, invoking the familiar rule that, where a public body or officer has been empowered to do an act which concerns the public interest, it becomes the duty of the public body or officer to do it. There is no doubt as to the correctness of the rule, but there is just as little doubt that the rule is not of universal application. Permissive language authorizing official action is often held to be mandatory, but, on the other hand, mandatory language is sometimes held to be permissive only. No hard and fast rule is to be applied in such cases, but the court must look to the nature of the power conferred and to the general rules applicable to the construction of statutes. Generally if the act authorized is legislative in character, the power is construed as discretionary; if executive, it is usually held to be mandatory.

"The Legislature has conferred upon the governing boards of the various political divisions of the state authority to determine whether a proposed local improvement is a public convenience or necessity. The determination of such question by the governing board is a legislative act, not subject to review by the courts. 'The act of the board of supervisors in determining whether a street shall be opened or closed, or widened or contracted, or otherwise improved, is a legislative act performed in the exercise of the power which has been conferred upon the municipality by the Legislature to enable it to provide for the welfare of its citizens.' Brown v. Board of Supervisors, 124 Cal. 277, 57 Pac. 82. 'The Legislature having conferred upon the board of supervisors the power to open and close streets "whenever the public interest or convenience may require," the determination by that board of the question whether the public interest and convenience require that streets be closed, is conclusive, and not open to review by the courts. Symons v. San Francisco, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453.

"It will probably be conceded that the determination of the question whether the public interest and convenience require that a bridge be constructed across a river is as fully a legislative question as that of opening or closing a street. A county or city cannot be compelled by the courts to bridge every water course crossed by its roads or streets, or any of them. 'In deciding to erect a bridge a public corporation is exercising discretionary power. Action or nonaction in that regard can lead to no liability.' Coffey v. City of Berkeley, 170 Cal. 258, 149 Pac. 559.

"If the territory on both banks of the river to be crossed were wholly within the city of Redding, the determination of the trustees as to the necessity of a bridge would undoubtedly be conclusive; so that of the supervisors if the location were wholly outside the city. Is the rule different where the two boards are authorized to act jointly?

"If both boards had determined that public convenience required the construction of the bridge, no one would contend that such determination was not conclusive. On the other hand, if both boards had determined that the public interest did not require the bridge, that determination would have been equally conclusive.

"The city trustees, in their legislative capacity, determined that the bridge was a public necessity. The supervisors in their equal legislative capacity, determined that no such necessity existed in behalf of the county.

"Why are not the legislative determinations of such boards conclusive as to their respective jurisdictions, and by what authority is the determination of one board to be held superior to that of the other?

"In considering the question we must not confuse the authority conferred upon a board to construct a bridge with the duty of the board to keep the bridge in repair after its construction. Having, in the exercise of their discretion, constructed and opened a bridge, thereby inviting the public to travel over it, the duty of the officers to keep it in good repair is mandatory. Having assumed the burden of maintaining the structure, that obligation must not be discharged in a negligent manner.

"Again, the question of the construction by two boards jointly of a new bridge must be distinguished from the obligation of each to maintain a bridge which they had by their voluntary agreement constructed jointly. The joint agreement to build implies an agreement for joint maintenance.

"Most of the cases cited by counsel for the plaintiff had to do with the repair or reconstruction of bridges rather than with the construction of new ones; besides, they are based upon statutes essentially different from ours.

"Thus the Nebraska statute [Comp. St. 1909, c. 78, § 88] provided that, if either county charged with the joint maintenance of a bridge should refuse to join with the other in making needful repairs, 'it shall be lawful for the other of said counties to enter into such contract for all needful repairs, and recover by suit from the county so in default such proportion of the costs of making such repairs as it ought to pay.'

"The law of Kansas [Gen. St. 1909, § 7309] provides that, where a road is located on a county line, 'all expenses * * * arising from the improvement of any portion of such road shall be borne jointly by the counties * * * contiguous thereto.' It was held that one county could recover from the adjoining county for one-half the cost of making necessary repairs to a bridge on such a road. County of Brown v. County of Keya Paha, 88 Neb. 117, 129 N. W. 250, Ann. Cas. 1912D, 790; Dodge County v. Saunders County, 77 Neb. 787, 110 N. W. 756; Buffalo County v. Kearney County, 83 Neb. 550, 120 N. W. 171; Cass County v. Sarpy County, 72 Neb. 93, 100 N. W. 197; Cloud County v. Mitchell County, 75 Kan. 750, 90 Pac. 286.

"Under a New York statute [Laws 1890, c. 568, § 130] providing that, when the whole expense of constructing a bridge in 'any one town * * * shall exceed one-sixth of one per centum on the assessed valuation of the taxable property of the town, * * * the county in which such town is located, shall then pay not less than one-third part of such excess,' it was naturally held that the county was liable for such one-third. People v. Board of Supervisors, 146 N. Y. 107, 40 N. E. 738.

"Section 256 of the Highway Law of New York [Consol. Laws, c. 25] provides that, 'where two towns are liable to make or maintain * * * a bridge, and one of them refuses or neglects to join therein, application may be made to the court to compel the delinquent to act.' The intention of the Legislature in this statute is too plain to admit of doubt, and it was held that the court could compel the delinquent town to act. In re Town of Saratoga, 160 App. Div. 60, 145 N. Y. S. 468.

"Section 250 of the same law provides that, when bridges are constructed over streams forming the boundary line of towns, either in the same or adjoining counties, such towns shall be liable jointly to pay such expense, and that each county shall be liable to pay not less than one-sixth part of such expense. Here again the language of the statute is so plain that there can be no doubt of its meaning. People v. Warren County, 170 App. Div. 144, 155 N. Y. S. 642.

"In the Illinois cases cited the statute [Starr & C. Ann. St. 1885, c. 121, par. 19] provided: 'When it is necessary to construct or repair any bridge over a stream, or any * * * approaches thereto, * * * and the cost of which shall be more than twenty cents on the one hundred dollars on the last assessment roll, and the levy of the road and the bridge tax for that year, * * * was for the full amount of sixty cents on each hundred dollars allowed by law for the commissioners to raise, the major part of which is needed for the ordinary repair of roads and bridges, the commissioners may petition the county board for aid; and, if the foregoing facts shall appear, the county board shall appropriate from the county treasury a sum sufficient to meet one-half of the expenses of said bridge or other work. * * * The plain provisions of the statute requiring the appropriation were held to be mandatory. Stark County v. People, 118 Ill. 459, 9 N. E. 192; Macon County v. People, 121 Ill. 616, 13 N. E. 220.

"The Wisconsin Statute [Laws 1899, c. 284] provided that 'bridges across navigable streams * * * shall be built, maintained and repaired by the town and village jointly, the expenses to be borne by each in proportion to their equalized valuation as fixed by the county board.' It was held that the town was liable for its proportion of the necessary expense incurred by the village of building a new bridge to replace an old one. Village of Bloomer v. Town of Bloomer, 128 Wis. 297, 107 N. W. 974.

"In the Kentucky cases cited, with one exception, the questions under consideration had relation to the repair of bridges or the rebuilding of bridges which had been destroyed.

"In the one exception, City of Clinton v. Hickman County, 160 Ky. 687, 170 S. W. 11, it appears from the decision that the bridges in controversy were original constructions, but it does not clearly appear what the terms of the statute were under which contribution by the county was enforced. An examination of the Kentucky decisions leads to the inference that the conclusion reached in the Clinton Case was the result of judicial legislation. This view is strengthened by the closing sentence of the dissenting opinion of three out of the seven justices in the case of Flemingsburg v. Fleming County, 127 Ky. 120, 105 S. W. 133, where it is said, referring to the confusion which the courts had arrived at upon the question of constructing and maintaining joint bridges: 'This confusion, which is further extended by the opinion in this case, is the result, in my judgment, of an attempt on the part of the court to relieve a situation which calls for some remedy, but which has not been provided for by legislation.'

"Whatever may be said as to the correctness of the Kentucky decisions, they are out of harmony with the decisions of this state respecting the finality of the determination by governing boards of questions committed to their discretion.

"It appears very clearly that, whatever natural right to contribution the city of Redding may have against the county of Shasta, the Legislature has not attempted to impose any legal liability upon the county in a case of the character involved."

[1] It is said that the conclusion of the judge was based principally upon the statement that the board of supervisors had, in their legislative capacity, determined that the bridge was not a public necessity, whereas what occurred was not such a determination, but was merely a refusal to participate in the erection of the bridge or to contribute or agree to contribute any part of its cost. This action by the board of supervisors was

taken in its official capacity at its place of conducting business, and was in response to plaintiff's request then and there made. The board was not required to declare by formal ordinance or resolution that in its opinion there was no necessity for the bridge. It is a fair inference from their refusal to participate in or pay any part of its construction that they determined this question in the negative. In any view taken of this action it was a very plain notice to plaintiff that it must not look to defendant for contribution.

In the discussion of the questions involved the briefs take a wide range and are very elaborate. But, after all is said, the liability of defendant, if it be liable at all, depends upon the construction to be given section 2714 of the Political Code, and it is upon that section plaintiff relies.

Turning to the section, it seems to us that its true interpretation or meaning is not far to seek. It first provides for "the repair of a bridge." The overseer of one district may give five days' notice to an overseer of an adjoining district to aid in the repair of a bridge in which each is interested, and the one giving the notice may make the necessary repairs, "and must be allowed a pro rata compensation therefor by the board of supervisors out of the road fund of the defaulting district." Plainly this provision refers only to the repair of existing bridges. We do not think plaintiff's contention, made at the argument, can be maintained, that the bridge in its original construction can be treated as a repair within the meaning of the statute. The provision as to repairs stands out apart from the provisions relating to the construction of new bridges.

The section then provides that bridges crossing the boundary line between cities or towns and road districts, or between cities or towns, may be constructed and maintained by the cities or towns and the road district, or by the cities and towns into which such bridges extend. We can discover no mandate here that compels such construction of bridges. The statute is permissive, and authorizes the construction of bridges across lines between cities and towns and road districts. The section next provides that such bridge may be constructed by contract let as provided by law by either the town, city, or county into which such bridges extend, and any such town, city, or county may contribute toward the cost or maintenance of such bridge by appropriating for such purpose any funds in the treasury of such town, city or county not otherwise appropriated, "upon such terms and conditions as may be prescribed by ordinance or resolution of the governing body of such city, town, or county aiding in the construction or maintenance of such bridge." Clearly, it seems to us, no liability attaches to an interested city, town, or county until the governing body of such city, town, or county has by ordinance or resolution prescribed the terms and conditions upon which such contribution shall be made. Just what is meant by "terms and conditions" which must first be prescribed by ordinance or resolution is not explained. It is not unreasonable to assume that this would require the governing body to determine whether or not there was a necessity for a bridge as well as the kind and character of bridge required and its cost. But, whatever may have been the intention of the Legislature in thus expressing its meaning, by no course of reasoning can it be said that a town, city, or road district may, independently of the wish of the adjoining town, city, or district, and particularly in the face of a refusal to participate or pay any part of the cost of the proposed bridge, proceed to erect the bridge and hold the nonconsenting town, city, or county liable for one-half the cost. This section of the Code provides for compulsory contribution for the repair of existing bridges by the interested adjoining districts, but it makes no similar provision as to the original construction of bridges. To illustrate our meaning: The boundary line between the city of Sacramento and the county of Yolo is the Sacramento river. There are now two free bridges connecting said city with said county erected by the joint action and at the joint cost, in an agreed proportion, by the city and county, one at the foot of M street, and one at the foot of H street. We do not think that the governing authorities of the city of Sacramento could erect another bridge across the river—we may say at the foot of K street—however much it may be desired by or of benefit to the city, and hold the county of Yolo liable for a part of its cost unless the governing authorities of Yolo county had in some manner duly and legally authorized the erection of the bridge. For still greater reasons would this be true had Yolo county, in the supposed case, not only failed to take favorable action, but had given notice that it would not participate in the erection of such bridge or contribute to its cost. The building of public roads and bridges is made the subject of statutory regulation, and for the authority to build roads and bridges we must look alone to the statute. By what we regard as a strained and unwarranted construction, appellant would read into section 2714 substantially the same authority to build bridges and enforce compulsory contribution as is provided by the section for repairs of bridges.

> "In the absence of statute or agreement one territorial subdivision of the state cannot compel another to assist it in erecting bridges over their common boundaries. It is therefore a just and equitable exercise of legislative discretion to provide that, when the necessity or convenience of travel renders advisable the erection of bridges over the boundaries between counties or townships, each must contribute to the expense thereof. Such statutes must be clear and ex-

> plicit, and must be strictly complied with to enable one county or town to build a bridge at its own expense and recover a pro rata from the other." 5 Cyc. p. 1062.

The courts have held in numerous cases that counties, towns, and cities in the matter of building bridges over a stream dividing one county or town from another have only such powers as are conferred upon them by statute, and that, where one county has determined that such a bridge is necessary, and has so notified an adjoining county and requested the co-operation of the latter, no liability is cast upon the latter through its neglect or refusal to join with the former. In dealing with this question it was said, among other things, in Commissioners of Highways of Dimmick v. Commissioners of Highways of the Town of Waltham, 100 Ill. 636:

> "If the commissioners of one town have the power to compel the commissioners of another town to contribute one-half of the cost of erecting a bridge over a stream on the line of two towns, without a prior contract or agreement, by merely serving notice, there are many cases where a densely populated township might bankrupt and bring ruin upon an adjoining township containing but few inhabitants and a small amount of taxable property. * * * We cannot believe such a result was ever within the contemplation of the Legislature, and yet, should the construction of the statute contended for by appellant prevail, such results would necessarily follow."

That there must be concert of action and agreement between the parties concerned seems to be the principle running through the cases generally. Harlow v. Board of Commissioners, 33 Okl. 353, 125 Pac. 449; Washer v. Bullitt County, 110 U. S. 558, 4 Sup. Ct. 249, 28 L. Ed. 249; Brown v. Merrick County, 18 Neb. 355, 25 N. W. 356; Jefferson County v. St. Louis County, 113 Mo. 619, 21 S. W. 217; Pickens County v. Greene County, 171 Ala. 377, 54 South. 998; McPeeters et al. v. Blankenship, 123 N. C. 651, 31 S. E. 876; Board of Commissioners of Fountain County v. Board of Commissioners of Warren County, 128 Ind. 295, 27 N. E. 133. In Pickens County v. Greene County, supra, dealing with the contention that the commissioners of one county may impose their will upon the commissioners of another county, under the statute in question, the court said:

> "But that construction of the statute would lead to some surprising results—results so at variance with the spirit of our institutions that it may well be doubted that the Legislature had the power, if it had the purpose, to bring them about. Certainly nothing short of an unequivocal legislative declaration could induce us to believe that the Legislature intended to permit the commissioners of one county to control the revenue of another on the judgment of one that the interests of both will be subserved."

In Fountain County v. Warren County, supra, the court said:

> "If the construction [of the statute] contended for by the appellant is to be adopted, we have the anomalous case of a tribunal in one county serving summons in another county, beyond its ordinary jurisdiction, upon another tribunal of equal dignity and jurisdiction, and entering judgment and making orders against the tribunal so served, as upon a default. Certainly a construction so much at variance with our general system of laws, and followed by such unusual consequences, should not be adopted unless the language used is such as is not susceptible of any other reasonable construction."

The concluding paragraphs of section 2714 confer no authority, but merely provide that, when the matter of building the bridge is determined by the towns, cities, and counties interested, as the statute requires, the expense shall be borne equally if they do not agree as to the proportion each is to pay. The provision as to the proceeds of bonds authorized to meet the bridge building expense presupposes that the erection of the bridge has been authorized under the provisions of the statute. Section 2713 of the Political Code, which immediately precedes section 2714, is not without significance. Among other things is the following provision:

> "Bridges crossing the line between counties must be constructed by the counties into which such bridges reach, and each of the counties into which any such bridge reaches shall pay such portion of the cost of such bridge as shall have been previously agreed upon by the boards of supervisors of said counties."

Here the necessity for joint action is clearly manifested. And we think the same principle of joint and concurrent action pervades section 2714.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

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36 Cal. App. 199

STEPHENS v. ANDERSON et al.

(Civ. 2107.)

(District Court of Appeal, Second District, California. Feb. 7, 1918.)

1. BROKERS 🔑86(4)—SALES OF LAND—SUFFICIENCY OF EVIDENCE.

Evidence *held* insufficient to show that plaintiff furnished a buyer for land, or that he was entitled to a commission.

2. BROKERS 🔑54—COMMISSION—BURDEN OF PROOF.

Before an agent may be said to have earned a commission for a sale of land, he must show that he produced to the vendor a purchaser ready, able, and willing to buy for the price and terms proposed by the vendor in the agency contract.

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by Richard B. Stephens, as executor, substituted for C. M. Stephens, deceased, against Nathalie Anderson and Charles Anderson. Judgment for defendants, and plaintiff appeals. Affirmed.

Kendrick & Ardis, of Los Angeles, for appellant. Frank C. Scherrer, of Independence, and J. H. Ryckman, of Los Angeles, for respondents.

JAMES, J. This action was brought to recover a sum of money alleged to have been earned by the plaintiff in negotiating a sale of certain real property owned by the defendants. Subsequent to the commencement of the action C. M. Stephens died and his executor was substituted as party plaintiff. At the trial, after evidence had been introduced on behalf of the plaintiff, the trial judge, agreeable to motion made by the defendants, ordered judgment of nonsuit, which was thereafter entered, and from which this appeal is taken.

It is claimed on behalf of the appellant that there was evidence to sustain the allegations of the plaintiff's complaint. It appears from the bill of exceptions that C. M. Stephens was the general attorney of defendants, particularly of Nathalie Anderson, 'and that in the year 1911 defendants gave a written statement to said Stephens, wherein they particularly described certain real property, and further stated:

> "Our price for the above two tracts is $25,000 cash, or half cash balance secured by mortgage payable at one year at 6 per cent. net. Will pay C. M. Stephens 5 per cent. commission on sale."

One Leonis testified that while acting as agent for a corporation, which latter desired to purchase the Anderson property, he called upon C. M. Stephens, knowing that the latter had the property for sale, and agreed orally with said Stephens to take the property at the price of $25,000. He stated that he gave Stephens a check for $100 to bind the bargain, and was later told by Stephens, who returned him the check, that the owner would not accept the offer. Further, that Stephens told him that he would have to go to Mrs. Anderson and buy the property direct from her. It appeared in testimony that subsequent to this time other agents of the corporation which desired to purchase the property, acting upon the report of Leonis that he was unable to get it through Stephens, took up negotiations with Mrs. Anderson and, after considerable talk was had backward and forward and much discussion over the price, the corporation purchased the property for the sum of $35,000. It was nowhere shown in the testimony that Mrs. Anderson, at the time she dealt with the agents of the company to whom she sold her property, knew that the purchaser was a purchaser who had been found or produced by Stephens.

[1, 2] There was no evidence that Stephens communicated to her any offer to purchase the property, and in these particulars we think there was a failure of proof necessary to sustain the plaintiff's case. We think the rule is fundamental and well understood that before an agent may be said to have earned a commission he is required to show that he produced to the vendor a purchaser ready, able, and willing to buy for the price and upon the terms proposed by the vendor in the agency contract. The alleged agency was in no wise an exclusive agency, and under the conditions shown, Mrs. Anderson had the right to deal independently with any one who desired to purchase directly from her. While it is true that she did secure a price in excess of $25,000, the negotiations which led to a consummation of the deal were all carried on directly with her, and the price and terms of purchase were thus arrived at. We are of the opinion that the trial judge was right in ordering the judgment of nonsuit.

The judgment is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

(36 Cal. App. 123)

ANDERSON v. RECORDER'S COURT et al.

(Civ. 2421.)

(District Court of Appeal, Second District, California. Feb. 4, 1918. Rehearing Denied by Supreme Court April 4, 1918.)

APPEAL AND ERROR ⟹757(1)—BRIEFS—SUFFICIENCY.

Where the only record on appeal is in the form of a typewritten transcript, and no part of it is printed in the brief, as prescribed by Code Civ. Proc. § 953c, the judgment below must be affirmed.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Certiorari by Fred N. Anderson, directed to the Recorder's Court, etc. Judgment for defendants, and plaintiff appeals. Affirmed.

William Sea, Jr., of Calexico, for appellant.
D. L. Ault, of Calexico, for respondent.

PER CURIAM. This is an appeal from a judgment rendered on writ of certiorari. The only record on file is in the form of a typewritten transcript. Appellant has not complied with section 953c of the Code of Civil Procedure, which provides that upon such a record the parties must "print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." The brief for appellant is absolutely deficient in that no part of the record has been printed therein.

On the authority of Stewart v. Andrews, 169 Pac. 397, Jones v. American Potash Co., 169 Pac. 397 (decided October 25, 1917), Hepler v. Wright, 170 Pac. 667 (decided December 13, 1917), and other cases cited in those decisions, the judgment is affirmed.

(36 Cal. App. 175)

FONTAINE et al. v. LACASSIE et al.

(Civ. 2180.)

(District Court of Appeal, First District, California. Feb. 6, 1918.)

1. MONEY RECEIVED ⟹18(3) — SUFFICIENCY OF EVIDENCE.

Judgment for money had and received is sustained by the facts that plaintiff furnished defendant money to be used by her to provide a home for plaintiff, and shortly thereafter defendant ejected plaintiff from the house.

2. Contracts 🔑260—Rescission—Partial Failure of Consideration.

Contract, whereby plaintiff furnished money for defendant to build a house to be occupied by plaintiff for life, is entire, authorizing rescission under Civ. Code, § 1689, and recovery of the entire amount, for partial failure of consideration; defendant having soon ejected plaintiff.

3. Money Received 🔑17(1)—Complaint.

Complaint for money received need not set forth the entire contract, from breach of which the right arises.

4. Property 🔑4—Realty or Personalty—Agreement—Houses.

House built by defendant on her land with money furnished by plaintiff under agreement that plaintiff might occupy it for life, unless it was sold, in which case plaintiff should be repaid the money, is not personal property, removable by plaintiff on ejection by defendant.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Emile Fontaine and another against Simeon Lacassie and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

W. S. Tinning and A. B. Tinning, both of Martinez, for appellants. George C. Thrasher, of San Francisco, for respondents.

BEASLY, Judge pro tem. Catherine Fontaine, one of the above-named plaintiffs, is the mother of the defendant Simeon Lacassie, and the latter's codefendant is his wife, who owns a piece of land at Walnut Creek in Contra Costa county. In the month of December, 1914, Mrs. Fontaine, who was then unmarried, furnished to Mrs. Lacassie the sum of $439.50 with which to build a house on said property, as the trial court found, under an agreement between them that Catherine Fontaine might occupy the said house during her life, with the proviso that if the land was sold before her death by Mrs. Lacassie she would repay to her mother-in-law the money furnished by her for the building of the house. It is further found that Mrs. Lacassie was to attend to expending the money in erecting the house, and that she did so, paying the bills with the money so furnished by Mrs. Fontaine. The building was complete on January 1, 1915, and the plaintiffs occupied it thence until the month of December following, when the defendants ordered them off the premises with threatening and violent language, and, as the evidence discloses, had Mrs. Fontaine arrested and removed from the property on a charge of insanity. She never returned to the house thereafter. The court also found that the object of the agreement to build the house was to furnish a home for Mrs. Fontaine. The defendants on this appeal insist that this finding has no support in the evidence, but the whole tenor of the testimony supports it; and it also specifically appears that when the money was advanced to Mrs. Lacassie by her mother-in-law the latter had become too infirm to work in the laundry where she had been employed, that the defendants were to charge her no rent, and were to furnish her with wood, water, and milk free of charge. From this—and indeed from the entire evidence—it may be fairly inferred that the agreement itself under which the money was furnished was that Mrs. Fontaine should occupy the house as long as she should live, unless the property should in the meantime be sold. This evidence certainly supports the finding attacked.

[1] The defendants also rely for a reversal upon a question of pleading, claiming that the facts above set forth will not support a judgment for "money had and received." The language of the pleading material to this question, to be exact, is as follows:

> "That * * * the defendant received the sum of $439.50 from the plaintiff for the use and benefit of plaintiff."

It is plain from these facts that the money was furnished by Mrs. Fontaine to Mrs. Lacassie to be used by the latter for Mrs. Fontaine's benefit, namely, to provide a home for her in her old age, and that she was, within a comparatively short time after having furnished the money, deprived of its benefit and use by being ejected from the house. The view of the trial court was that this evidence sustains the judgment. With this view we are constrained to agree.

[2] The contract here was entire within the rule announced in the leading case of Wooten v. Walters, 110 N. C. 251, 14 S. E. 734, 736, upon the construction of entire and divisible contracts, a rule approved by our own Supreme Court in Sterling v. Gregory, 149 Cal. 117, 85 Pac. 305. In the latter case it was also held that where a contract is entire there is a right of rescission thereof for partial failure of consideration under section 1689 of the Civil Code. This proposition is illustrated in this state also by Howlin v. Castro, 136 Cal. 605, 69 Pac. 432, a case of somewhat different nature, where the facts were that Castro undertook to take care of Howlin during the remainder of the latter's life in consideration of receiving Howlin's property at his death. Howlin delivered a deed to one Rowling as security for the performance on his part of this agreement, and Castro, after performing the agreement on his part for a year, discontinued doing so. The Supreme Court held that, the contract being executory and having been broken, the plaintiff was not confined to a remedy for damages, but might have the deed delivered up and canceled in an action for that purpose, thus receiving back all the consideration which he had promised for the performance of Castro's agreement to care for him. The ancient rule of the Court of King's Bench, the fountain of common-law

pleading, was that, where there is an entire contract, and by defendant's default plaintiff could not perform what he had undertaken to do, he had a right to put an end to the whole contract and recover back money which he had paid thereunder. Giles v. Edwards, 7 Term, 181.

Lord Mansfield, in Moses v. MacFerlan, 2 Burr, 1005, adapted the count for money had and received to an action of the character of the case of Mrs. Fontaine. Previous to the decision of that case a debt proved in support of this action had always been a debt arising under the operation of purely legal principles. In that case there was clearly no debt. Indeed, the only possible ground of recovery was that it would have been inequitable under the circumstances to permit MacFerlan to retain the money. The real question, therefore, was whether a debt sufficient for the purposes of an action in debitatus assumpsit might arise from the operation of purely equitable principles. The court unanimously answered the question in the affirmative, Lord Mansfield stating the scope of the obligation as follows:

> "If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract. * * * This kind of equitable action, to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, ex æquo et bono, the defendant ought to refund. * * * In one word the gist of the action is that the defendant upon the circumstances of the case is obliged by the ties of natural justice and equity to refund the money."
>
> "From the use of such expressions as 'obliged by the ties of natural justice and equity' it must not be inferred that the right of recovery in a particular case is a problem of moral philosophy. Recovery does not depend upon the trial judge's idea of justice in the particular case, nor yet upon the jury's notion of what is right between man and man. Here, as elsewhere, the courts must be guided by principles and rules fairly capable of uniform administration. These must be sought in the reports of decided cases." 7 Modern American Law, p. 372.

Here, as we have seen, the courts of our own state have held that an agreement such as that made by the parties to this action may, under circumstances such as the trial court found to exist here, namely, where the contract is entire and the consideration has partially failed by reason of the default of one of the parties, be rescinded by the other party, who may then recover the money which he has paid thereunder.

[3] From this discussion we think it fairly deducible that in an action such as this the plaintiff need not set forth the entire contract, but may sue quasi ex contractu for money had and received.

[4] It is argued that the house was personal property and could have been removed by Mrs. Fontaine. The terms of the agreement under which it was built negative this contention, for the intent of the parties evidently was that it should remain permanently on the land; and the trial court found that M. E. Lacassie retained the house for her own use and benefit.

This disposes of the points urged in support of the appeal. The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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36 Cal. App. 153

MASSIE et ux. v. ELDORADO GOLD STAR MINING CO. (Civ. 2035.)

(District Court of Appeal, Second District, California. Feb. 5, 1918.)

1. CORPORATIONS 🔑432(12)—AUTHORITY OF PRESIDENT—SIGNING NOTES—SUFFICIENCY OF EVIDENCE.

In an action on notes against a corporation, evidence *held* insufficient to show authority in the former president of the company, who signed, to bind the company by the execution of promissory notes.

2. CORPORATIONS 🔑426(4)—ACT OF PRESIDENT—RATIFICATION.

The determination of a mining company's board of directors that, in the event the mine became productive and no change of mind was had upon the matter, they might take care of notes given to lenders to the company by its former president, unauthorized to borrow and execute notes, was not a ratification of the president's act, nor the making of a new contract.

Appeal from Superior Court, Los Angeles County; George H. Cabaniss, Judge.

Action by John Massie and Lou Massie, husband and wife, against the Eldorado Gold Star Mining Company, a corporation. From judgment for plaintiffs, and an order denying motion for new trial, defendant appeals. Reversed.

G. W. Wickliffe, of Los Angeles, for appellant. Randall & Bartlett, of Los Angeles, for respondents.

JAMES, J. This appeal was taken by defendant from the judgment and from an order denying defendant's motion for a new trial. On the evidence as shown by the bill of exceptions, we are of the opinion that the judgment cannot be sustained; and it will be unnecessary to notice particularly errors assigned by appellant which do not refer to the question of the insufficiency of the evidence to justify the decision of the court.

[1] Plaintiffs sued upon two promissory notes alleged to have been executed by the defendant, each for the sum of $500; the first alleged to be of date May 15, 1910, and the second of June 15, 1910, each payable one year after date, with interest at the rate of 7 per cent. per annum. It was alleged that plaintiffs were not in possession of the promissory notes at the time suit was brought, but that they were informed and believed that the same were in possession of the defendant. The

defendant by answer specifically denied the making of the promissory notes and denied that it had possession of any notes. It appeared that at the time the notes were alleged to have been made one Sims was president of the defendant company. Plaintiff Lou Massie testified that Sims borrowed the money from her and her husband, the coplaintiff. When asked by whom the first note was signed, she answered that it was signed by "Sims." As to the second note, the following interrogatory was put to her: "And this second note, the one dated June 15, 1910, or thereabouts, was signed the same as the other note, or signed as president of the Eldorado Gold Star Mining Company?" to which the witness answered, "Yes, sir." Sims testified as a witness, and stated that he borrowed the money and signed the notes with his own name, adding thereto the words: "President of Eldorado Gold Star Mining Company." He gave no testimony as to any alleged particular authority given him by the company to borrow money. Later in his testimony he added that the notes had also been signed by the secretary of the company. When asked what was done with the money, he said:

> "The first money, there was a writing desk, typewriter, carpet, some little fixtures we had there, went down to the mine twice, carried down parties twice to investigate, to take out stock with the company, and of course that cost money. Q. Do you know how the second $500 was used? A. Pretty much the same way. We were trying to get started, and the money did not last very long."

Plaintiff John Massie testified that he at one time demanded payment of the full amount of the notes from one Folke, secretary of the company, and that Folke gave him a note which was in form a statement reading as follows:

September 25, 1911.

Eldorado Gold Star Mining Company to John Massie, Dr.

Sept. 25.	To 2 notes..............	$1,000.00
	" cash & inst...........	319.00
		$1,319.00

The foregoing statement constitutes the substance of all the material testimony introduced on behalf of the plaintiffs. From that testimony it is very clear indeed that no authority was shown in Sims, as president of defendant corporation, to bind the corporation by the execution of promissory notes. Black v. Harrison Home Co., 155 Cal. 121, 99 Pac. 494.

[2] The claim that the act of Sims was ratified must rest wholly upon the transaction which resulted in the giving of the alleged statement of account as above quoted. The secretary of the defendant was sworn as a witness on the latter's behalf. This witness, without objection, testified that he had examined the minutes of the corporation, which contained a full, true, and correct report of the meetings of the board of directors, and had found no record of any action taken on behalf of the board authorizing the making of the promissory notes here sued upon. The secretary testified positively that the board "had never authorized any loan of that character." He testified that, at one of the meetings subsequent to the date of the maturity of the notes, a Mr. Shields, by request of the plaintiffs, made a statement to the board of directors regarding the borrowing by Sims of the plaintiffs' money, and the witness then stated:

> "The board had considered the matter, they said. Well, we are not entitled to pay it, because we didn't borrow it and did not use it; but as you are old people, and you let him have the money individually, when the mine gets on a productive basis we will try and take care of it. We will have our secretary make an entry, so when we get on a productive basis we can look after you if we so choose."

It was upon this authority that the secretary made the statement of account which has before been referred to. Plainly the determination of the board of directors that they might, in the event the mine became productive and no change of mind was had upon the matter, "take care" of the notes, in no sense amounted to a ratification of the act of Sims, nor the making of a new contract. There was no claim made by plaintiffs that any express authority had been granted to Sims to borrow money on behalf of the corporation. The testimony given by the secretary was in no wise disputed or contradicted. Upon the record, we think the decision of the court is without sufficient evidence to support it.

The judgment and order are reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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36 Cal. App. 173

SMITH v. MEADE. (Civ. 2085.)

(District Court of Appeal, Second District, California. Feb. 6, 1918. Rehearing Denied March 8, 1918. Denied by Supreme Court April 1, 1918.)

1. APPEAL AND ERROR 🔑671(1)—REVIEW—APPEAL ON JUDGMENT ROLL — QUESTIONS PRESENTED.

Where the findings of fact made by the court are sufficient to support the judgment, no further point is presented which can be determined on appeal on the judgment roll and brief bill of exceptions.

2. APPEAL AND ERROR 🔑719(6)—RECORD—ASSIGNMENTS OF ERROR—NECESSITY.

Where the bill of exceptions contains no assignment of error, no point as to the sufficiency of the evidence to sustain the decision can be considered in view of Code Civ. Proc. § 648, providing that when the exception is to the verdict or decision upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by W. C. Smith against A. J. Meade. Judgment for defendant, and plaintiff appeals. Affirmed.

Bicksler, Smith & Parke, of Los Angeles, for appellant. Avery & French, of Los Angeles, for respondent.

JAMES, J. [1] This appeal is one taken from a judgment entered in favor of the defendant. It is presented on the judgment roll and a brief bill of exceptions. The action was upon a promissory note executed by a corporation of which the defendant was treasurer, the payment of which note was guaranteed in writing by the defendant. Recovery was sought against the defendant by reason of his contract of guaranty. In the complaint it was alleged that subsequent to the maturity of the promissory note referred to, a note and draft were received by plaintiff's assignor, the payee of the first note, which last note and the draft, it is alleged in the complaint, "were forwarded to plaintiff's assignor to satisfy and liquidate the note sued upon herein." A further allegation followed, showing that attempts had been made to collect the second note and draft, which attempts were unsuccessful; and it was alleged that the second note and draft were valueless, and that the corporation maker was insolvent. The answer admitted all of the facts alleged, except it contained a denial of nonpayment of the note sued upon, and alleged affirmatively that the same had been wholly paid and satisfied. The court made its findings sustaining the defense of payment. The findings were sufficient in form and substance to support the judgment which followed. The bill of exceptions contains a copy of an affidavit made by a representative of the payee corporation. It appears to have been stipulated that this affidavit might be used as evidence in the case. The affidavit contains a narrative of the transactions had regarding the making of the several instruments referred to. There appears to have been no other evidence offered on behalf of either party at the trial. As the findings of fact made by the court were sufficient to support the judgment, no further point is presented which can be determined by an examination of the judgment roll.

[2] The chief contention of appellant refers to the matter of the insufficiency of the evidence to sustain the findings. The bill of exceptions contains no assignment of error, either in general or particular terms. Upon this state of the record, counsel for respondent insist that no point as to the sufficiency of the evidence to sustain the decision can be here considered, and with this contention we must agree. Section 648, Code of Civil Procedure, provides that:

> "When the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient. * * *"

In Swift v. Occidental Mining, etc., Co., 141 Cal. 161, 74 Pac. 700, it is said:

> "The substance of all these decisions is that the object of the rule requiring these specifications is first to shorten the statement of the evidence by excluding everything irrelevant to the specified fact; and, second, to notify the opposing party of the particular finding called in question, in order that he may see that the statement fairly and fully presents the evidence bearing upon that particular matter."

It has been repeatedly held that in the absence of any specification pointing out wherein the evidence is insufficient to sustain the decision, no review can be had on appeal of that particular matter. Hawley v. Harrington, 152 Cal. 188, 92 Pac. 177; Meek v. Southern California Ry. Co., 7 Cal. App. 606, 95 Pac. 166; Millar v. Millar et al., 167 Pac. 394.

For lack of error shown by the record, it follows that the judgment should be affirmed.

The judgment is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

36 Cal. App. 127

BISSIG v. JOHNSTON ORGAN & PIANO MFG. CO. (Civ. 2109.)

(District Court of Appeal, Second District, California. Feb. 4, 1918. Rehearing Denied by Supreme Court April 4, 1918.)

PLEADING ⟹258(5)—AMENDMENT—LEAVE.

Defendant's answer in an action on a note denying the alleged consideration, but insufficiently denying the execution, his motion for leave to amend, accompanied by sufficient amended answer, made pending motion for judgment on the pleadings, should have been allowed.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Vincent Bissig against the Johnston Organ & Piano Manufacturing Company. Judgment for plaintiff, and defendant appeals. Reversed, and rehearing denied.

Frank Bryant, of Los Angeles, for appellant. Carter, Kirby & Henderson, of Los Angeles, for respondent.

CONREY, P. J. The defendant appeals from a judgment which was rendered pursuant to an order granting a motion for judgment on the pleadings. The complaint, which was verified, alleged that on the 17th day of September, 1913, defendant was indebted to plaintiff in the sum of $1,000, and that as evidence of said indebtedness defendant executed and delivered to plaintiff on that day the described note. The answer contains an evasive and insufficient denial of the execution of the note, and we will assume that the note was executed and delivered as alleged. But the answer does specifically and in sufficient terms deny that on September 17, 1913, or at any time, the defendant was indebted to the plaintiff in the sum of $1,000 or at all.

If the complaint had alleged the execution of the note without specifying the fact of pre-existing indebtedness and without stating that the note was given as evidence of such indebtedness, we think that defendant's denial that it was indebted to the plaintiff would have raised no issue, for it would have been merely a denial of a conclusion of law, and would not have been equivalent to an assertion that the note was given without consideration. But the allegations of the complaint relied upon such pre-existing indebtedness as constituting the sole consideration for the execution of the note. The defendant was entitled to meet the case as alleged. By denying the existence of the indebtedness and by denying that the note was executed as evidence of such indebtedness, the issue tendered by the plaintiff was accepted. In this condition of the pleadings the plaintiff was not entitled to judgment without proof that the only claimed consideration for the note did in fact exist.

While the motion for judgment on the pleadings was pending, the defendant moved for leave to file an amended answer, which, as offered, was undoubtedly sufficient to raise issues upon which a trial would have been necessary. Under the circumstances this amendment should have been permitted.

The judgment is reversed.

We concur: JAMES, J.; WORKS, Judge pro tem.

Opinion of Supreme Court Denying Rehearing.

PER CURIAM. In denying the application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District we deem it proper to say that we do so on the ground last stated in the opinion, viz.: That the trial court erred in refusing to allow an amended answer to be filed. This being a case within the appellate jurisdiction of the District Court of Appeal, as declared by the Constitution, the rules expressed by us in such cases as Rauer's Law, etc., Co. v. Berthiaume, 21 Cal. App. 675, 132 Pac. 833, govern.

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36 Cal. App. 152

SOLOMON v. JUSTICES' COURT OF LOS ANGELES TP., LOS ANGELES COUNTY, et al. (Civ. 2473.)

(District Court of Appeal, Second District, California. Feb. 5, 1918.)

1. Appeal and Error 🔑757(1)—Burden to Show Error—Absence of Points.
As it is incumbent on an appellant to make an affirmative showing that the trial court has committed error before he can be relieved from the effects of the judgment, judgment will be affirmed where there is on file only a typewritten clerk's transcript setting forth the judgment roll in the action, and no points and authorities in support of the appeal have ever been filed.

2. Costs 🔑260(1). — Frivolous Appeal—Damages.
Where the appeal is frivolous, respondents, in addition to any costs recoverable by them, may recover damages.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Irl Solomon against the Justices' Court of Los Angeles Township, Los Angeles County, State of California, Harlan G. Palmer, Justice of the Peace of such court, and Giacchino Giangregorio. From judgment for defendants, plaintiff appeals. Affirmed.

Irl Solomon, of Los Angeles, in pro. per. Carter & Torchia, of Los Angeles, for respondents.

PER CURIAM. [1, 2] This is an appeal from a judgment entered after the sustaining of a demurrer to a complaint without leave to amend. There is on file a typewritten clerk's transcript setting forth the judgment roll in the action, but no points and authorities in support of the appeal have ever been filed. As it is incumbent upon an appellant in any case to make an affirmative showing that the trial court has committed error in the case, before he can be relieved from the effects of the judgment appealed from, the judgment is affirmed. As it appears to us that the appeal is frivolous, the respondents, in addition to any costs recoverable by them because of the affirmance of the judgment, shall have and recover from the appellant the sum of $50 as damages.

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36 Cal. App. 208

CURRAN v. WILSON. (Civ. 2120.)

(District Court of Appeal, Second District, California. Feb. 7, 1918. Rehearing Denied March 8, 1918. Denied by Supreme Court April 4, 1918.)

1. Bills and Notes 🔑496(3)—Action by Indorsee—Indorsement by Payee—Proof.
In an action on a note by plaintiff, alleged indorsee, for value before maturity, where indorsements were denied, it was essential for plaintiff to prove the indorsement.

2. Evidence 🔑370(3)—Documentary—Identification—Authority of Indorsement by Payee—Corporate Agent.
A written instrument, purported to have been executed by payee corporation, and purporting to authorize S. to receive notes and indorse and discount the same, was inadmissible to establish the authenticity of indorsement by S. for the corporation, where neither the instrument nor the signatures attached thereto were identified by any witness.

3. Depositions 🔑90—Use in Civil Cases—Presence of Witness.
In an action on note by plaintiff, alleged indorsee, for value before maturity, the deposition of one not a party, but to whom note had been indorsed by original payee, was inadmissible in the absence of a showing as to the existence of conditions set forth in Code Civ. Proc. § 2021, providing for use of depositions only where attendance of witnesses cannot be procured, etc.

4. Bills and Notes 🔑497(1)—Holder in Due Course—Presumption.
While the effect of a blank indorsement is to make a negotiable note payable to bearer, the presumption cannot be invoked in favor of plaintiff indorsee that by such indorsement he acquired the note free from equities.

5. **Bills and Notes** ⚷497(3)—**Bona Fide Purchaser—Proof.**

Before the defense of fraud could be cut off, it was incumbent on plaintiff indorsee to show that he acquired the note for value before maturity.

Appeal from Superior Court, Los Angeles County; Stanley A. Smith, Judge.

Action by William M. Curran against Mrs. Lydia A. Wilson. Judgment for plaintiff, and defendant appeals. Reversed.

Anderson & Anderson and Victor T. Watkins, all of Los Angeles, for appellant. Hocker, Morris & Austin and Hocker & Austin, all of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment entered against the defendant. The action was upon a promissory note, the text of which is set out in the complaint as follows:

"$500.00. Pomona, Cal., March 1st, 1915.

"Sixty days after date, (without grace) I promise to pay to the order of Silent Engine Co. five hundred dollars for value received with interest at 7 per cent. per annum from Mch. 1st, 1915, until paid both principal and interest payable only in United States gold coin.

"Payable at First National Bank, Pomona, Cal. Mrs. Lydia A. Wilson.

"No. ...... Due ......"

Indorsements on back:

"Silent Engine Co., Bradford Stein, Gen. Mgr. T. Carter Doremus."

It was further alleged in the complaint that before maturity, for a valuable consideration, the note was indorsed and delivered to Doremus, who thereafter, before maturity and for a valuable consideration, indorsed the same to the National Surety Company. It was then alleged "that thereafter said note was transferred and delivered by said National Surety Company to the plaintiff herein." A sufficient allegation of nonpayment appears in the complaint. In the answer the defendant made denial of the allegations as to the indorsements made on the note and the transfer thereof in the following form:

"Alleges that she has no information or belief sufficient to answer the allegations of the second paragraph thereof and for want of such information and belief, or either, and upon that ground denies that before maturity or for a valuable consideration, or at all, said note was indorsed, or at all delivered to T. Carter Doremus, or that thereafter or before maturity, or for a valuable consideration, or at all, said note was indorsed or delivered by said T. Carter Doremus to the National Surety Company, or that thereafter or at all said note was transferred or delivered by said National Surety Company to the plaintiff herein."

A special defense was set up by the defendant showing fraud in the obtaining of the note by the payee, and praying that judgment be denied to the plaintiff. Plaintiff offered the note, with the indorsements made thereon, in evidence, to which objection was made and overruled. Without calling a witness, a written document was then offered and received by the court, which purported to have been executed by the corporation payee of the note by its president and secretary, with corporate seal attached. Objection was made to the reception of this document, and this objection was also overruled. The plaintiff thereupon offered in evidence the deposition of Doremus, wherein Doremus gave testimony showing that he sold to the payee of the note, 15 days after its date, an automobile, and took as part payment the note in suit. He further testified that he assigned the note later to the National Surety Company in payment of a debt owing to the corporation by his mother. Objection was made to the introduction of the deposition and to particular parts thereof. The general objection was first made that the deposition was not admissible for the reason that it was not shown that the attendance of Doremus as a witness at the trial could not be secured. This objection was overruled. Plaintiff having rested his case, defendant was called to the witness stand, and counsel sought to elicit from her the details of the transaction in which the note was given as sustaining the special defense made by the answer. This testimony was objected to on the ground that it had been shown that Doremus had obtained the note before maturity for value and without knowledge of the transaction involved in the making of the note. The objection was sustained. The court thereupon ordered judgment in favor of the plaintiff.

[1, 2] It will be noted that there was no testimony showing any indorsement to have been made by the National Surety Company to the plaintiff herein, and that the allegation of the complaint was merely that the note had been transferred and delivered by that surety company to the plaintiff herein. In our opinion, it was first essential for the plaintiff to prove the indorsement of the payee. The indorsement appeared in the terms set out above, and the first evidence tending to establish the authenticity of that indorsement was the written document referred to hereinbefore purporting to have been executed by the Silent Engine Company, and which purported to authorize Stein to "receive moneys, notes, checks and indorse and discount same; to take subscriptions for stock, make contracts and issue evidences of indebtedness." This document was not, nor were the signatures attached thereto, identified in any way by the testimony of any witness and, under the objection made by the defendant, we think was inadmissible. The case of Burnett v. Lyford, 93 Cal. 114, 28 Pac. 855, shows a case different on the facts; the court there declaring only that where no objection was made, the seal of the corporation affixed with the signatures would prima facie be proof of the regularity of the execution of the document. Neither was there evidence showing that Stein was the general manager of the payee of the note.

[3, 4] But it is said that in the testimony given by deposition Doremus furnished evidence showing the regularity of the transfer by the payee of the note to him. Doremus was not a party to the action. His deposition was not admissible, unless some showing was made as to the existence of conditions set forth in section 2021, Code of Civil Procedure.

The witness in his answers showed that at the time of making the note he was a resident of Los Angeles, and gave no testimony showing that any change of residence had been made afterward. As we have noted, there was no testimony showing facts regarding the transfer of the note from the National Surety Company to this plaintiff, and no indorsement made by the Surety Company appeared upon the note. If we were to assume, without proof, that the indorsements of the payee corporation and Doremus were regularly made, it might perhaps be further presumed that by the production of the note from the hands of the plaintiff, ownership would be implied. Plaintiff, however, assumed, and we think rightly, that it was essential to his case to show the indorsement of the note by the payee; but he failed to furnish the court with competent evidence to establish the fact.

[5] We may add further that, while it has been held that the effect of an indorsement in blank is to make the note payable, not as an indorsee strictly, but as to bearer (Eames v. Crosier, 101 Cal. 260, 35 Pac. 873), we do not believe that the presumption can be invoked in favor of this plaintiff that he acquired the note in such a manner as to free it from equities existing in favor of the defendant. We are of the opinion that it was incumbent upon the plaintiff to show that he acquired the note for value before maturity, before the right of the defendant to urge her special defense of fraud would be cut off.

The judgment is reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

(36 Cal. App. 129)

FICKES et al. v. BAKER et al. (Civ. 1788.)

(District Court of Appeal, Third District, California. Feb. 4, 1918.)

1. Reformation of Instruments 🔑8—Voluntary Conveyances.

A voluntary conveyance will not be reformed so as to include land not referred to therein, unless all parties interested in the land consent.

2. Judgment 🔑688 — Reformation of Instruments — Voluntary Conveyances — Death of Grantor.

A voluntary conveyance reformed after the death of the grantor in a suit against the grantor's executors, to include land not referred to therein, is not binding on an heir under Code Civ. Proc. § 1664, prescribing method for assertion of heirship.

3. Reformation of Instruments 🔑28—Voluntary Conveyances—Death of Grantor.

Assuming that a voluntary conveyance can be reformed after death of the grantor without heirs to include land not referred to therein, the state, under Civ. Code, § 1386, is a party with a contingent interest in the estate of one dying intestate whose consent would be necessary.

4. Executors and Administrators 🔑129(1) —Reformation of Conveyances.

Executors and administrators have no authority to consent to the reformation of a voluntary conveyance by the deceased to include land not referred to therein.

Appeal from Superior Court, Yolo County; Malcolm C. Glenn, Judge.

Action to reform a deed by Mary Fickes and others against W. S. Baker and another, executors of the last will and testament of John Cradwick, deceased. Judgment for defendants, and plaintiffs appeal. Affirmed.

E. E. Gaddis, of Woodland, and L. Ernest Phillips, of Oakland, for appellants. A. G. Bailey, of Woodland, for respondents.

BURNETT, J. The action was brought for the reformation of a deed executed by the testator in his lifetime. It was found by the court that at the time of his death the deceased was the owner and in the possession of property described as lot No. 6 in block No. 10, in the town of Winters, county of Yolo; that he made no disposition of it by his will; that on the 31st day of July, 1912, said Cradwick executed a certain deed of conveyance to the plaintiffs, granting a certain lot of land contiguous to the parcel here in controversy; that "said deed was by its express terms made, executed, and delivered by the grantor therein, John Cradwick, for and in consideration of the love and affection which he had and bore unto the grantees therein named, and also for the better maintenance, support, protection, and livelihood of the grantees therein named, and said consideration was the sole consideration for the execution of said deed"; that said grantees were not blood relatives of deceased, "and, so far as known, at the date of trial said deceased had no heirs at law; that prior to the time said deed was drafted said John Cradwick directed the scrivener to include in the said deed the said lot No. 6, in block 10, but said scrivener failed and neglected to do so; that at the time said deed to said lot No. 7 and a portion of said lot 8 was executed and delivered nothing was said by any of said parties or by said scrivener in reference to the omission of said lot 6 from said deed." It is further found "that W. S. Baker and W. P. Womack, executors of the last will and testament of said John Cradwick, deceased, in open court at the trial of the issues involved in this proceeding consented to the granting of a decree directing them to amend and reform the deed hereinbefore described, so as to include lot 6 in block 10, in said town of Winters." The court concluded from the foregoing facts that the plaintiffs were not entitled to a reformation of said deed, and therefore directed judgment in favor of defendants for their costs. The appeal is from such judgment. It is to be observed that there is no express finding that at the time of the execution of said deed the grantor intended to convey said lot, but the cause has been treated here by both parties as though such intention existed, and we shall so consider it.

[1] It is quite apparent that the judgment of the lower court must be affirmed. This follows from the rule recognized by all the authorities that a voluntary conveyance will not be reformed so as to include land not referred to or conveyed therein, unless all the parties interested in said land consent thereto. The rule and the reason underlying it are clearly stated in Enos v. Stewart, 138 Cal. 112, 70 Pac. 1005, from which we quote:

> "A court of equity interferes to correct a mistake in a written instrument only in furtherance of justice, and to prevent fraud or some injustice. In this case, by refusing to correct the deed no fraud nor injustice is done to appellant. She has lost nothing because she paid no consideration for the deed. She has been deprived of nothing the law would otherwise give her. It is true the intention of the grantor is not carried out, but it would have been equally true if an attempt had been made to make a will and it had been defective in a vital part. The court could not reform a will, nor make it so that it would comply with the law. In this case the deceased intended to convey the property, but she did not do so."

In Smith v. Smith, 80 Ark. 458, 97 S. W. 439, 10 Ann. Cas. 522, it was held that the deed was not sufficient to convey the 82½ acres of land defectively described, that it was a voluntary conveyance without a valuable consideration to support it, and that equity would not reform said deed, citing a long number of authorities. This case was affirmed in Johnson v. Austen, 86 Ark. 446, 111 S. W. 455, wherein it was held:

> "In the absence of evidence of fraud or undue influence, a deed of gift from a wife to her husband cannot be reformed without the consent of all parties."

By the Supreme Court of Michigan, in Tuthill v. Katz, 174 Mich. 217, 140 N. W. 519, it was declared to be "a well-established rule that a court of equity will refuse its aid to rectify a mistake in a conveyance that is voluntary and without consideration unless all the parties consent." In Willey v. Hodge, 104 Wis. 81, 80 N. W. 75, 76 Am. St. Rep. 852, it was declared:

> "There can be no doubt of the intention of the father to convey this tract of land to the plaintiff. His deed, however, fails to describe it. The rule is quite familiar that a defective deed may be treated in equity as an agreement to convey, and performance enforced. But the rule is equally well understood that when it appears that the deed was voluntary, equity will not carry it into effect or reform it."

But we forbear further citation, as we are referred to no contrary decisions.

[2] It seems to be contended, however, that equity will withhold relief after the death of the grantor only where there is an heir to succeed to the property and it is claimed that the converse of the proposition, namely, that where there are no heirs the court should correct the mistake at the instance of the grantees, is a sound principle of equity. As to this contention, we may observe that there is no express finding that there was no heir, and it is quite apparent that if there be any heir to an estate he would not be precluded by such finding in this case from asserting and maintaining his heirship by the method pointed out in section 1664 of the Code of Civil Procedure.

[3] But waiving the foregoing considerations and admitting for the sake of argument that if all parties in interest consent such deed may be reformed after the death of the grantor, it is quite apparent that there are other parties in interest besides the heir or heirs and the grantees. Whoever would succeed to the property under the laws of the state stands in the same relation to the grantor as far as reformation is concerned and to what he has failed to convey as would an heir. In fact, the heir—so called—is a party in interest only by virtue of the statute and the same section of the Code which provides for the succession by a relative to the decedent determines that the state has a contingent interest in the estate of one dying intestate. For said section 1386 of the Civil Code reads:

> "When any person having title to any estate not otherwise limited by marriage contract dies without disposing thereof by will, it is succeeded to and must be distributed * * * in the following manner: * * * 9—If the decedent leaves no husband, wife, or kindred, and there are no heirs to take his estate or any portion thereof, under subdivision eight of this section, the same escheats to the state for the support of the common schools."

In other words, the legal title to said lot No. 6 on the death of John Cradwick vested according to the order prescribed by said section 1386, and the interest of the one entitled to the same is not affected by the class or category to which he may belong. The matter cannot be made plainer by argument, and it will not be disputed that the state has not consented to the reformation of said deed. It may be said also that the creditors, if any—and it does not appear that there was none—probably have such an interest that equity would not be justified in reforming said deed without their consent, but as to that we need not express any definite opinion.

[4] There is some pretense that the executors represented the interested parties in expressing their willingness to have the deed reformed. Such position, however, cannot be maintained. We need not consider at length the duties and responsibilites of executors, as those matters have been often discussed in the decisions, and the provisions of the Code of Civil Procedure on the subject scarcely need elucidation. It is sufficient to say that they have no power to consent to such

a decree, and if they attempt to do so it cannot affect the legal title to the property. They may compound with a creditor as provided by section 1588 of the Code of Civil Procedure, but that must be "with the approbation of the court or a judge thereof." They may also be required to complete contracts for sale of real or personal property made by the decedent in his lifetime (section 1597, Code Civ. Proc.), but this must be by direction of the court, and, of course, it must be in cases wherein the grantor if living could be compelled to execute the conveyance.

No one would contend that in a case like this where the conveyance was voluntary the grantor could be compelled to convey the land in controversy. Manifestly the executors stand in a relation no more favorable to the grantees.

We think there is no merit in the appeal, and the judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

36 Cal. App. 171

KARALES v. LOS ANGELES CREAMERY CO. (Civ. 2036.)

(District Court of Appeal, Second District, California. Feb. 6, 1918.)

1. SALES 🔑62—INDIVISIBLE CONTRACT.

A contract to sell and deliver to defendant all milk produced by plaintiff for a period of three months was indivisible, notwithstanding the milk was to be paid for monthly.

2. SALES 🔑342—BREACH OF CONTRACT—RECOVERY.

Where plaintiff stopped delivery, before termination of contract to deliver a certain amount of milk from a certain number of cows, because of the sale of his cows, he could not recover in an action on the contract for milk delivered, as one who himself breaches a contract cannot recover in an action thereon for breach of the other party.

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by Steve Karales against the Los Angeles Creamery Company. Judgment for plaintiff, and defendant appeals. Reversed.

Lloyd, Cheney & Geibel and Ovila N. Normandin, all of Los Angeles, for appellant. Chas. S. McKelvey, of Los Angeles, for respondent.

WORKS, Judge pro tem. [1, 2] The amended complaint in this action asks for judgment for the contract price of milk delivered during the months of January and February, 1915, at the special instance and request of the defendant. The answer alleges that the milk was delivered pursuant to the terms of a written contract between the parties, and that none was delivered after February 10, 1915. A copy of the contract is attached to the answer as an exhibit. By it Karales agreed, under date of December 1, 1914, to sell and deliver daily, and the creamery company agreed to buy, all the milk produced by Karales, being not less than 400 pounds per day from not less than 35 cows, for a three-month period from December 1, 1914, to March 1, 1915, at an agreed price per pound of butter fat content of the milk, payment to be made before the 15th of each month for deliveries during the preceding month. The contract also bound Karales to furnish the milk from healthy, well-fed cows, to keep his dairy in a clean and sanitary condition, and to protect the milk with a proper canvas covering while it was in transit to the company. It also provided that if the delivery of milk should be interfered with by strikes, or other specified untoward occurrences, then the contract should be suspended only during such interference. The trial court found the facts as alleged in the answer, with the further finding, in effect, that Karales had stopped the delivery of milk on February 10th because he had sold his cows, but rendered judgment in his favor. The appeal is from the judgment.

Notwithstanding the fact that the milk was to be paid for monthly, the contract was indivisible and entire, and the plaintiff committed a breach of its provisions by ceasing delivery on February 10th. McConnell v. Corona City Water Co., 149 Cal. 60, 85 Pac. 929, 8 L. R. A. (N. S.) 1171; Wood, Curtis & Co. v. Seurich, 5 Cal. App. 252, 90 Pac. 151; Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co., 156 Cal. 776, 106 Pac. 55. And one who himself breaches a contract, without excuse, cannot recover in an action upon the contract for a breach of its terms by the other party. Wood, Curtis & Co. v. Seurich, supra; Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co., supra; California Sugar Agency v. Penoyar, 167 Cal. 274, 139 Pac. 671; Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co., 168 Cal. 140, 142 Pac. 46. The fact that Karales sold his cows and went out of the dairy business was plainly no excuse or justification for his breach of the contract.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

36 Cal. App. 156

GLOBE GRAIN & MILLING CO. v. DRENTH, Constable. (Civ. 2185.)

(District Court of Appeal, First District, California. Feb. 5, 1918. Rehearing Denied by Supreme Court April 4, 1918.)

1. SALES 🔑88 — EXECUTED OR EXECUTORY CONTRACT—QUESTION FOR JURY.

Even if a contract, otherwise showing an actual sale of barley, might be construed to be executory, because of the expression "as per your samp. No. 1 Fen," though there was testimony that no sample was given, yet the positive testimony of the parties that the transaction was an absolute sale, raised a conflict of evidence for the jury, against motion for nonsuit.

2. TRIAL ⚷165 — MOTION FOR NONSUIT—VIEW OF EVIDENCE.

On motion for nonsuit, the evidence being fairly susceptible of two constructions, the court must take the view most favorable to plaintiff.

3. FRAUDULENT CONVEYANCES ⚷137(4)—CHANGE OF POSSESSION—GROWING CROPS—"IN THE POSSESSION OR UNDER THE CONTROL OF."

Growing crops are not in the possession or under the control of the seller thereof within Civ. Code, § 3440, so as to require immediate delivery and continued change of possession, which could only be by abandonment of the premises, to save the sale from being a fraudulent conveyance.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Globe Grain & Milling Company against Ben Drenth, constable. From an adverse judgment, plaintiff appeals. Reversed.

Short & Sutherland, of Fresno (Carl E. Lindsay, of Fresno, of counsel), for appellant. Barnard & Watters and S. L. Strother, all of Fresno, for respondent.

KERRIGAN, J. This action was brought by plaintiff for the alleged conversion of certain grain. The trial was had before a jury, and at the conclusion of the plaintiff's case a motion of nonsuit was made, and the court took the case from the jury and granted the motion, and this is an appeal from the judgment of nonsuit.

There are two points relied upon for a reversal: First, that no proper motion for a nonsuit was made; and second, that there was sufficient evidence to make out a prima facie case for the jury.

The first objection is based upon the assertion that no formal motion for nonsuit was ever made, and, if made, the grounds of the motion were not specified.

The record clearly discloses the fact that, not only was the motion made, but that it was based and granted upon the grounds that there had been no sufficient change of possession of the property under a sale thereof to satisfy the requirements of section 3440 of the Civil Code, and, further, that it was not shown that there was ever any sale of the property. There is therefore no merit in either of the contentions contained in the first objection.

In support of the second objection, it is argued that plaintiff presented substantial evidence tending to prove all the facts in issue constituting his case, and was therefore entitled to have the case go to the jury for a verdict on its merits.

[1] There is no conflict as to the facts. It appeared in evidence that two parties, S. C. Robertson and Geo. R. Harrison, were engaged in farming barley upon certain lands which they had leased, situated in Fresno county. In the month of June, 1916, and before the barley was harvested, they undertook to sell to plaintiff some 1,350 sacks of the crop, and agreed to deliver the same at San Joaquin, their nearest railroad station, as soon as the grain was harvested. The sale was made in two different lots. During the course of the harvest, but before completion thereof, it was taken by defendant into his possession as constable under a writ of attachment, and finally sold by him under execution. It was admitted by defendant that plaintiff at the time of the attachment served upon him a duly verified claim of ownership, and it is not denied that the defendant refused to deliver the barley to plaintiff notwithstanding the claim so made, but, on the contrary, sold the same under execution as above stated. The barley so sold constituted the entire interest of Robertson and Harrison in the crop, which amounted in all to about 1,100 sacks. The testimony of the vendors Robertson and Harrison, who sold the barley, and plaintiff's officers, who conducted the purchase, was positive and direct that an actual sale had been made. The terms of the contract itself show an actual sale unless the expression contained therein "as per your samp. No. 1 Fen" can be construed as having the effect to make the contract merely executory. Testimony was introduced to show that no sample of the barley was ever given, and from this evidence it might be inferred that the expression used was one of description only. Assuming, however, that the contract might be construed to be executory in character, the positive testimony of the parties to it was to the effect that the transaction was an absolute sale, and a conflict in the evidence was thus presented.

[2] A motion for nonsuit should be denied where there is any evidence to sustain plaintiff's case. On such motion, if the evidence is fairly susceptible of two constructions, the court must take the view most favorable to the plaintiff. Mitchell v. Brown, 18 Cal. App. 117, 122 Pac. 426.

[3] This being so, the only remaining question to be discussed is as to the sufficiency of the transfer of the property to satisfy section 3440 of the Civil Code.

The property was not in existence when the sale of the grain was made, and, of course, was not and could not then be in the possession of the transferor. For like reasons there could be no actual or continued change of possession of this nonexistent property. Fissel v. Monroe, 33 Cal. App. 756, 166 Pac. 607.

Growing crops are chattels not susceptible of manual delivery until harvested, and are not "in the possession or under the control of the vendor" within the meaning of the statute requiring an immediate delivery and continued change of possession. O'Brien v. Ballou, 116 Cal. 318, 48 Pac. 130. To so construe the statute would make it an imperative duty on the part of the grower to abandon the possession of his farm to the vendee at the time of the sale, a proceeding the statute certainly does not contemplate. Davis v. McFarlane, 37 Cal. 634, 99 Am. Dec. 340.

In the state of the evidence we think it clear, in view of these authorities, that it was error to grant the defendant's motion for nonsuit. The judgment is therefore reversed.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

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36 Cal. App. 159

TRELOAR v. KEIL & HANNON et al.

(Civ. 1555.)

(District Court of Appeal, Third District, California. Feb. 6, 1918. On Rehearing, March 8, 1918.)

1. INSURANCE 🔑514—LIABILITY—INDEMNITY INSURANCE—INJURY TO THIRD PERSON—"DEFEND."

Under contract of P. insuring K., not against liability that may be incurred by K.. but against loss and expenses arising from claims on K. on account of bodily injuries accidentally suffered, or alleged to have been suffered by any person, and caused by K.'s horses or vehicles, and providing that no action shall lie against P. for any loss or expense except such as has actually been sustained and paid by reason of a final judgment, P. is not liable to one so injured, so as to authorize action against it and K., and this notwithstanding provision of contract that, if action is brought on account of an accident, K. shall notify P., and P. will settle or defend the action; "defend" not meaning to successfully defend.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Defend.]

2. INSURANCE 🔑514—INDEMNITY INSURANCE—LIABILITY OF INSURER—STATUTES.

Liability of the insurer on a policy, insuring against loss and expenses actually sustained and paid by reason of a final judgment by insured on account of a claim for injury to another from insured's horses or vehicles, is not intended to be changed by Civ. Code, § 2777, providing that one who indemnifies another against an act to be done by the latter is liable to every person injured by such act; section 2778, subd. 2, providing that, on an indemnity against claims, demands, damages, or costs, the person indemnified is not entitled to recover without payment thereof.

3. APPEAL AND ERROR 🔑1073(3)—HARMLESS ERROR — JUDGMENT AGAINST FIRM AND PARTNERS.

Judgment having been properly rendered against the individual members of a firm, it is a matter of no moment to them whether the partnership, against which judgment was also rendered, was dissolved pending the action.

On Rehearing.

4. INSURANCE 🔑146(3)—POLICY—CONSTRUCTION.

Policy of insurance will not be construed against insurer, where this will require the doing of violence to its plain terms.

5. CONSTITUTIONAL LAW 🔑113—OBLIGATION OF CONTRACTS.

Where parties have entered into a lawful contract and clearly expressed their intention, the Legislature cannot provide a different contract for them.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Alfred Treloar against Keil & Hannon, a partnership, and others. Judgment for plaintiff, and defendants appeal. Reversed in part, and affirmed in part.

Meredith, Landis & Chester and Wachhorst & Wachhorst, all of Sacramento, for appellants. L. T. Hatfield and Frank A. Prior, both of Sacramento, for respondent.

BURNETT, J. Plaintiff was injured in consequence of being struck by a vehicle driven by said E. P. Hannon of the said firm. The action against said copartnership and the individual members thereof was based upon the claim of negligence in producing said accident, and the evidence was sufficient to sustain the finding to that effect.

[1] The claim as to the casualty company's liability grows out of the execution by said company of an indemnity insurance policy issued to said Keil & Hannon. The said policy provides:

"Pacific Coast Casualty Company, of San Francisco, California, hereinafter called the company hereby insure Keil & Hannon, of the county of Sacramento, state of California, hereinafter called the assured, against loss and expense arising from claims upon the assured for damages on account of bodily injuries accidentally suffered or alleged to have been suffered during the period of this policy by any person, and caused by the horses or vehicles in his service and the use thereof, while in charge of the assured, or his employés."

Said policy also provides that:

"No action shall lie against this company for any loss or expense under this policy unless it shall be brought for loss or expense actually sustained and paid in consequence of a final judgment within 90 days from the date of said judgment and after trial of the issue."

There is no contention that Keil & Hannon, or either of them, or any one on their behalf, has paid any judgment or any money in consequence of the injury suffered by the plaintiff, nor is there any contention that any final judgment has been obtained in the action.

The complaint herein was brought against the defendants upon the theory that they are jointly and severally liable for the damages suffered, and the judgment, except as to the amount of damages, was in accordance with the prayer of the complaint. From the portions of the policy which we have hereinabove quoted there can be no possible doubt that the parties thereto intended—and by apt language expressed their intention—that the liability of the indemnifying company should attach only after loss or expense had been actually sustained and paid by the indemnitee. We are at a loss to understand how such intention could be more accurately or plainly expressed. It is true that the language is "that no action shall lie against the company," instead of "that no liability shall accrue to the company." But it is too plain for argument that if no action will lie, no liability will be incurred.

It may be stated, also, that the portion of the said policy hereinabove first quoted, by express language limits the insurance to "loss and expense" incurred by the assured. This language necessarily implies that the assured must have suffered loss and expense before he has any claim against the insurance company for indemnification. It is to be observed that the insurance is not against liability that may be incurred by the assured. If so, a very different case would be presented. However, the conclusion of the lower court in awarding judgment against said insurance company is sought to be justified by reason of the following provision in said insurance policy:

> "B. Upon the occurrence of an accident the assured shall give to the company, or to its duly authorized agent, immediate written notice thereof, with the fullest and most accurate information obtainable; and the company, at its own expense, will make such investigation as it may deem necessary. If a claim is made on account of an accident, the assured shall give like notice thereof; and the company at its own expense, will settle or contest the same. If a suit is brought on account of an accident, the assured shall forward immediately to the company, or to its duly authorized agent, every process and paper served upon him. The company, at its own expense, will settle or defend said suit whether groundless or not; the moneys expended in said defense shall not be included in the limits of the liability fixed under this policy. The assured shall not assume any liability, nor interfere with any negotiation for settlement or any legal proceeding, nor incur any expense nor settle any claim except at his own cost, without the written consent of the company."

It seems to be thought that this provision modifies, changes, or nullifies the other provisions, limiting liability to loss or expense that has been incurred and paid by the assured, but, attributing to the language its ordinary significance, we can reach no such conclusion. The purpose of the agreement requiring notice to be given to the indemnitor of any action that may be brought on account of an accident, and authorizing the company to contest or settle the same, was to protect the interest of the company, to prevent any possible collusion between the plaintiff and the assured; and it is quite natural and reasonable that since the company was interested in any judgment and the amount that might be awarded in the action, it should want to appear and contest the proceeding.

It is easy to understand, also, why the company should desire to have the option of settling or contesting the litigation, and that the matter should not be taken out of its hands by reason of any negotiation for settlement on the part of the assured.

A fair construction of the said provisions leads to the conclusion that, instead of modifying, defeating, or nullifying the effect of the language limiting the liability of the insurance company to the loss or expense incurred by the assured, they operate to extend an additional protection to the assured in the matter of providing that the expense of a contest of any litigation should be borne by the company, and not included in the limits of the liability fixed by the policy, and also to authorize and afford to the company the protection of conducting or of contesting or defending said litigation. It must be said, however, that there is some respectable authority for the position taken by the respondent.

The most carefully considered case in line with this contention is Sanders v. Frankfort Marine, Accident & Plate Glass Ins. Co., 72 N. H. 485, reported in 57 Atl., page 655, 101 Am. St. Rep. 688, wherein it was held:

> "So far as the agreement to defend involves the relief of the assured from the expense of such litigation, that agreement also involves the performance of the contract of indemnity by the assumption of the liability indemnified against."

This conclusion is reached by reason of the court's opinion of the meaning of the expression, "to defend." The court attributed to this phrase the signification "to successfully defend." In other words, it is held that the insurance company agreed that it would defend successfully any litigation for damages that might be instituted against the assured. To defend successfully was held equivalent to the expression to assume liability. Hence the court held that by this covenant the insurance company agreed to be subrogated to the liability incurred by the assured. It seems to us quite manifest that the said court placed a wrong interpretation upon the language used by the parties to said insurance policy. The expression to defend does not ordinarily mean, we think, to defend successfully, but as used herein its meaning is to contest the suit. We see nothing in the expression to indicate the intention of the insurance company to assume liability of the assured and to pay whatever judgment might be awarded in the action. Of course, the policy should be construed so as to give effect to every portion of it if such construction is reasonable, and we can see no inconsistency or conflict in the different provisions that we have hereinbefore quoted.

It may be said also that the respondent relies upon the case of Moore v. Los Angeles Iron & Steel Co. (C. C.) 89 Fed. 73, wherein it was held that section 2777 of the Civil Code, providing that one who indemnifies another "against an act to be done by the latter, is liable jointly with the person indemnified, and separately to every person injured by such act," is not limited to cases where the indemnitee binds himself, or is bound by law, to do some act that may result in damage to another, or to cases in which the indemnitor is held to be a joint trespasser or tort-feasor with the indemnitee; but it "includes * * * all cases of indemnity against future contingencies." It is to be observed, however, that the policy of insurance in that case indemnified "against liability for personal injuries," and the language is thus quite different from that fixing the liability of the insurance company in the present instance. And it must be said also that the great and overwhelming weight of authority is decidedly against the position taken by respondent.

In Poe v. Philadelphia Casualty Co., 118 Md. 347, 84 Atl. 476, the policy provided that the surety company "would on demand pay to said plaintiff the amount of any judgment recovered by it in said suit not exceeding $6,000.00 with interest." Therein are traced historically indemnity policies issued by insurance companies, and it is pointed out that in the earlier ones the insurance was provided against "liability" incurred by the assured, and that under such policies the courts held that the liability of the insurance companies was fixed by the rendition of a final judgment, and that the casualty companies were liable on their contract, even though the employer had not discharged his liability by payment. Several decisions are cited based upon a construction of this language of the policy. Thereafter the wording of the policies was changed to cover only liability which had been paid. Attention is called to decisions construing this language wherein it was held, "The contract of the insurance company does not require that the payment should be made in cash," but that it is satisfied if the payment is made in property. Thereafter the language of the policies was changed by the insurance companies so as to limit recovery to "losses" resulting from liability and actually paid by the employer in money. And the court, after quoting the language of said policy, said:

> "The distinction which is decisive of this case is now firmly established, and is nowhere more clearly stated than in Amer. Emp. Liability Ins. Co. v. Fordyce, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305, in these words: 'The difference between a contract of indemnity and one to pay a legal liability is that upon the former an action cannot be brought and a recovery had until the liability is discharged; whereas upon the latter the cause of action is complete when the liability attaches.'"

A large number of cases and other authorities is cited in support of said view.

In Finley v. U. S. Casualty Co., 83 S. W., page 2 (113 Tenn. 592, 3 Ann. Cas. 962) it was held:

> "Agreements in an employer's liability policy that, if suit is brought against the assured, he shall immediately forward the process to the insurer w,hich will defend against or settle the claim, do not, when considered with a provision of the policy declaring its purpose to be indemnity to the assured 'against loss from liability for damages,' and another agreement that no action shall lie against the insurer in reference to any loss under the policy unless brought by the insured himself to reimburse him for payment by him in satisfaction of a judgment, render the policy one of indemnity against liability, but it is a policy against loss or damage by reason of liability, under which the amount of insurance does not become available until payment of the loss by the assured, and cannot be impounded by an employé on recovery of a judgment against his employer."

In Frye v. Bath Gas & Electric Co., 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500, it was held by the Supreme Court of Maine that:

> "A contract to indemnify an employer against loss by reason of liability for accidental injuries to employés does not inure to the benefit of an injured employé so that he can enforce payment of it in case the employer becomes insolvent and makes an assignment for creditors before he receives his judgment so that the judgment cannot be enforced, especially where the contract provides that no action shall lie against the insurer, as respects any loss under the policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue."

In Cushman v. Carbondale Fuel Co., 122 Iowa, 656, 98 N. W. 509, it was said:

> "While the policy provided that the guaranty company might appear and defend for the fuel company in any action brought against it for personal injuries, such provision was for the protection of the guaranty company alone, and imposed no liability upon it beyond the terms of the contract. A court of equity can no more disregard the express provisions of the contract than could a court of law, and neither can make a new contract for the parties which would impose a liability not originally contracted for; hence whatever relief a court of chancery might grant plaintiff in any event must, of necessity, be based upon and be determined by the contract which the parties have themselves made. The only obligation of the guaranty company was to indemnify the fuel company against 'a loss actually sustained and paid in satisfaction of a judgment after trial of the issue.' This covenant is as explicit and certain as language could well make it, and, as between the parties to the contract, no recovery could be had against the guaranty company because the judgment against the fuel company was not paid, and consequently the covenant was not broken."

There is a large number of cases cited in support of the views announced by the court.

In Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981, it appears that the employer's liability policy was subject to the agreement that if any suit was brought for damages, immediate notice should be given to the insurer, so that it could defend or settle the same, and that the insured would not settle or interfere with negotiations for settlement or in any legal proceeding without consent of the insurer, and it was further provided that:

> "No action shall lie against the insurer for any loss under the policy unless it shall be brought by the insured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issues against the assured for personal injuries."

It was held by the court that "making a payment of a judgment against the defendant is no part of a covenant to defend the action," and there was no claim against the insurance company because the insured had not paid the judgment and therein was recognized the difference between such policies and one insuring against liability of the employer.

In Carter v. Ætna L. I. Co., 76 Kan. 275, 91 Pac. 178, 11 L. R. A. (N. S.) 1155, the policy contained the stipulation as to liability similar to the one before us, and the court held that it was a contract of indemnity for the benefit of the assured, and that no right of action thereon arose against the insurance company until the assured sustained a loss by payment of a liability. The said policy contained a similar provision in reference to the defense or settling of an action, and it was held by the court that this did not change the effect of the other provisions as to its liability, the court saying:

> "The fact that the insurance company made the defense for the bridge company against plaintiff's claim for damages did not estop it from denying liability under its contract. The right to defend was specifically given by the contract, and this burden was assumed for the reason that the award to be made in the proceeding might ultimately be the measure of its own liability. To defend the action in behalf of the assured was in no sense an agreement to pay the plaintiff's judgment, and could not have misled the plaintiff."

A similar view is expressed in Puget Sound Imp. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co., 52 Wash. 124, 100 Pac. 190.

The provisions of the policy therein construed were similar to the ones before us, and it was therein held that the policy constituted a contract of "indemnity against loss," and not against liability merely, and no right of action accrued thereon until the assured had actually paid a judgment rendered against him.

In Allen v. Gilman, McNeil & Co. (C. C.) 137 Fed. 136, a similar policy was construed by the circuit court of Pennsylvania, and it was therein held that the policy was an agreement insuring the defendant against loss, and not against liability and therein reference is made to the case of Sanders v. Frankfort Marine, Accident & Plate Glass Ins. Co., 72 N. H. 485, 57 Atl. 655, 101 Am. St. Rep. 688, supra, as follows:

> "Against the ruling thus referred to is the single case of Sanders v. Frankfort, etc., Ins. Co. [72 N. H. 485] 57 Atl. 655 [101 Am. St. Rep. 688], in which an opposite conclusion is reached by the Supreme Court of New Hampshire in construing a policy like the one now under consideration. The opinion is careful, and deserves much respect; but it is certainly opposed to the weight of authority, and I am not satisfied with the construction of the policy that the court found it necessary to adopt in order to avoid the force of the provision forbidding suit by the insured until after he has paid the employé's judgment."

It is further said that the objection to the construction placed upon the policy by the said New Hampshire court is:

> "That it defeats a plain and unambiguous provision by what appears to be a pure assumption that the parties did not mean what they clearly said. The suits which they had in mind and provided for were suits by the insured for losses, 'under this policy,' and for such losses the insurance company was liable whether it had defended the employés' suits or not. If it had defended these, it would probably be estopped to deny its liability afterwards. If it had refused to defend, taking the ground that the policy did not cover the particular injury, it could raise that question afterwards when a suit should be brought by the insured against it after the employé had obtained a judgment and had been paid."

It might be said, also, that in Northam v. Casualty Co. of America (C. C.) 177 Fed. 981, a different construction is placed upon said section 2777 of the Civil Code from that in the Moore Case (C. C.) 89 Fed. 73, supra, and it is held that said section is to be regarded as a declaration of the common law, and that it announces a rule of no greater import. That it applies, in other words, to joint tort-feasors or where the liability of the indemnitor and indemnitee is joint and concurrent. As illustrative of this position are cited Herring v. Hoppock, 15 N. Y. 409; Davidson v. Dallas, 8 Cal. 227; Lewis v. Johns, 34 Cal. 629.

[2] As to said section we may say that it would not be competent for the Legislature to modify, defeat, or nullify a contract of the parties by creating a liability that was not contemplated or provided in their contract, and in the second place it is entirely obvious by the provisions of the succeeding section 2778 that the Legislature did not intend to change the liability of the indemnitor in such policy as the one herein involved. For therein it is provided:

> "Sub. 2. Upon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof."

It may be stated finally that the encyclopedias and text-books approve the doctrine which we have herein announced.

Applying the familiar rules of interpretation we can reach no other conclusion than that the surety company is not liable for this claim. To hold that the surety company bound itself to defend *successfully* any suit that might be brought against the indemnitee and to assume any liability of the latter, and therefore satisfy any judgment that might be obtained against the employer in such case and under the circumstances herein appearing, would be doing violence to the language of the contract adopted by the parties themselves and supplying an additional covenant not to be found in the policy.

[3] There is some contention made that the judgment against the partnership cannot be supported for the reason that the partnership was dissolved before the action was begun. There is no doubt, however, that it was in existence at the time of the accident, and that the suit was properly brought against said partnership and the individual members thereof. It is equally clear that the judgment against C. H. Keil and E. P. Hannon, and each of them is justified, and under the circumstances it would seem to be a matter of no moment to them whether the partnership is still in existence.

The judgment as to the Pacific Coast Casualty Company, a corporation, is reversed and in other respects it is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

On Rehearing.

BURNETT, J. [4] Respondent in his petition for a rehearing claims that the court has construed the contract of indemnity in favor of the insurer rather than the insured, whereas, it is the latter that should be favored. We are aware of the rule that justly requires the courts to resolve doubtful and obscure provisions so as to give the fullest protection possible to the interests of the insured, and we are in accord with that policy, but it seems to us that to support the position of respondent in this case would require us to do violence to the plain terms of the contract which the parties have deliberately chosen.

Petitioner, with some degree of acerbity, complains because we failed to notice specifically some of the cases cited by respondent, especially Rodgers v. Pacific Coast Casualty Company, 33 Cal. App. 70, 164 Pac. 1115. Of course, there must be some limit to an opinion, and it is not generally supposed that the appellate courts in that respect usually err upon the side of brevity. The cases cited by respondent, though, were examined, and we thought our reference to them was sufficient for the purpose of the case in expressing our views as to the merits of the controversy. As to the Rodgers Case, we may add that in the opinion of the Second District Court of Appeal, written by Mr. Justice James, for whose judgment we have the highest opinion, the language of a policy similar to the one before us was construed in harmony with respondent's contention herein, but it is to be noted that the affirmance of the judgment of the lower court was also grounded upon the other position that there had been a payment of the judgment by the indemnitee; and, in denying the petition for rehearing therein, the Supreme Court limited its concurrence to that view, saying that the opinion of the District Court "also proceeds upon the theory that the payment by Irwin (indemnitee) of the judgment against her in favor of the injured party is a *condition precedent to the existence of a cause of action in favor of Irwin against the company*, as indeed the policy expressly declares; but that such previous payment need not be made in money, but may be made in property of any kind, including the promissory note of Irwin if such note is *accepted expressly as payment;* a theory in which we concur." (Italics ours.)

The foregoing language seems very clear, and it can leave no doubt as to how the highest court of this state regarded a similar policy. It is expressly declared that a payment of the judgment by the indemnitee was a condition precedent to the existence of a cause of action against the insurance company. It may be that we have misunderstood the significance of the terms employed by the Supreme Court, but, if it be so, we are fearful that we are without satisfactory excuse.

[5] There is some criticism of the declaration of this court as to the incompetency of the Legislature to change the terms of the contract of the parties. Probably the proposition was not expressed as clearly as it should have been. Of course, we assumed that the contract was legal, and what we intended to say was that, where parties have entered into a lawful contract and have clearly expressed their intention, it does not lie with the Legislature to provide a different contract for them.

We would be glad to afford relief to the plaintiff if we could so construe the policy, but we find ourselves unable to do so.

The petition for rehearing is denied.

We concur: CHIPMAN, P. J.; HART, J.

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36 Cal. App. 179

COLE et al. v. MUGRIDGE. (Civ. 1556.)

(District Court of Appeal, Third District, California. Feb. 7, 1918. Rehearing Denied by Supreme Court April 4, 1918.)

1. VENDOR AND PURCHASER 🔑21 — AGREEMENTS TO CONVEY — CONSIDERATION — CARE AND SUPPORT.

Agreements to convey property in return for support and care during life are enforced without reference to the form or phraseology of the writing by which they are expressed.

2. VENDOR AND PURCHASER 🔑44—MUTUALITY—AGREEMENT TO CONVEY LAND.

Evidence *held* sufficient to support a finding that there was a meeting of the minds in a transaction wherein defendant agreed to convey property in return for support and care during life.

3. APPEAL AND ERROR 🔑1068(1)—HARMLESS ERROR—INSTRUCTIONS.

In action for damages for breach of contract to convey land in consideration for personal care, attention, companionship, and consolation in which good faith was not in issue, a statement in an instruction that "in cases of bad faith the measure of damages would be somewhat different" did not impute bad faith to the defendant, and could not have misled the jury, especially where the jury gave a verdict for less than the value of the property.

Appeal from Superior Court, Solano County; Henry C. Gesford, Judge.

Action by Bertram W. Cole and Nora E. Cole against Olive J. Mugridge. Judgment for plaintiffs, and defendant appeals. Affirmed.

Leon Samuels, of San Francisco, for appellant. James H. O'Leary, of Vallejo, and E. S. Bell, of Napa, for respondents.

CHIPMAN, P. J. This is an action for damages for breach of an alleged contract entered into by plaintiffs, who are husband and wife, and defendant on or about March 11, 1914, by the terms of which it is alleged that in consideration of plaintiffs' giving defendant their personal care, attention, companionship, and consolation and furnishing defendant with necessary food during the remainder of her life, defendant would convey to plaintiffs a certain lot of land situated in the city of Vallejo, together with the dwelling house thereon and the furnishings therein, defendant to reserve unto herself an estate in said property during her life, plaintiffs to reside with her in said dwelling house on said premises, "free from rent, during the remainder of defendant's natural life."

It is alleged in plaintiffs' second amended complaint: That on March 23, 1914, and for a long time prior thereto, plaintiffs resided in the county of Worcester, state of Massachusetts. That about March 23, 1914, plaintiffs departed from their former home in the said county of Worcester for the city of Vallejo, arriving in said city about April 14, 1914. That on said day defendant had not conveyed said property to plaintiffs in accordance with said contract or at all. That on or about March 11, 1914, and April 14, 1914, and at all times between said dates, plaintiffs were ready and willing to comply with the terms of said contract and on April 14, 1914, at the said city of Vallejo, plaintiffs "offered defendant immediate compliance with the terms of said contract; but defendant then and there rejected plaintiffs' said offer of performance, and then and there refused to convey said property to plaintiffs in accordance with the terms of said contract, or at all, and then and there refused to allow plaintiffs to reside in said dwelling house with or without the use of said furnishings, during the remainder of defendant's natural life, or during any other period free from rent, or otherwise, or at all, and then and there refused to comply at all with the terms of said contract. By defendant's failure and refusal to comply with the terms of said contract as aforesaid, plaintiffs have suffered injury and damage as hereinafter alleged." That in order to comply with the terms of said contract on their part, plaintiffs were compelled to and did surrender a certain leasehold interest in certain land in said Worcester county that had four years to run and which was yielding plaintiffs an annual profit of $1,200, and were obliged to pay the lessor the rents reserved, to wit, the sum of $480, to plaintiffs' damage in the sum of $5,280. That plaintiffs were for like reason obliged to sell and did sell certain farm implements and other personal property described, at a loss of $602. That in coming to California in order to comply with the terms of said contract they incurred certain expenses, the items of which are enumerated, amounting to $329, and that to return to Massachusetts the expense to plaintiffs will be a like amount. That plaintiffs were unemployed by reason of defendant's failure to perform on her part, for a period of 48 days, resulting in plaintiff's further damage in the sum of $240. The prayer of the complaint is for the sum of $6,781.70 and costs of suit. The complaint is verified. The answer consists of specific denials of the averments of the complaint with the single exception that defendant admits that she would not convey said property to plaintiffs on or about the 14th day of April, 1914, or at any time. The cause was tried with a jury, and plaintiffs had a verdict for $1,500, for which amount the court entered judgment with interest from its date, September 2, 1915, and for costs fixed at $111.20.

[1] Appellant says in her brief that the facts are "extremely unusual," which may be said of most of the cases in this class, for it would be difficult to find any two alike in their facts. While this is true, it is also true, as was said in Bruer v. Bruer, 109 Minn. 260, 123 N. W. 813, 28 L. R. A. (N. S.) 608:

> "By the modern trend of authority these transactions are placed in a class by themselves, and enforced without reference to the form or phraseology of the writing by which they are expressed."

The contract in question is chiefly derivable from letters exchanged between plaintiff Mrs. Cole and defendant Mrs. Mugridge. Mrs. Cole in her testimony thus explains how this epistolary correspondence sprang up:

> "I first learned of Mrs. Mugridge in March, 1910, in Vallejo. I met Mr. Mugridge her husband in Dr. Klotz's office at that time, when I was there with my husband. Mr. Mugridge spoke to us first, and in the course of the conversation we found that Mr. Mugridge and I were from the same state, New Hampshire. We all left Dr. Klotz's office together and Mr. Mugridge walked with us as far as the St. Vincent Hotel, where we were stopping. He was very friendly to us and invited us to his home, at the same time telling us of his wife, whom he said was also a native of New Hampshire. After that we met him about half a dozen times. He made two or three visits to us at our hotel, and on each occasion invited us to come to his home; but we never did so. However, at his insistence, we did upon one occasion walk with him to the street corner near his home and he pointed it out to us. This is the same property which his wife later on promised to deed to us. About the last time he saw us, he asked my husband and myself to write to him, stating at the same time that his wife was very fond of postal cards, and asked us to send her some. About two weeks after meeting Mr. Mugridge, my husband and I returned to New Hampshire. After our return to New Hampshire I wrote to Mr. Mugridge and his wife answered the letter, giving as her reason for doing so that her husband could not see to write. After this, at Mrs. Mugridge's request, I wrote to her directly and sent her some postal cards. This was the beginning of my correspondence with her, and from then on many letters were exchanged between us."

At this time, 1910, defendant's family consisted of herself and husband and son. She was almost 73 years old; her husband several years older. He died some time prior to 1913, and her son also died in March of that year. The earliest letters are not in the record. Defendant introduced a letter written by Mrs. Cole of date January 1, 1913. There is nothing in this letter indicative of the wish on appellant's part to have respondents come to California or of respondents' entertaining any intention to do so. Defendant introduced another letter written by Mrs. Cole dated March 4, 1913, in which the writer expresses her sorrow on hearing of the accident to Mrs. Mugridge's son. She writes of the griefs and troubles her own family is passing through and asks forgiveness for inflicting them upon her friend who has so many of her own. The next letter in order of time is one dated December 28, 1913, from defendant addressed to "My dear friends, Mr. and Mrs. Cole," partly written on that date, partly on January 4, 1914, and January 6, 1914. In this letter she dwells upon the death of her husband and especially the death of her son Charlie. In this letter she says that after the death of her husband she wanted to ask Mrs. Cole if she ever thought of coming out to California but "did not dare to" for fear she could not do her justice, adding:

> "I don't know what will become of me if some body dont come to my relief for I cant always do as I do now, * * * if you ever want to come out here and can then write me so I can think, then I will write you more. * * * I have just got your New Years cards; how can you have so much patience with me? yet if you was here you could see for yourself all I can do is to thank you many times for all your kindness."

On February 1, 1914, appellant wrote Mrs. Cole, among other things saying:

> "Would it be any temptation to you to come to California if I should tell you I would give you my home with what is in it. I have got to have some one and of course it wont be long that I shall need any one or anything, there are many who would come and be glad to, but I am afraid to ask any and if you are the kind of people I think you are I would gladly do all I could for you. Now think this matter over and write me and ask me anything you want to know and I will try to explain anything and everything and if it don't strike you favorably it will be all right and if it does ask any questions you want to, and I will try to answer satisfactorily."

Appellant wrote again February 16, 1914, in which she takes up the matter of respondents' coming to California, saying, among other things:

> "I will willingly give my home to you and it is not likely I shall trouble anybody long for I am 76 years old, and it is not every one that reaches that age; * * * don't put any money into that field of potatoes but save it to come out here with, that is if you would like to come and I certainly would like for you to come; all you would have to do for me is to board me and take care of me a little and if I should get so I could not do for myself I will hire a nurse. My property is not involved in any way only with street work paving and so fourth which I have money to pay and I am trying every way to keep squair so as not to die in debt."

Again, in the same letter, she says:

> "Just dispose of what you have and get ready and come right along and you will find everything on the squair for I could never take advantage of anyone much less one who is so kind as I think you and your husband are and you will find me just what I say, to be sure we have never seen each other, and I do hope we neither of us will ever be sorry for what we are trying to bring about."

In another letter of February 22, 1914, she describes to respondents her home, saying among other things:

> "I do hope you will come, you will never get another chance like it, you never will find a home ready for you, I have been thinking of you all day and thinking what I wanted to tell you and I want you to come while I am living."

Again, on March 3, 1914, she wrote to respondents:

> "I hope you will come soon and hope that we shall all be spaired to enjoy each others companionship."

And in the same letter she said that she had not mentioned the matter to any one for it would be time enough when the respondents came to her.

> "I think I will have a deed made out to you and your husband to take effect at my death or would you rather I would wait till you get here? You answer this as soon as you get this letter, this house is insured for three years, and there is no incumbrance on it anyway only as I told you in the first letter the street work and I have money in reserve for that purpose."

In a letter of March 11, 1914, she says:

> "I am going out this afternoon to look after your interests and if you come and I sincerely hope you will, I shall do all I can to make us happy."

The day following, March 12, 1914, she writes advising against bringing any furniture, saying:

> "If I were in your place I would bring the traveling expenses down as low as possible for perhaps if you stay here till I am gone you will want to sell out and go East again, so perhaps it would be well to store it if you want to keep it."

On March 14 she wrote again:

> "I have not spoken to anyone about you and shall not for if anything should happen which I do hope will not, everybody would blame me for taking up with strangers, but I put confidence in you both if you are strangers, I hope we wont always be * * * I will close now hoping to see you soon; write me and make a rough guess if not very accurate what time you will start and if I dont have everything done be assured it is not my fault. * * * P. S. Dont worry the Deed is all right don't say anything. I don't wonder you cried over your cow and calf, I should cry over chickens and pigs, or anything that had life that I had."

On March 22d she wrote Mrs. Cole again, addressing her as follows, "My dear niece or daughter or whatever you want to call me," in which she expresses the hope that they will be happy when they are all together. On March 23d she writes Mrs. Cole again, expressing the hope that they have done right in regard to the Coles coming to California, adding:

> "I am willing and will do what I said I would if you come and I hope you will and that neither of us will be disappointed with the other, now what I write is for both your and my good so please take it so, I should feel very bad to have you come out here and find things not as well as you expected."

On February 10, 1914, Mrs. Cole wrote to appellant acknowledging the receipt of a letter from appellant, stating:

> "Dear friend, do you mean that if we would go and take care of you and be kind to you as long as you lived that you would give me your

> home for myself? * * * I would like to live there very much. I liked it when I was there. Of course, I should have to know just what you thought best to do before we gave up our place here. We only leased it, as I wrote you, but it was a chance one would seldom find, and the stock is ours what there is of it, and it is all we have in the world."

She asks her "Aunt Mugridge" to think the matter over for as the planting season was coming on they would have to know what they were going to do.

> "Of course we would not want to sell our stock to pay our way out there and lose all we had here, unless we were sure of the place. I know we would do all in our power for you to help you and to make the sunset of your life as contented as possible after such a loss. It means a great deal to us all and I only hope we may all live to thank God for bringing us together in mutual help. Now, you too, write me just what you mean and think best to do. If I could afford it I would go out and talk with you myself, but it is more than I can do. We know each other pretty well, now don't we? I shall have this on my mind until I know."

On February 25th Mrs. Cole again writes Mrs. Mugridge acknowledging the receipt of her letter, stating:

> "I received your welcome letter today, and I am all excitement myself. I believe it will mean more happiness for us all. It was quite a decision for me, because it meant so very much, for you see, we shall not have anything, practically, left, after we pay our fare out there. It will cost about two hundred dollars, but Auntie, I know you are true and would not let us give this chance up here, only to lose all. * * * Of course, I would not expect you to give me your home until you knew us, but I am sure you would do what was right under the circumstances. It will take a little time to dispose of all our stock but we will do it as quickly as we can. I hesitated a little at first, because I knew if we gave this place up we never would find again the chance we had here. * * * I want to say too, that it is not because you have a home and a little money alone, that I am going to you, it is both because I want a home and believe I can make you happier, Auntie, too, in your last years. It must have been meant to be so. I hope nothing happens in any way to any of us before we get together and try and find a little comfort for you."

On March 4, 1914, Mrs. Cole writes to Mrs. Mugridge:

> "Started packing yesterday. One room done. Mr. C. packs everything in burlap and paper. * * * Keep up courage, Auntie, we will be there before very long now. I dread to see my animals go and break up but I hope we shall all be happy there together."

On March 9th she writes again, acknowledging the receipt of a letter from Mrs. Mugridge, among other things, saying:

> "Auntie, if you feel perfectly willing I should feel pleased to have you make out the deed. God knows I do not anticipate anything happening to you, Auntie, but it would be almost like insuring us."

On March 16th she wrote reporting progress in her preparations for going to California and acknowledging the receipt of a letter from Mrs. Mugridge. On March 19th she wrote again, acknowledging the receipt of another letter and stating that they were about through packing, and on March 24th she wrote again at some length describing the many things she had to do in disposing of their property, closing as follows:

> "We will all be together soon now I hope and then we can both find comfort, sympathizing with each other and I think it will help us both. Don't try to do too much Auntie and keep as well as you can. We both send you sincere love until we can see you, which will be soon now."

On April 2d she wrote:

> "I sent a letter to you yesterday but will send you a few words more today to tell you that we have secured our tickets and will leave for Cal. (and you) April 8th on a Wednesday and the trains are scheduled to arrive Monday night, April 13th, in San Francisco. * * * We will all be together soon now. Yes, it was a great decision for us all, but I am sure it was for the best, because we both mean to do right by each other, and we did need each other, didn't we? No, Auntie, I never thought you were rich, and you never misrepresented anything to me. What I did want was a home, and I was willing to do all we could for you in return for yours."

This ends the correspondence so far as shown in the record. Plaintiffs called upon the defendant at the trial to produce all the letters written by Mrs. Cole to the defendant, but the defendant stated that she could find no others except the ones already referred to. Mrs. Mugridge wrote very volubly and with great frankness and apparent sincerity, as did also Mrs. Cole. We think an examination of the letters taken in their entirety will show quite satisfactorily that the defendant was not only willing but very anxious to bring about the coming of Mr. and Mrs. Cole to California to live with her and care for her upon the terms substantially as set out in the complaint, and that the plaintiffs came to California induced thereto by the representations and promises made by the defendant, and that they would not otherwise have broken up their home in Massachusetts.

The defendant in her answer makes no claim of fraud or false representations or concealments on the part of plaintiffs, and, aside from the fact that Mrs. Mugridge was laboring under a feeling of great loneliness and sorrow because of the loss of her husband and son, there is nothing in the record tending to show that she was not possessed of average mental faculties or did not fully understand what she was doing.

Mrs. Cole testified:

> "When we arrived in Vallejo, in April, 1914, we went direct to Mrs. Mugridge's house and Mrs. Mugridge came to the door; that was the first time any of us had met. We had lunch there and the first thing she said was, 'We have all done wrong. We have made a mistake.' We asked her what she meant by this and she told us that she meant that she should not have promised us her home and should not have had us come to California. We tried to convince her that it was all right and that we would all be happy together and asked her to place the deed she had made to us in escrow and to keep her promise to us, but she refused to do so. We stayed there from April 14, 1914, to May 27, 1914, and during this time we often tried to point out to her what a great wrong it would be for her not to keep her promise to us under the circumstances, and often asked

her to place the deed to the property in escrow, but she said she did not want to do so; that her husband had told her never to part with any of her property. We did everything we could to keep our promise to her and were always ready and willing to do so. While we were at her house we did everything in our power to make her happy and make it pleasant for her, assisting her in every way we could about the house and during this time bought most of the provisions for the house. We finally became satisfied that Mrs. Mugridge had no intention of keeping her promise to us; that she did not want us in her house, and so on May 27, 1914, we moved away from there. We inquired of Mr. Madren and he told us he had prepared a deed for Mrs. Mugridge in which she deeded the property at 412 Carolina street, Vallejo, to myself and my husband. This is the same property involved in this suit and which she promised to give us. I wrote Mrs. Mugridge many letters which she has not produced here. We did start packing some of our small things about March 4, 1914, but we were sure at this time from what Mrs. Mugridge had said to us in her letters that the agreement in question would be entered into. We did not finish packing our stuff and getting it away from our farm and stored until about March 19, 1914."

Mr. Madren, the person referred to by Mrs. Cole, testified that he was a notary public in and for the county of Solano.

"On March 11, 1914, at the request of Mrs. Mugridge, I prepared a deed of her house and lot at 412 Carolina street. I gave this deed to Mrs. Mugridge. My record shows deed dated March 11, 1914, executed by Olive J. Mugridge to Bertram and Edna Cole. The deed was a grant, bargain, and sale deed, and the consideration named was $10."

The defendant, Mrs. Mugridge, testified that when the plaintiffs came to her house, she said to them:

"We had all made mistakes, and I made a mistake in sending for them and they had made a mistake in coming. The deed was mentioned and I said I had a deed made out, and they said 'Why don't you put it in escrow?' and I said, 'I can keep it just as well myself, but for all that if you stay here and do what is right, at my death you shall have my home;' but during the time they were at my house they did nothing for me and contributed nothing to my household expenses, but they lived at my house mainly at my expense. I refused to give them any deed and they wanted a deed, and such request was made several times."

In rebuttal, Mrs. Cole testified that:

"Mrs. Mugridge did not say on the occasion of our first visit to her home in 1914, while we were having lunch, that if we would stay with her and do what was right we should have her home at her death. While we began packing some of our furniture before the letter came in which Mrs. Mugridge said she had had the deed made, we did so because we felt from the way she had written in her letters that the agreement between her and us would be entered into."

There was some evidence as to the value of the premises, plaintiffs' witnesses placing it at $2,700 or $2,800.

[2] Defendant contends that no contract was entered into because—

"there never was any meeting of the minds of the parties to the alleged contract and the most that can be said in favor of the claim of respondents is that there was a mere suggestion, not an offer or proposal * * * accepted merely as a suggestion and in the hope that ultimately they would attain their object."

As we read the letters, we find in them a definite offer made by appellant definitely accepted and acted upon by respondents. After respondents had notified appellant that they were disposing of their property and preparing to come to California in compliance with appellant's request and, as the letters show, in the belief that appellant would do as she had promised, appellant wrote to hasten their coming and these urgent messages continued until late in March, 1914, and on March 11th she executed a deed of the property to respondents and so informed them by letter. On respondents' arrival at appellant's house, and without waiting to see whether her hopes of a happy life with them would or could be realized, appellant promptly told them a mistake had been made—she "had made a mistake in sending for them and they had made a mistake in coming," and her attitude remained unchanged toward respondents until they were compelled without fault of theirs, so far as the record shows, to quit the premises.

We do not think it necessary to resort to the books to justify us in holding that there was ample and legal support for the verdict of the jury.

[3] It was not error of the court to refuse to instruct the jury, as requested by defendant, that there was no contract between the parties. Defendant requested an instruction designated as No. 5 upon the measure of damages, and states that, while substantially given in another instruction by the court, the court erred in stating that "in cases of bad faith the measure of damages would be somewhat was different." The court then adds:

"In this case no specific price for the property having been alleged or proven to have been paid or agreed upon under the alleged contract or expenses incurred in examining title or preparing papers, you can make no allowance to plaintiffs on account of these items, notwithstanding you may find the contract to have been made and broken as alleged; and under such circumstances your verdict cannot exceed in amount the value of the property in controversy at the time of the breach of contract, if you find there was such a breach of contract, irrespective of any sum or sums of money which plaintiffs may have expended or expenses they incurred prior to the time plaintiffs took up their residence with defendant on or about April 14, 1915, unless you find from the evidence that any such sum or sums of money were properly paid out or such expenses were properly incurred in preparing to enter into possession of the premises in controversy."

The objection urged is what the court—

"distinctly instructed the jury that there was bad faith on the part of appellant, and also that the jury was not, under the circumstances, confined to rendering a verdict for the price paid and the expense properly incurred in examining the title and preparing the necessary papers but could render a verdict up to the amount of the value of the property."

It is true that no issue of fraud, concealment, or bad faith was raised in the case, but we do not think the instruction complained of can reasonably be said to have imputed bad faith to appellant or that the jury could have so understood the instruction. In point of fact, the verdict was less than the evidence showed was the value of the property. The instruction excluded as matter of damages all expenses incurred prior to the time plaintiffs took up their residence with the defendant. We cannot perceive any prejudicial error in the instruction.

No other error is specified. Defendant states "that the instructions given by the court were on the whole fair and unobjectionable."

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

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35 Cal. App. 776

WATT v. BEKINS VAN STORAGE CO.

(Civ. 1963.)

(District Court of Appeal, Second District, California. Jan. 8, 1918. On Rehearing in Supreme Court March 6, 1918.)

APPEAL AND ERROR ⚷110—DECISIONS REVIEWABLE—ORDER DENYING NEW TRIAL.

Code Civ. Proc. § 963, as amended August 8, 1915, making orders denying new trials nonappealable, applies to an order entered after such date, although the right to appeal from the judgment in such case had expired before the amendatory act was enacted.

In Bank. Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by L. V. Watt against Bekins Van Storage Company. Judgment for plaintiff, and from an order denying a new trial, defendant appeals. Appeal dismissed.

R. T. Lightfoot, of Los Angeles, for appellant. Williams, Goudge & Chandler and Goudge, Robinson & Hughes, all of Los Angeles, for respondent.

CONREY, P. J. In this case the defendant on the 2d day of October, 1915, served and filed its notice of appeal from an order denying its motion for a new trial, which order was made September 13, 1915. Briefs were filed touching upon the merits of the case, and the appeal was submitted for decision. Thereafter the fact was noticed by us that at the time when said appeal was attempted to be taken, and also when the order was made, the law did not provide for appeals from orders denying motions for new trial. Formerly the right to take such appeals was provided for by section 963 of the Code of Civil Procedure. By an amendment of that section, in effect on and after August 8, 1915, that right has been taken away. With consent of counsel for respondent, we have permitted counsel for appellant to file a supplemental brief for the purpose of showing, if possible, that the law as thus amended is not applicable to this case. We have given careful consideration to his argument.

The question seems to have been definitely determined against the contention of appellant. In Hirsch v. All Persons, etc., 173 Cal. 268, 159 Pac. 712, as well as in other cases there cited, the Supreme Court determined that the amendment in question is necessarily applicable in every case where the order was made subsequent to the date of the taking effect of the amendment; that it is the condition of the law at the time of the making of the order that controls.

Appellant calls our attention to the fact that the judgment in the case was entered on October 7, 1914; that at that time and until August 8, 1915, the time allowed for appealing from the judgment was limited to six months (Code Civ. Proc. §§ 939, 941b); that the defendant in this case had allowed that time to expire without appealing from the judgment; that the amendments to the two sections last mentioned, whereby, if the amendments could apply here, its right to appeal from the judgment would not expire until 30 days after entry in the trial court of the order determining defendant's motion for a new trial, in fact cannot be applicable here, and cannot have the effect to restore defendant's right to appeal from the judgment in this case, since by failing to appeal within six months the right to the judgment had become finally vested in the plaintiff as against any appeal therefrom, and remained subject only to the pending attack by means of the motion for a new trial. All of these statements we concede to be true, and the consequent hardship to the defendant is very apparent. But we are unable to derive therefrom any ground of support for its claim that these facts have the effect to preserve its right of appeal from the order denying its motion for a new trial. The Legislature had the power to take away defendant's right of appeal from that order at any time before the order itself was made. This power having been exercised, it is settled law, under the decisions to which we have referred, that the amended section 963 is applicable to a case like this, because in this case the order denying the motion for new trial was made subsequent to the 8th day of August, 1915. The position of appellant is not improved by the decisions rendered in Schmitt v. White, 172 Cal. 554, 158 Pac. 216, and Murray v. Southern Pacific Co., 169 Pac. 675. Those decisions are merely to the effect that where the motion for a new trial was pending on the 8th day of August, 1915, the ruling on that motion may be reviewed on appeal from the judgment, as is permitted by section 956, Code of Civil Procedure, as then amended.

The appeal is dismissed.

We concur: JAMES, J.; WORKS, Judge pro tem.

Opinion of Supreme Court Denying Rehearing.

PER CURIAM. In denying the petition for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, we deem it proper to say that we are not to be understood as conceding that the defendant did not have the right to appeal from the judgment within 30 days after entry of the order denying his motion for a new trial, for the purpose of having reviewed the latter order of the court (section 939, Code Civ. Proc.), notwithstanding that his right to appeal from the judgment had expired prior to the amendment of sections 939, 956, and 963, Code of Civil Procedure, in the year 1915. That very question is involved in a motion to dismiss an appeal now pending in this court. Its determination is unnecessary in this case.

The application for a hearing in this court is denied.

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36 Cal. App. 124

WARD v. OTZEN PACKING CO.

(Civ. 2182.)

(District Court of Appeal, First District, California. Feb. 4, 1918. Rehearing Denied by Supreme Court April 4, 1918.)

1. APPEAL AND ERROR ⚷1011(1)—REVIEW—FINDING—CONFLICTING EVIDENCE.
In the presence of conflict, not only in the evidence adduced on the whole case, but even in the testimony of defendant's witnesses as to a question of fact, the finding of the trial court must prevail.

2. WAREHOUSEMEN ⚷34(7) — NEGLIGENCE—STORAGE OF PRUNES—SUFFICIENCY OF EVIDENCE.
In a prune grower's action against a packing company for negligent warehousing, evidence *held* to show that the company negligently warehoused the prunes, and that as a result they became moldy and sugared, to the grower's damage.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by James Ward against the Otzen Packing Company, a corporation. From judgment for plaintiff, and an order denying new trial, defendant appeals. Affirmed.

H. H. McPike and McPike & Murray, all of San Francisco, for appellant. William A. Kelly, of San Francisco, for respondent.

LENNON, P. J. The plaintiff, James Ward, was, in 1914, conducting a prune orchard in Marin county. He shipped three pickings, consisting of 13,175 pounds of prunes, to San Francisco, arriving on the 19th day of September, 1914. The prunes were delivered to the defendant, Otzen Packing Company, for final processing and packing in boxes. When so processed and packed they aggregated some 527 boxes, which were then stored in the wareroom of the defendant, where they remained from the month of October, 1914, to the latter part of January, 1915, when they were examined and found to be moldy, sugared, and in poor condition. The entire lot of prunes was finally sold at 3 cents per pound, with the exception of 112 pounds which sold for 1 cent per pound. The market price at that time was 6 cents per pound. The plaintiff thereupon brought suit against the defendant corporation charging that the defendant had negligently warehoused the prunes and claiming damage in the amount of $500. The court found that the allegations of negligence were true, and that plaintiff was thereby damaged in the sum of $500, minus $27.31, the amount of defendant's counterclaim for storage due. Judgment was accordingly rendered in favor of the plaintiff, from which judgment and from the order denying a new trial defendant prosecutes this appeal.

The only question presented is as to the sufficiency of the evidence to sustain the finding of negligence on the part of the defendant corporation. It is contended that the evidence not only failed to show negligence on the part of the defendant in storing the prunes, but that it affirmatively showed that the condition of the prunes was caused by the failure of plaintiff to properly cure the prunes by sufficient sweating and drying. In this connection one Castle, a witness called upon behalf of the defendant, testified that "in very good weather—hot weather—five days would be the time for prunes to be on the trays." Another of defendant's witnesses, one Porter, testified that prunes should sweat from ten days to two weeks. In attempting to qualify these witnesses as experts, it was disclosed that neither had ever personally dried prunes, and that there testimony was based purely upon observation. Hunsinger, a witness called upon behalf of the plaintiff, testified that he had been in the business of growing and selling prunes "off and on for 30 years," and that he had usually picked, stored, and dried the prunes himself; that he had personally looked after the drying and dipping of the prunes in question; that as the prunes dried they were put in the storehouse on the ranch of the defendant and there turned twice. In effect this witness further testified that the method and time employed for the preliminary processing a quantity of prunes as small as the "batch" of prunes in question was a sufficient preparation for their packing and shipping. Both Hunsinger and Ward testified that the prunes when shipped from the ranch were in "fine condition."

There was also testimony to the effect that the character of the weather is an important factor in determining the method and time to be employed in processing prunes; that the weather during the period of time the prunes in question were drying was "first class" for that purpose—it was extra hot—and that while in "just moderate weather it takes from six to eight days" to dry prunes, still with extra hot weather they can be dried in four days, the time employed for the drying of the prunes in question.

[1] Thus it would seem that there was a conflict not only in the evidence adduced up-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

on the whole case but even in the testimony of the witnesses for the defendant as to the time required for properly processing prunes. In the presence of such conflict, the finding of the trial court must prevail.

[2] That the defendant negligently warehoused the prunes and that as a result of that negligence the prunes became moldy and sugared may be fairly inferred from the following facts adduced upon the trial of the case, to wit: The prunes were piled in boxes in the storeroom of defendant within 12 feet of a large opening into an adjoining room which the defendant used for the purpose of processing fruit, and through this opening steam and moisture "kept coming out all the time" into the storeroom where the plaintiff's prunes had been stored. The molding of prunes may occur from several causes, according to the testimony of expert witnesses; one cause is vapor and steam coming in contact with them. This was evidently the theory of Otzen, the president and manager of the defendant corporation, as to the cause of the damage to the plaintiff's prunes, who, upon cross-examination, admitted that he had told the plaintiff that "he didn't know any reason for it except the steam and moisture from the processing room next door."

Under all of the circumstances of the case, the trial court was justified, we think, in finding that the defendant did not exercise the ordinary care required of it as a warehouseman, and that as a result of its negligence plaintiff was damaged.

The point made in support of the appeal that "there was a failure of direct evidence to justify the amount of the damage found" appears only in the closing brief of counsel for the defendant, where it is supported by an elaborate argument in conjunction with much mathematical calculation. But having been made only in the closing brief, we must decline to discuss it further than to say that a consideration of the evidence, direct and substantial adduced upon the entire case, in our opinion, sufficiently supports the trial court's finding.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

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36 Cal. App. 133

WILLIAMS v. CITY OF VALLEJO et al.

(Civ. 1774.)

(District Court of Appeal, Third District, California. Feb. 4, 1918.)

1. MUNICIPAL CORPORATIONS 🔑44 — FREEHOLDERS' CHARTER — POWERS OF LEGISLATURE.

The Legislature can only approve or reject a proposed freeholders' charter, but is without power to amend or alter it.

2. MUNICIPAL CORPORATIONS 🔑48(2)—CONTRACTS—PAYMENT — STATUTES APPLICABLE.

Where city of Vallejo, under freeholders' charter of 1899 (St. 1899, p. 370), contracted on June 19, 1911, for building a reservoir, the contract was governed by such charter, and not that of 1911 (St. 1911, p. 2004, § 66), requiring retention of 25 per cent. to pay laborers and subcontractors, since by section 128 thereof the charter became effective July 1, 1911, for all purposes, except election of officers, and Const. art. 11, § 8, providing for municipal charters, does not prevent the charter itself from stating its effective date.

3. MUNICIPAL CORPORATIONS 🔑271—WATER SUPPLY—CHARTERS—POWERS—"MUNICIPAL AFFAIR."

Construction of reservoir for public water supply is a "municipal affair," within Const. art. 11, § 8, authorizing city charter empowering the city to make and enforce all laws relating to municipal affairs.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Affairs.]

4. MUNICIPAL CORPORATIONS 🔑345 — CONTRACTS—PAYMENT — STATUTES APPLICABLE.

Since Vallejo charter of 1899 (St. 1899, p. 370) provides a complete scheme for city contracts and payment of material and labor claims thereon, Act March 27, 1897 (St. 1897, p. 201), as amended by Act May 1, 1911 (St. 1911, p. 1422), as to contractor's bond, does not apply to work in such city done under such charter.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Edwin H. Williams against the City of Vallejo and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Karl F. Kennedy and Edwin H. Williams, both of San Francisco, for appellant. James H. O'Leary and L. G. Harrier, both of Vallejo, for respondents.

CHIPMAN, P. J. This action was brought by plaintiff to recover judgment for the sum of $3,496.44, with interest at seven per cent. from February 29, 1912, and for costs of action against the defendant city of Vallejo, and the defendants Pryor, Blake, and Chappelle, as individuals, by reason of their having been, at the time the alleged indebtedness occurred, members of the board of public works of the city of Vallejo. It is alleged in the complaint:

> That on the 19th day of June, 1911, the city of Vallejo "duly and regularly authorized the board of public works of the city of Vallejo to accept the bid of the American Construction Company, a corporation, for the construction of a reservoir for the said city of Vallejo and to award a contract for the performance of said work to said American Construction Company. That thereupon and in pursuance of said authorization said board of public works of the city of Vallejo, and G. Pryor, W. P. Blake, and J. F. Chappelle, commissioners thereof, did accept said bid of said American Construction Company for the performance of said works, and did enter into a contract with said American Construction Company for the performance of said work, for the amount of its bid, to wit, the sum of $35,925. That under and by the terms of said contract said reservoir was to be and actually was constructed upon land within the limits of said county of Solano, state of California, belonging to said city of Vallejo and

owned by it, and that all of said property is, and was at all the time herein mentioned, public property owned in fee simple absolute by said city of Vallejo." That at the time said contract was entered into said board of public works, "and the defendants herein and each of them, wholly failed and neglected to furnish or file with said board of public works or otherwise, or require said American Construction Company to furnish or file with said board of public works or otherwise any bond in favor of subcontractors, laborers, and materialmen * * * as required by that certain act of Legislature entitled, 'An act to secure the payment of the claims of materialmen, mechanics, or laborers, employed by contractors upon state, municipal, or other public work,' approved March 27, 1897, and that no bond of any kind or character was filed by any person whomsoever at any time in compliance with the terms of the statute above mentioned or otherwise."

It is then alleged:

That the said American Construction Company entered upon the performance of the work and completed the same on or about February 29, 1912, "and thereupon said city of Vallejo and said defendants herein duly and regularly accepted said work from said American Construction Company and paid for the same in full. That the contract hereinabove mentioned was reduced to writing and entered into as a written contract." That during the performance of the work under said contract, the said American Construction Company employed certain five different persons, corporations, or companies to furnish certain work and labor and certain materials to be used in the construction of said reservoir, and in separate counts the complaint sets forth the fact showing that each of said persons did perform the work and furnish the materials as alleged, also setting forth the reasonable value of said work and that the said American Construction Company promised to pay in each instance the amount claimed therefor "immediately upon the completion of said work, but that, although often demanded, it has refused to pay" the amounts severally claimed by said claimants, and that the amount claimed in each instance is now "owing and unpaid on said account after deducting all just credits and offsets." That said claimants and each of them prior to the commencement of this action assigned their several claims to plaintiff and he is now the owner and holder thereof. That plaintiff has demanded settlement from defendants herein and each of them, of the several amounts shown by the complaint to be still due on said claims, "but that said defendants and each of them have wholly neglected and refused to pay the same or any part thereof."

The aggregate of these said several claims amounts to the sum above stated for which judgment is asked. The contract referred to in the complaint is not set out in full, nor is there any exhibit showing a copy thereof.

A general and special demurrer was filed, and the court ordered that it be sustained. Whereupon judgment was entered for defendants and that plaintiff take nothing by this action. Plaintiff appeals from the judgment.

The point chiefly relied upon by appellant is as follows:

"The city and its responsible officials are liable to the plaintiff for their failure to file a bond to secure the payments of the claims of laborers and materialmen in accordance with public works act."

The statute referred to is the act approved May 1, 1911 (Stats. 1911, p. 1422), amending the act approved March 27, 1897 (Stats. 1897, p. 201). Section 1 of the act of 1911 provides as follows:

"Every contractor * * * to whom is awarded a contract for the execution or performance of any building, excavating, or other mechanical work for this state, or by any county, city and county, city, town, or district therein, shall, before entering upon the performance of such work, file with the commissioners, * * * common council, or other body by whom such contract was awarded, a good and sufficient bond * * * and must provide that if the contractor, person, company * * * fails to pay for any materials or supplies furnished for the performance of the work contracted to be done, or for any work or labor done thereon of any kind, that the sureties will pay the same in an amount not exceeding the sum specified in the bond; provided, that such claim shall be filed as hereafter required."

Section 2 of the act provides that any person furnishing materials or supplies used in the performance of the work contracted to be executed or performed, or any person who performed work or labor upon the same, or any person who supplies both work and materials, and whose claim has not been paid by the contractor, company, or corporation to whom the contract has been awarded, shall within 90 days from the time such contract is completed, file with the body of officers by whom said contract was awarded a verified statement, of such claim together with a statement that the same has not been paid.

Appellant also calls attention to section 66, article 11 of the 1911 charter (Stats. 1911, p. 2004), which provides that progressive payments may be made for work done under contracts, but—

"no contract shall provide for or authorize or permit the payment of more than seventy-five per cent. of the contract price before the completion of the work done under said contract and the acceptance thereof by the proper officer, department or board."

[1,2] Respondents contend that at the time the alleged contract was entered into the city of Vallejo had a freeholders' charter which controlled absolutely and was free from impairment by general laws as to all municipal affairs, and that this was the charter of 1899 (Stats. 1899, p. 370); that the contract under consideration was made June 19, 1911, whereas the charter of the city of Vallejo of 1911 went into effect July 1, 1911, by its own provisions, section 128 thereof being as follows:

"For the purpose of nominating candidates and electing the mayor, auditor, commissioners and school directors in accordance with this charter, this charter shall take effect from the time of the approval of the same by the Legislature; for all other purposes it shall take effect on the first day of July, 1911." Stats. 1911, p. 2027.

Appellant's reply to this contention is that under the provisions of article 11, § 8, of the Constitution, the charter went into effect March 11, 1911, the date at which the joint resolution approving and ratifying the charter was filed in the office of the secretary of state "notwithstanding the provision in the charter itself to the contrary." The provision found in the Constitution reads as follows:

> "The Legislature shall by concurrent resolution approve or reject such charter as a whole, without power of alteration or amendment; and if approved by a majority of the members elected to each house it shall become the organic law of such city or city and county, and supersede any existing charter and all laws inconsistent therewith."

In other words, the appellant contends that the taking effect of the charter is governed by the constitutional provision and not by the terms of the charter itself, and in support of this contention cites the case of Burke v. Board of Trustees of San Francisco, 4 Cal. App. 235, 87 Pac. 421. The quotation cited by appellant reads as follows:

> "The act of March 3, 1899 (Stats. 1899, p. 57), is not available to the appellant. That act was a general law applicable to all counties, cities and counties and towns in the state, whereas the charter of San Francisco is a freeholders' charter, and, when approved by the Legislature in 1899, became by the express terms of the Constitution (article 11, §§ 6, 8) the organic law of the city and county, and superseded the existing charter and all laws inconsistent therewith, and thereafter the city and county was no longer subject to or controlled by general laws."

It is stated in the opinion that the charter of San Francisco went into effect January 1, 1900, and, as it further appears that the resolution of approval was passed in 1899, the charter itself must have declared when it was to take effect and this would seem to show that the case does not support appellant's contention. However, we entertain no doubt of the power of the people in adopting a freeholders' charter to provide when certain of its provisions shall take effect. The Legislature has no authority under the Constitution to make any alteration or amendment of the charter. Its sole power is to ratify or reject. It is true that the charter takes effect as declared by the court in the case cited when approved by the Legislature, but that case does not hold that the charter in all its provisions takes operative effect on the date of its approval by the Legislature. What the court said is entirely consistent with the view that the charter takes effect according to its provisions. We do not think the statute of 1911, or the charter adopted in that year, upon which appellant relies, is applicable here, but the right of recovery on the part of plaintiff must be determined by the provision of the charter of 1899 and the condition of the law prior to the adoption of the charter of 1911. Appellant's argument is based exclusively upon rights alleged to arise out of the provisions of the charter of 1911, and unless that charter was in force when the contract was entered into the complaint fails to state a cause of action since no similar provisions are found in the charter as it stood prior to the execution of the contract.

[3] That the construction of a reservoir by a city upon its own land and to be used for the benefit of the inhabitants of the city as a part of its water system constituted a "municipal affair" cannot admit of doubt. The Constitution expressly provides that:

> "It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws." Section 8, art. 11; Burke v. Board of Trustees, supra; Dinan v. Superior Court, 6 Cal. App. 217, 91 Pac. 806.

[4] The charter of 1899 provides a complete scheme for the letting of contracts, including the terms and conditions under which such contracts are to be let (Stats. 1899, p. 399), including also the giving of a bond by the contractor for the faithful performance of the contract (Stats. 1899, § 85, p. 402). It follows that the act of March 27, 1897, or the act of May 1, 1911, referred to by appellant, relating to the giving of a bond to protect materialmen and laborers employed by the contractor on public work, has no application to the present case. This seems to have been definitely settled as the law in the case of Loop Lumber Company v. Van Loben Sels, 173 Cal. 228, 159 Pac. 600. Defendant entered into a contract with the city and county of San Francisco to do certain sewer work. He gave bond as required by the act of March 27, 1897, for the protection of materialmen, mechanics, and laborers employed on the work. Defendant defaulted and the action was brought against him and his sureties. Plaintiff had judgment and on appeal the judgment was reversed. We quote from the opinion, written by Chief Justice Angellotti, 173 Cal. at page 232, 159 Pac. at page 602:

> "We do not think it can be seriously questioned that a municipality may provide in its freeholders' charter for a complete scheme for the doing of such work that will be paramount to anything contained in any act of the state Legislature, and that, in regard to such municipality, anything contained in any general law of the state that is inconsistent with the charter provisions must be inoperative."

We quote further, 173 Cal. at page 233, 159 Pac. at page 602:

> "Section 21 (referring to the charter of the city and county of San Francisco) provides for the contract and its execution. It requires, among other things, that, at the same time with the execution of the contract, the contractor shall execute to the city and county a bond conditioned 'for the faithful performance of the contract.' No other bond is required by the charter. * * * It is apparent that a complete scheme is thus provided by the charter for the doing of such work as is here involved, and that it was intended to specify all the terms and conditions upon which a contract was to be awarded and the work contracted for performed. * * * It seems to us to be perfectly clear that a state statute imposing other conditions on the contractor * * * is inconsistent with the charter provisions on the subject, and, consequently ineffectual for any purpose. It is urged that the act is not in conflict with the charter for the reason that the latter contains no provision at all in regard to such a

bond as is required by the act—neither requires such a bond nor in terms declares that no such bond is essential. But this in no degree affects the question. The charter does purport to provide all the conditions imposed on the contractor as a prerequisite to doing the work, including the giving of a bond for the faithful performance of the contract, and contemplates that upon compliance with those conditions he shall proceed with such work. Any law purporting to impose other conditions as a prerequisite to doing the work is necessarily inconsistent with the charter. It is not a case where the charter is silent upon the matter, and the authorities recited by respondent in this connection are therefore not in point. * * *"

The Vallejo charter is quite similar to the charter of the city of San Francisco in its provisions relating to contracts respecting the letting of contracts, and as to contracts embracing a "municipal affair" its provisions are controlling. Respondents advance some other reasons in support of the judgment, but as we deem the foregoing as conclusive of the question presented by appellant, we need not consider them.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

36 Cal. App. 141

WILLIAMS v. CITY OF VALLEJO et al.
(Civ. 1775.)

(District Court of Appeal, Third District, California. Feb. 4. 1918.)

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Edwin H. Williams against the City of Vallejo and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Karl F. Kennedy and Edwin H. Williams, both of San Francisco, for appellant. James H. O'Leary and L. G. Harrier, both of Vallejo, for respondents.

CHIPMAN, P. J. The general features of this action do not differ very materially from those presented in No. 1774, 171 Pac. 834, this day decided. In addition to the parties named as defendants in the action No. 1774 are the following: Board of trustees of the city of Vallejo and the members thereof, to wit: R. C. Pierce, J. Sullivan, Geo. Tripp, Wm. Herbert, and C. B. Butler; Geo. Hildreth, auditor of the city of Vallejo, and J. V. O'Hara, treasurer of the city of Vallejo. The averments in the complaint not found in the complaint in No. 1774 are the following: That the contract referred to entered into by the American Construction Company provided for payment in installments "in such manner that said American Construction Company should receive 90 per cent. of the total value of all the work done by it immediately upon the completion and acceptance thereof by said city of Vallejo, and that 10 per cent. and no more of the contract price should be reserved as a final payment upon said contract to be paid subsequent to the completion of the same." That at the completion of the contract the said company presented its demands for 90 per cent. of the full contract price for said work, to wit, the sum of $32,332.50, and that in due course this amount was paid by the city and received by the company "immediately upon the completion of said work and contract * * * and the said payment constituted 90 per cent. of said contract price." In the averments relating to the various claims assigned to plaintiff for work done and materials furnished, it is alleged: That the claimant in each case, "within 30 days subsequent to the time when said contract of said American Construction Company with the said city of Vallejo hereinabove mentioned was completed," filed his claim with the auditor of said city giving notice to withhold from said American Construction Company the amount of his claim, and further notifying said auditor that he had furnished materials as set out in the complaint, stating in general terms the kind of labor and materials furnished, names of persons to whom the same were furnished, and the amount and value of the same. "That due to the failure of the defendants and each of them to reserve 25 per cent. of the full contract price of said work from said American Construction Company as hereinabove set out, said demand (naming the claimant) was not satisfied or paid." In each count settling forth the various claims, the reasonable value of the work, labor, and material and the amount agreed by the company to be paid "therefor immediately upon the completion of said work" is stated, and also the amount paid and the amount remaining due. It does not clearly appear whether or not these several payments shown were made out of the 10 per cent. remaining after the payment to the construction company of the 90 per cent. as hereinabove shown, nor does it appear that the construction company was paid any portion of this 10 per cent. We infer, however, from the treatment of the case in the briefs, that these several payments referred to by the different claimants were paid out of this reserve 10 per cent., and appellant's contention is that the defendants are liable for "the failure of the defendants and each of them to reserve 25 per cent. of the full contract price of said work from said American Construction Company."

Appellant's argument takes the same course of reasoning as in the case No. 1774, and rests upon the assumption that the Vallejo charter of 1911 was in force at the time the contract was made with the American Construction Company, and that the statute of 1911 amendatory of the statute of 1897 applies. This we have shown in the case above referred to is an erroneous assumption upon the part of appellant.

We can discover no legal basis for this action, and the judgment is therefore affirmed.

We concur: HART, J.; BURNETT, J.

36 Cal. App. 103

CITY OF NAPA v. MAXWELL et al.
(Civ. 1755.)

(District Court of Appeal, Third District, California. Jan. 31, 1918. Rehearing Denied by Supreme Court April 1, 1918.)

1. APPEAL AND ERROR 🔑419(1)—AMBIGUOUS NOTICE OF APPEAL—JURISDICTION.

While jurisdiction cannot be conferred by waiver or consent, where the attorney for defendant admits as contended by plaintiff's attorney, that the judgment for costs is fairly within plaintiff's notice of appeal, and the language of the notice is rather ambiguous in that respect, the court, on appeal, will consider the appeal as one from the judgment for costs and so review merits.

2. MUNICIPAL CORPORATIONS 🔑378—STREET-OPENING PROCEDURE.

Street Opening and Widening Act (St. 1889, p. 71) § 6, providing that, having acquired jurisdiction, the city council shall appoint three commissioners to assess benefits and damage, was not superseded by city charter providing that the duties of the commissioners under the general law in the matter of opening, extending, widening, straightening, or closing streets shall be performed under the direction of the councilman in charge of the department of streets and public improvements and the city attorney, in view of charter section providing that except as otherwise provided the general laws relative to laying out, opening, extending, widening, straightening, or closing up, in whole or in part, shall control and all proceedings shall be in conformity therewith.

3. Municipal Corporations 🔑266—Street-Opening Proceedings—Compliance with Statute.

Proceedings for street improvements being in invitum, the statutory requirements as to the essential steps to be taken must be observed with substantial strictness.

4. Eminent Domain 🔑169 — Street-Opening Proceedings—Condition Precedent.

Street Opening and Widening Act (St. 1889, p. 71) § 6, requiring the appointment of three commissioners to assess benefits and damages in street-widening proceedings must be complied with before proceedings in condemnation can be maintained against an owner of property which may be taken or damaged for purposes of the improvement, and an appointment of two commissioners is insufficient.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by the City of Napa against Thomas Maxwell and another. From a judgment or order sustaining demurrer to complaint without leave to amend, the City appeals. Affirmed.

Wallace Rutherford, of Napa, for appellant. E. S. Bell, of Napa, for respondents.

HART, J. An opinion, prepared by Justice Burnett, was filed in this action on November 20, 1917. While in the original opinion the merits of the controversy were considered and discussed, the appeal was dismissed because this court had no jurisdiction thereof. A rehearing was granted on the petition of the appellant for the purpose of giving further consideration to the position taken by this court that the attempt by the plaintiff to take an appeal was abortive and also to consider whether, as the plaintiff contends in its petition, the complaint states a cause of action and is therefore good as against a general demurrer, no special grounds of demurrer having been set up against said pleading.

[1] In disposing of the appeal, this court, in its former opinion, said:

"We have considered the foregoing on the merits, but another question of serious moment arises, though not suggested by counsel, and that is whether we have any jurisdiction of the attempted appeal. The notice specifies that the appeal is taken from 'that certain judgment made and rendered on November 15, 1916, by the above-entitled court in the above-entitled action, and entered on November 15, 1916, sustaining said defendant's demurrer to said plaintiff's amended complaint without leave to amend and from the whole of said judgment. But the statute does not confer the right of appeal from a judgment or order sustaining or overruling a demurrer to a complaint, and it has been so declared several times by the appellate courts of this state. Litch et al. v. Kerns et al., 8 Cal. App. 747 [97 Pac. 897]; Kinard v. Jordan et al., 10 Cal. App. 219 [101 Pac. 696]; Hadsall v. Case et al., 15 Cal. App. 541 [115 Pac. 330]; Hanke v. McLaughlin, 20 Cal. App. 204 [128 Pac. 772]; Foster v. Bowles et al., 138 Cal. 449 [71 Pac. 495]; Wood, Curtis & Co. v. Missouri, etc., Ry. Co., 152 Cal. 344 [62 Pac. 868]. In a case like this where the demurrer is sustained without leave to amend, the proper course is to have a judgment entered dismissing the action and then the appeal is taken from this final judgment. But you look in vain through section 963 of the Code of Civil Procedure to find authority for taking an appeal from an order or judgment sustaining a demurrer to a complaint. The dignity of such an order, it may be said, is not enhanced by calling it a judgment."

Of course, there can be no question of the correctness of the rule as it is above set forth. And upon its face the appeal seems to be addressed entirely to the order sustaining the demurrer, for, as seen, it specifically refers to that order as a judgment and further says that the appeal is "from the whole of said judgment." There is, however, a judgment against the plaintiff for costs, and its attorney now contends that the appeal, being "from the whole of said judgment," must be considered to be from the judgment for costs. At the oral argument, the attorney for the defendants conceded that the language of the notice of appeal was broad enough to include an appeal from the judgment for costs. Of course, jurisdiction cannot be conferred by waiver or the consent of the parties, still, in this case, since the attorney for the defendants himself admits that an appeal from the judgment for costs is fairly within the scope of the notice of appeal, and since the language of said notice is rather ambiguous in that respect, we shall take a liberal view of the language of the notice of appeal and consider the appeal as one from the judgment for costs, and so review the merits.

Discussing the merits of the appeal, Justice Burnett, in the former opinion, stated the case and the views of this court as follows:

"This is an action commenced by the city of Napa, a municipal corporation, to condemn a strip of land to widen a street under the act of the Legislature of 1889, known as the street opening and widening act. Stats. of 1889, p. 70. A demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action was interposed by defendant Maxwell and sustained without leave to amend. From the judgment or order sustaining the demurrer the plaintiff appeals.

"The regular steps set forth in the act of 1889 were followed by the plaintiff until section 6 was reached, which requires the appointment of three commissioners. As to that requirement the city charter of Napa was followed on the assumption that the charter in this respect superseded the general law and provided for a different method for the assessment of damages and benefits. As to the further procedure the general law was followed.

"Section 6 of said street opening and widening act provides: 'Having acquired jurisdiction as provided in the preceding section, the city council shall order said work to be done, and unless the proposed work is for closing up, and it appears that no assessment is necessary, shall appoint three commissioners to assess benefits and damages and have general supervision of the proposed work or improvement until the completion thereof in compliance with this statute.' The section then provides that the compensation of the commissioners shall not exceed $200 a month and requires an affidavit and bond of each commissioner.

"Section 68 of the Napa charter provides: 'The duties of commissioners * * * under the general law in the matter of opening, extending, widening, straightening or closing streets * * * shall be performed under the direction of the councilman in charge of the department of streets and public improvement and the city attorney, neither of whom shall receive compensation therefor.'

"The city council appointed the councilman in charge of the street department and the city attorney commissioners, and each put up a bond and took oath. In the lower court respondents urged in support of their demurrer that 'there was nothing in the city charter (section 68) which authorized the city council to appoint commissioners; that its only authority to appoint commissioners was derived under the provisions of section 6 of the street opening and widening act of 1889; that having appointed only two commissioners instead of three as provided for by section 6 of the act of 1889 it was without jurisdiction to act upon and confirm the report of the two commissioners.' The further claim was made that the two officials appointed, especially the councilman, were disqualified to act, and therefore their appointment was void.

"Section 67 of said charter provides: 'Except as otherwise in this charter or by ordinance of the city provided, the general laws of the state of California, or which may hereafter be adopted by the Legislature of this state, relative to * * * laying out, opening, extending, widening, straightening or closing up, in whole or in part, of any thereof; the condemning and acquiring of any and all lands necessary and convenient therefor; * * * the levying and collecting of assessments upon property for doing such improvement, or work, or carrying out all or any such purposes * * * shall control and all proceedings shall be in conformity therewith.'

"It is admitted by appellant that the general law must apply unless said section 68 of the Napa charter was intended to supersede said section 6 of said general law and does in sufficient phraseology provide that said two city officers shall perform the work required of commissioners in 'opening, extending, widening, straightening or closing streets.' It is apparent that the words of said section 68 were not aptly chosen for the purpose of conveying the meaning that said officers should perform the duties of commissioners. If such had been the intention of the framers of the charter it is somewhat surprising that they did not so express it, since it could have been done with such facility and simplicity. If the charter had provided that 'the duties of commissioners * * * shall be performed by the councilman,' etc., we would find just what might be expected to express the view contended for by appellant, and, of course, there would be no doubt as to the construction of the clause. It was provided, however, that these duties should be performed under the direction of these officers. The phrase presupposes that the actual work shall be done by some one else but it is to be supervised by the said city councilman and the city attorney. Webster's definition of 'supervision' is: 'The act of directing or of aiming, regulating, guiding, or ordering; guidance; management; superintendence.' If the expression were used in reference to mere manual labor there would manifestly be no doubt as to its significance. If it were provided that a certain building should be erected or a public improvement should be made under the direction of these officers it would not for a moment be contended that they should perform the actual work of construction, but it would be readily admitted that they were to direct and supervise the manner in which the work should be done by others. In the present instance it might be said that there is less reason probably for supervising the work of assessing and apportioning the benefits and damages occasioned by said improvement, and it may be said also that the change contended for by appellant may have been contemplated in order to save expense, but the fact remains that the framers of the charter have deliberately—at least we must assume that it was done deliberately—chosen language that expresses an entirely different meaning. Some reference is made by appellant to the charters of Oakland and Valejo as indicative of a general purpose in the framing and enactment of these freeholders' charters to provide for such change. But it is manifest that those charters come nearer to an expression of intention to vest said power in the commissioner of streets and city attorney than does the provisions before us, for they expressly provide that 'no commissioners shall be appointed, and that all the duties imposed on commissioners * * * shall be performed under the direction of the commissioner of streets and city attorney of the city.' While such expression is not altogether clear, it does at least appear that it was the intention to have no other than said officers act as commissioners.

"Of course, the rule is that 'proceedings for the improvement of streets are in invitum and purely statutory, and afford no opportunity for invoking any of the principles of equity and the validity of an assessment therefor depends upon a statutory power, and the party seeking the right to enforce it must show that the statutory power has been strictly followed.' Warren v. Chandos, 115 Cal. 382 [47 Pac. 132]. As to the disqualifications of these officers to act as commissioners we do not agree with respondent. We think the contention in that respect is completely answered by the decisions in the case of United Real Estate & Trust Co. v. Barnes, 159 Cal. 242 [113 Pac. 167], to which we refer for a thorough consideration of the question. It may be, therefore, that these officers could constitute two of the commissioners to be appointed under the general law, but as to that we express no opinion."

[2] It is now argued by the appellant that the allegations of the complaint relative to the appointment by the city council of commissioners to assess damages, etc., involve evidentiary matter and are therefore unnecessary to the statement of a cause of action in eminent domain, and may be treated as surplusage; that, so viewing those allegations, the complaint states a cause of action to condemn property for a public use, since it contains a statement of all the facts required to be shown in such an action by section 1244 of the Code of Civil Procedure, to wit: (1) The name of the owner of the property; (2) the right of plaintiff; (3) a description of the land proposed to be taken and the statement that the same is a part of a larger tract described therein.

Upon further consideration of the proposition, we are convinced that the conclusion announced in our former opinion that section 68 of the charter of the plaintiff was not intended to supersede or take the place of the provisions of section 6 of the state law is correct. The language of section 68 of the charter appears to be clear as to the idea intended to be expressed thereby and its meaning is plainly this: That the duties of commissioners or other officials authorized to be appointed by the general law of the state to attend to the matter of opening, extending, widening, straightening, or closing streets, etc., shall be performed by the commissioners and other officials so authorized to be appointed for that purpose under the direction of the councilman in charge of the department of streets and public improvements and the city attorney. In other words, section 6 of the statute of 1889 governs in the matter of the appointment and as to the number of the commissioners who are to asses benefits and damages in the case of the widening, extending, or straightening of streets, etc., and section 68 of the charter merely provides, and was obviously intended only to provide, that the duties which the general law imposes upon such commissioners shall be performed by such commissioners under the direction of the councilman in charge of the department of streets, etc., and the city attorney.

[3] It now remains to be seen whether the complaint, having alleged that the councilman in charge of the department of streets and the city attorney were by resolution of the council appointed commissioners to assess the benefits and damages, states a cause of action for the condemnation of property for street-widening purposes; or to state the proposition perhaps more accurately) has the plaintiff pleaded itself out of court by alleging in its complaint the fact that the said councilman and the city attorney were by the council appointed commissioners to perform the duties imposed upon the commissioners authorized and required to be appointed for the purpose of assessing benefits and damages by section 6 of the street widening act of 1889?

The question thus propounded may best be answered by a brief survey of the provisions of some of the sections of said act. We have already seen that section 6 of said act provides for the appointment of three commissioners for the purpose stated and in general language prescribes their duties. The succeeding sections, so far as they relate to the duties and powers of the commissioners, provide: That the commissioners shall view the lands described in the resolution of intention and, if necessary, take the testimony of witnesses, and thereupon proceed to determine the value of the land and damage to improvements and property affected; that, thereafter, having made their assessment of benefits and damages, the commissioners shall make and file with the city council a report thereof, and accompany their report with a plat of the assessment district, showing the land taken or to be taken for the work or improvement, and the lands assessed, etc.; that a copy of said report and plat, after such report and plat have been approved by the council, shall be filed by the city clerk in the office of the county recorder of the county; that the said report shall specify each lot, subdivision, or piece of property taken or injured by the widening or other improvement of the street, or assessed therefor, together with the name of the owner or claimants thereof or other persons interested as lessees or incumbrancers, etc.; that, upon the filing of said report and plat in the clerk's office of the city council, the clerk shall give notice of such filing by publication for at least 10 days in one or more daily newspapers published and circulated in said city; that said notice shall require all persons interested to show cause, if any, why such report should not be confirmed, before the city council, on or before a day fixed by the clerk, and stated in said notice, etc.; that all objections shall be in writing and filed with the clerk, who shall lay the same before the council, which shall fix a day for hearing the same; that said report having finally been confirmed, a certified copy thereof, and of the assessment and plat, shall by the clerk be forwarded to the superintendent of streets. Other provisions relative to the duties of the superintendent of streets after receiving the report, assessment and plat follow, but it is not important that they should be referred to here; and then comes section 18 of the act which, among other things, provides:

> "If any owner of land to be taken neglects or refuses to accept the warrant drawn in his favor as aforesaid, or objects to the report as to the necessity of taking his land, the commissioners, with the approval of the city council, may cause proceedings to be taken for the condemnation thereof, as provided by law under the right of eminent domain. The complaint may aver that it is necessary for the city to take or damage and condemn the said lands, or an easement therein, as the case may be, without setting forth the proceedings herein provided for, and the resolution and ordinance ordering said work to be done shall be conclusive evidence of such necessity."

Where, in the exercise of the taxing power or the right of eminent domain, the state imposes a tax upon the property of a citizen or authorizes it to be taken for a public use, the Legislature always takes the pains to point out with precision the mode and manner of exercising such power or right, and so important is the power thus to trench upon and even divest private rights to the owners of private property that the courts, in their adjudications in such cases, have always strictly applied the rule, above stated, that proceedings in street improvement, being in invitum, therefore the statutory requirements as to the essential steps to be taken in such proceedings must be observed with substantial strictness. The owner of property proposed to be taken for a specific purpose or to be taken or damaged for a public use is entitled to have the proceedings leading to that end carried out in all vital or material respects precisely as the Legislature has prescribed or established it.

In clothing municipal corporations with the power to widen or extend or straighten streets, the Legislature has been careful to provide in detail how that character of improvement may be done so as to protect the property owner whose property is to be affected by the improvement against unjust deprivation of private rights or the taking or taxing of his property without a public necessity therefor or the taking or damaging of more of his property than the requirements of the proposed improvement demand.

[4] The ascertainment of benefits accruing or the damage resulting to property affected by the proposed improvement by three commissioners appointed for that purpose is a substantial and an essential step to be taken before proceedings in condemnation can be instituted or maintained against an owner of property which may be taken or damaged for the purposes of the improvement. The property owner is entitled to the judgment of all three of the commissioners so appointed as to the value of his property to be taken or the damage which will result thereto by reason of the improvement. It will not do to say that because, perhaps two of the commissioners, being a majority, may agree upon and make a report, the appointment of two would satisfy the requirement of the statute as to the number to be appointed and to discharge the duties imposed upon them. There are substantial reasons against such an argument. The first is that the statute expressly provides that the number of commissioners shall be three. If, in the face of this provision, the council may appoint two, why could it not with equal reason determine that the appointment of one commissioner would be sufficient and so devolve the duties of the three commissioners required by the statute to be appointed upon a single person? Again, the third commissioner's judgment and voice might be sufficiently potent to control the determination of the result of the investigation; and if there should occur a disagreement between the commissioners as to the amount of damage which would be sustained to the property to be taken—two reaching one conclusion upon that all-important question and the third another—the dissenting commissioner's views and conclusion might be such as to justify the council in ordering a reinvestigation of the questions of benefits and damage and so finally bring about a report satisfactory to both the property owners and the city. These latter reasons merely go to the possible explanation of the underlying legislative motive in requiring three commissioners to be appointed for the purpose of performing the duties referred to; but, whatever may have been the motive in providing for three commissioners, the proposition remains that the Legislature has expressly and explicitly declared that that number shall constitute the commissioners who shall perform the duty of ascertaining and admeasuring benefits and damage, and, as above stated, there is no authority in the city council to determine that that duty may or can be performed by a less or greater number of commissioners. The statute in that regard is, as before in effect declared, mandatory, and a compliance therewith is essential to the procurement of a valid report on benefits and damage, without which report and the confirmation thereof by the council an action to condemn the property of a person not willing to accept the damage so appraised cannot be instituted or maintained.

Now as to the complaint. Section 18 of the statute in question provides, as we have seen, that the proceedings which are required to be taken for the widening or extending or straightening of streets need not be pleaded in a complaint in an action for the condemnation of property which is required and sought to be taken for any of the purposes mentioned or which may be damaged by reason of such work or improvement. The plaintiff therefore would have stated a case in eminent domain if it had omitted any reference to the alleged appointment by the city council of commissioners to assess benefits and damage. But, as seen, the complaint alleges that the city council had appointed two commissioners to assess benefits and damages, and that the commissioners so appointed had performed the duties required of such commissioners by law and made a report which was filed, approved, and confirmed in accordance with the provisions of the general law. Thus the complaint itself affirmatively shows that the council, in the appointment of commissioners, did not follow the requirements of the general law in a vital particular, and that the work and the report of the so-called commissioners were without legal force, or, in other words, were and are wholly void. The plaintiff has thus unnecessarily pleaded itself out of court. And even if, under the circumstances, the complaint were sustained, the plaintiff (assuming, as we must, that the complaint states the truth as to the appointment of commissioners and their work as such) would fail at the trial to sustain its action by the proofs.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

36 Cal. App. 32

FRANCK v. MORAN et al. (Civ. 1791.)

(District Court of Appeal, Third District, California. Jan. 24, 1918.)

1. FRAUDULENT CONVEYANCES 🔑273—LACK OF VALUABLE CONSIDERATION—PRESUMPTION.

Under Civ. Code, § 3442, providing that any transfer or incumbrance of property without a valuable consideration by a party while insolvent or in contemplation of insolvency shall be fraudulent and void as to existing creditors, if a transfer of property is made without a valuable consideration while the grantor is insol-

vent or contemplating insolvency, the undisputable presumption follows that the transaction is fraudulent, and the deed may be set aside at the instance of a creditor.

2. FRAUDULENT CONVEYANCES 🔑74(2) — TRANSFER WITHOUT VALUABLE CONSIDERATION—EVIDENCE.

Where deed recited that it was given in consideration of love and affection and for better support and maintenance, as well as in consideration of $1 and other valuable considerations, and plaintiff made no attempt to controvert the recital, it cannot be held that the transfer was without valuable consideration, in view of Civ. Code, § 1615, placing the burden of showing want of sufficient consideration on the party seeking to invalidate the instrument.

3. FRAUDULENT CONVEYANCES 🔑308(1)—INTENT TO DEFRAUD—QUESTION OF FACT.

Whether a transfer was intended by the grantor "to delay or defraud any creditor or other person of his demands," within Civ. Code, § 3439, is a question of fact.

4. FRAUDULENT CONVEYANCES 🔑273 — INTENT TO DEFRAUD—BURDEN OF PROOF.

In view of Civ. Code, § 3439, the burden is on the complaining creditor to show that the conveyance was made with intent to defraud.

5. FRAUDULENT CONVEYANCES 🔑69(1)—INTENT TO DEFRAUD—FUTURE CREDITORS.

Under Civ. Code, § 3439, a deed is subject to nullification if the intention existed to defraud a "future creditor" of a just claim.

6. APPEAL AND ERROR 🔑1008(1)—FINDING—REVIEW.

Question whether there was an intent of grantor to defraud creditors is to be determined from all surrounding facts, and if a court finding, with reference thereto, may be said to constitute a rational inference from the evidence, it cannot be disturbed by the appellate court.

7. FRAUDULENT CONVEYANCES 🔑23—INTENT TO DEFRAUD—EVIDENCE.

Where a person indebted to another divests himself of all his property and thereby renders himself incapable of paying his debts, it may be just and reasonable to hold that he intended, when he executed a conveyance, to render creditors powerless to obtain satisfaction of their claims.

8. FRAUDULENT CONVEYANCES 🔑154(1) — RIGHTS OF GRANTEE—ESTOPPEL.

Where credit was extended on the faith that the grantor was owner of the property, it would be inequitable to allow the grantees, who remained silent and failed to record their deed until the indebtedness was incurred, to prevent the creditor from resorting to such property, especially where grantor is insolvent.

9. FRAUDULENT CONVEYANCES 🔑282—CONVEYANCE AFTER FILING NOTICE OF SUIT—PRESUMPTION.

Deed to defendant grantee being subsequent to filing of lis pendens in suit setting forth claim to property, the presumption is that the grantee was speculating on the chances of defeating a just claim.

10. APPEAL AND ERROR 🔑1173(1) — JOINT APPEAL—MODIFICATION OF JUDGMENT AS TO ONE DEFENDANT.

Where appeal was taken jointly by all defendants from the whole of the judgment, the Appellate Court would hardly be justified in reversing a part of the judgment in favor of one appellant.

11. CONSPIRACY 🔑14—JOINT LIABILITY.

Where there was some evidence that defendant, to whom was executed a deed only a short time before suit, became a party to a conspiracy to defraud plaintiff creditor, it would not be inequitable to hold him jointly liable for the consequences of the conspiracy, although he was not directly connected with the fraudulent purpose in the beginning.

Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Suit by William Franck, as administrator of the estate of Sarah B. Hunter, deceased, against John Moran and others, to set aside certain deeds to property. From judgment rendered, defendants appeal. Affirmed.

Braynard & Kimball, of Redding, for appellants. W. D. Tillotson, of Redding, for respondent.

BURNETT, J. This is an appeal from the judgment rendered by the superior court of Shasta county in a suit in equity to set aside two deeds to real property, in which action defendants' motion for a new trial was denied.

The property in question was, on November 18, 1905, owned by Sarah B. Hunter, who at that time and at all times subsequently had but one creditor, Franck & Co., to whom she then owed $640.46. On said date she executed a trust deed to J. E. Hunter and Grant Hunter, for the benefit of Laura Hunter Newman, Ralph Newman, and Ruby Newman (Mrs. Moran), with directions to trustees to sell at Mrs. Laura Newman's orders and pay all proceeds to said Laura Newman. This deed was not recorded until 1915. It appears that on January 1, 1909, Sarah B. Hunter was indebted to Franck & Co. in the sum of $2,614.25, on January 1, 1910, in the sum of $3,499.90, and on January 1, 1911, in the sum of $1,287.50. On December 31, 1910, she was given a credit of $2,850 and during the next two years ending December 31, 1912, she was credited with $1,200. It thus appears that, from 1905 to December 31, 1912, she was credited with $4,050, and that the credit on December 31, 1910, was sufficient to cover the indebtedness as it stood on January 1, 1909. On January 23, 1913, Sarah B. Hunter executed a deed of the property covered by the trust deed to Laura Hunter Newman, which was recorded April 25, 1913. It may be noted in passing that respondent argues that this amounted to a repudiation by Laura Newman of the former trust deed. Sarah B. Hunter died March 31, 1913, and at the date of her death was indebted to Franck & Co. in the sum of $1,203.60. On March 27, 1915, letters of administration were issued to respondent, William Franck, one of the members of the firm of Franck & Co., and, on April 7, 1915, he commenced suit against appellant Laura Hunter Newman, to set aside the deed recorded April 25, 1913. In this action a lis pendens was filed and recorded. Shortly thereafter, on May 6, 1915, the trust deed, dated November 18, 1905, was recorded, and soon after, on June 5, 1915, a deed from the trustees was executed to John Moran, for which appellants claim Moran paid $1,-

000. In September, 1915, the action was tried, and the deed of 1913 was ordered canceled. But, on July 29, 1915, plaintiff had started this action to set aside the trust deed of 1905 and the deed to Moran, alleging that they were made without consideration and to hinder, delay, and defraud creditors, and that John Moran took his deed with notice of the creditor's claim and in furtherance of a conspiracy to defraud said creditor.

At the conclusion of the trial the court made its findings among which were the following: (1) That the trust deed was made without consideration, and for the purpose of defrauding creditors at a time when the grantor, Sarah B. Hunter, was insolvent; (2) that the deed to John Moran was made without consideration, and for the purpose of hindering, delaying, and defrauding the creditors of Sarah B. Hunter; (3) that John Moran took said deed in pursuance of a conspiracy to defraud the creditors of the estate of Sarah B. Hunter; (4) that the trust deed and the deed to John Moran were recorded for the purpose of hindering, delaying, and defrauding creditors of Sarah B. Hunter, deceased; (5) that Sarah B. Hunter owned the property in controversy on January 23, 1913, the date of the deed to Laura Newman, declared canceled in the prior action.

The main complaint of appellants is that the above findings are not supported by the evidence.

The finding as to the said trust deed is the first consideration inviting attention. As to this, it is the contention of appellants that:

> "There is no evidence that the trust deed was made without consideration, or that Sarah B. Hunter made the trust deed for the purpose of defrauding her creditors, or that she was at that time insolvent."

[1] The position is taken in contemplation of the statutory inhibition of what has been characterized as "actual fraud," and also of "constructive fraud." The former is referred to in section 3439, and the latter in section 3442 of the Civil Code. More strictly speaking, however, the latter prescribes a rule of evidence as to what shall indubitably constitute fraud. In other words, if a transfer of property is made "without a valuable consideration," and while the grantor is insolvent or contemplates insolvency, the indisputable presumption follows that the transaction is fraudulent, and the deed may be set aside at the instance of a creditor.

[2] Regarding this phase of the case first, we may observe the contention of appellants is that the recitals in the trust deed were the only evidence offered as to the consideration for which the deed was given, and these recitals are conclusive that such consideration was valuable. Thus it appears therein:

> "Now therefore, in consideration of the premises and of the love and affection which the said party of the first part has and bears unto the said parties of the third part and for their better support, maintenance and protection as well as in consideration of the sum of one dollar in lawful money of the United States and other good and valuable consideration which the said party of the first part acknowledges to have received of and from said parties of the third part," etc.

Respondent made no attempt to controvert said recital, and hence it could not be held that the transfer was "without valuable consideration." While the express declarations of the deed as to the consideration may be contradicted and controlled by parol evidence, if satisfactory, there was no such evidence offered herein, and there is no sufficient support, therefore, for the finding "that the said purported trust deed dated November 18, 1905, was without consideration." It will not be disputed that the burden of proof was upon plaintiff to overcome the proper inference from said recital, and it is equally plain that in this respect his position is vulnerable. As to the necessity for such proof on his part, we may refer to section 1615, Civil Code; Anthony v. Chapman, 65 Cal. 73, 2 Pac. 889; Duffy v. Duffy, 104 Cal. 602, 38 Pac. 443.

[3, 4] With equal earnestness appellants urge that the proof fails to make out a case contemplated by said section 3439. To make the instrument fraudulent under that statute there must be the intent in the mind of the grantor "to delay or defraud any creditor or other person of his demands." This is undoubtedly a question of fact and not of law, and the burden of proof is upon the complaining creditor to show that the conveyance was made with such intent. Schell v. Gamble, 153 Cal. 449, 95 Pac. 870.

[5-7] The only creditor at the time was E. Franck & Co. and the amount of the indebtedness was $640.46. This was paid afterwards, and it is claimed that this furnishes conclusive evidence that at the time of the execution of the deed she had no intention of defrauding her creditor. The principle, however, is not limited to the debt owed at the time of the conveyance. The deed would be equally subject to nullification if the intention existed to defraud a future creditor of a just claim, and in this connection it is to be recalled that she continued to do business with said firm for many years, and was at no time entirely free from financial obligation to said Franck & Co. Of course, it is generally difficult to prove satisfactorily the intent in cases like this. It is not to be expected that the grantor would declare a purpose to defraud his creditors. Indeed, it is natural to suppose that he would, if possible, conceal such purpose and so dispose the circumstances, if he could, that a fraudulent intent could not be shown. The trial court is to reach a conclusion from the consideration of all the surroundings facts; and, if the finding may be said to constitute a rational inference from the evidence, it cannot be disturbed by the appellate court. We think the lower court may have reasonably concluded that on said November 18, 1905, Mrs. Hunter rendered herself insolvent by

conveying all her property. The showing as to this, it is true, is not very persuasive, but Mr. Franck's testimony under the circumstances should be deemed sufficient in view of the difficulty of proving the fact and the absence of any evidence that she had other property. In addition, it is clear that she continued indebted to the company till her death, and left no property to satisfy the obligation. It is not unreasonable to conclude that she anticipated and contemplated that condition, and that when she performed the very act that would prevent her from paying her just indebtedness, she had the intention of accomplishing that result. In other words, when it is shown that a person is indebted to another, and so continues, and that he has divested himself of all his property and thereby renders himself incapable of paying his debts, it may be just and reasonable to hold that he intended when he executed the conveyance to render the creditor powerless to obtain the satisfaction of his claim, and that this intention is virtually a fraud upon the creditor, and should not be countenanced in a court of justice. Of course, we do not say that a finding to the contrary might not have been justified, but we think the conclusion of the court in favor of respondent is not unreasonable.

[8] There is a slightly different view of the case, set forth in the pleadings and disclosed by the evidence, which harmonizes with the findings of the lower court and comports with the demands of equity and good conscience. It involves the principle of equitable estoppel. The credit for the indebtedness herein was extended Mrs. Hunter on the faith that she was the owner of the premises concerned in the suit. Mr. William Franck so answered in response to the question whether the firm extended credit "in the belief and understanding that Sarah B. Hunter owned the house and lot in French gulch." There was no evidence to the contrary, and we must accept such as the fact. Under these circumstances it would be inequitable to allow the grantees, after remaining silent and failing to record the deed until said indebtedness was incurred, to prevent the creditor from resorting to said property for the satisfaction of its claim. As between the vendee and creditor, in such a case, the vendor will still be considered the owner of the property. Otherwise he would be permitted to perpetrate a gross fraud upon the creditor. And the decisions are to the effect that the deed will be treated as fraudulent and void as to creditors without regard to whether the parties to the deed intended any fraud or not. There are many cases to the point, but we content ourselves with this quotation from Curtis v. Lewis, 74 Conn. 367, 50 Atl. 878:

> "This rule of righteousness and broad principle of public policy, * * * as it relates to the delusion and injury of creditors through secret conveyance of land, it rests upon the principle, common to all jurisprudence, which imposes upon every man the duty of surrendering, to those justly entitled, property in his legal possession which in equity and good conscience he ought not to retain, and which forbids any one to assert his rights when in equity and good conscience he ought not to assert them against one who has been injured and deceived through his conduct in respect to such rights."

The circumstance of insolvency on the part of the grantor, which we have already considered, furnishes an additional reason for applying such principle as against the grantees. Clark v. Lewis, 215 Mo. 173, 114 S. W. 604.

[9] The other consideration of importance relates to the question of whether Moran was a purchaser for value and in good faith. There is evidence that he paid $1,000 for the deed, but there is no showing that he took without notice of the fraudulent character of the conveyance of November 18, 1905, or of the claim of respondent. He was the son-in-law of Laura Hunter Newman, one of the beneficiaries in the trust deed, and the husband of another beneficiary, and this consideration would furnish some ground for the inference that he had knowledge of the situation. Moreover, there was a lis pendens filed and recorded on April 7, 1915, in the case of William Franck, as Administrator of the Estate of Sarah B. Hunter, Deceased, v. Laura Hunter Newman, setting forth the claim of the plaintiff to the property in controversy; and, Moran's deed being subsequent to this date, the presumption is that he was speculating on the chance of defeating a just claim. Besides, it is alleged in the complaint, and not denied in the answer—

> "that said John Moran well knew of the pendency of said action, and the said John Moran took said deed of conveyance knowing of the claim of the said E. Franck & Co. against the said estate of said Sarah B. Hunter, deceased."

It may be remarked, also, as of some significance, that Moran was not a witness at the trial nor was any explanation offered for his failure to testify. There seems to be no doubt that the trial court was warranted in holding that Moran's deed was without validity.

[10, 11] In addition to the cancellation of said deed of trust, the judgment provided for damages in the sum of $202 for the rents and profits of the property subsequent to the time of the death of said Sarah B. Hunter, and it is claimed by appellant Moran that he is not liable for any portion of that sum, as his deed was executed only a short time before this action was commenced. But we think it sufficient to say that the appeal is taken jointly by all the defendants, and from the whole of the judgment, and this court would hardly be justified in reversing a part of that judgment in favor of one of the appellants. Besides, we think there is some evidence that Moran became party to a conspiracy to defraud respondent, and it is not inequitable to hold him jointly responsible for the consequences of that conspiracy, although he was not directly connected with the fraudulent purpose in the beginning.

We think the judgment just, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

36 Cal. App. 191

PORTER v. ANGLO & LONDON PARIS NAT. BANK OF SAN FRANCISCO (ROTHENBERG, Intervener). (Civ. 2143.)

(District Court of Appeal, First District, California. Feb. 7, 1918.)

1. Corporations 🔑446—Sale of All Corporate Assets—Consent of Stockholders.

Money on deposit in the name of intervener president, claiming title by bill of sale of corporation purporting to convey "all assets," was subject to execution on judgment against corporation which had ceased to exist where sale had not been made with consent of two-thirds of stockholders, as required by Civ. Code, § 361a; such sale being void as against execution creditor.

2. Corporations 🔑445 — Sale of Property.

While the word "property" was not specifically employed in the bill of sale by the corporation to intervener to designate the subject-matter of the transfer, the phrase "all the assets of the corporation" therein, with the preceding notice to consummate a sale of all assets, property, and effects of the corporation, comprehended and included the entire property of the corporation in the sale, so that the sale was void where not made with consent of two-thirds of stockholders, as required by Civ. Code, § 361a.

3. Corporations 🔑619 — Dissolution — Transfer of Corporate Funds — Trustee.

Although a corporation died a natural death, where the fund in the corporation's bank account, notwithstanding its attempted transfer to the account of intervener president and director was at the time of the dissolution and thereafter continued to be a corporate asset, the intervener became a trustee of the fund in view of Civ. Code, § 400, providing that unless other persons are appointed the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders, or members of the corporation dissolved.

4. Trusts 🔑372(1) — Intermingling of Funds—Presumption.

If intervener, after dissolution of corporation, continued its business, and money deposited by intervener to his account, which represented funds of the corporation, was his own, it was the duty of the trial court to disentangle the account, and in so doing was permitted to presume that the several sums of money from time to time added to or withdrawn were no part of the trust fund.

5. Trusts 🔑372(1)—Intermingling Funds—Presumption.

If, at the time of the levy of the execution, there remained of the original trust fund a sum equal to or in excess of the sum sued for and sought to be impressed with the trust, the legal presumption is that such sum, in the absence of a showing to the contrary, was part and parcel of the original trust fund.

6. Appeal and Error 🔑877(2) — Parties Entitled to Allege Error.

Where intervener's interest in the action was only that of an individual acting to establish a purely personal claim to the money in suit, the invalidity of the judgment against defendant bank cannot concern him in the absence of a showing that he had a valid individual claim, and will not be considered on his appeal.

Appeal from Superior Court, City and County of San Francisco; Geo. C. Crothers, Judge.

Suit by George K. Porter against the Anglo & London Paris National Bank of San Francisco and Louis Rothenberg, intervener. Judgment for plaintiff, and intervener appeals. Affirmed.

Henry G. W. Dinkelspiel and John R. Jones, both of San Francisco, for appellant. Wm. M. Cannon and Wm. M. Abbott, both of San Francisco, for respondent. Lilienthal, McKinstry & Raymond, of San Francisco, for defendant.

LENNON, P. J. On December 4, 1913, prior to the institution of the present action, the judgment against the Rothenberg Company, Incorporated, was recovered in an action wherein the plaintiff here, George K. Porter, was plaintiff and the said Rothenberg Company, Incorporated, was defendant. Execution upon the judgment thus obtained was issued and levied upon a certain sum of money on deposit in the name of the Rothenberg Company, "not incorporated," with the defendant in this action, the Anglo & London Paris National Bank of San Francisco. Upon a proceeding supplementary to said execution, Louis Rothenberg, the intervener in the present action, appeared and claimed that the money so deposited and levied upon belonged to him because the Rothenberg Company, Incorporated, against which the judgment in the original action was obtained, had ceased to exist prior to the levy of the execution, and that immediately prior to its dissolution it had transferred the deposit in question to the Rothenberg Company, "not incorporated," under which name he individually was doing business.

The court in the original action, upon the hearing of the supplementary proceeding, ordered that the deposit in question be held by the defendant bank pending the result of the present action which, pursuant to the direction of the court, was instituted for the purpose of determining whether or not said deposit belonged, at the time of the levy of the execution, to the Rothenberg Company, Incorporated, or to the Rothenberg Company, "not incorporated." The plaintiff's complaint in the present action proceeded in substantial accord with the facts above narrated, and all of its material allegations were admitted by the bank defendant, save the allegation that on January 10, 1914, the date of the levy of the execution, there was on deposit with it the sum of $650, or any other sum, belonging to and standing in the name of the Rothenberg Company, Incorporated.

Pursuant to stipulation and order, Louis Rothenberg, the intervener, interposed his complaint in intervention, wherein, among other things, he alleged that the Rothenberg Company, "not incorporated," was in fact himself doing business under the fictitious name of the "Rothenberg Company," and that he was the owner of the money which had been levied upon and on deposit with the bank defendant in the name of the Rothenberg Company, "not incorporated." After trial upon the issues thus raised, the court below found that, at the time of the issuance and levy of the execution in question, the bank defendant had in its possession and under its control an amount of money exceeding the sum of $650 belonging to the Rothenberg Company, Incorporated; that the intervener did not then or at any other time have any interest in or title thereto; and that the same was subject to the lien of the plaintiff's execution. Judgment was accordingly entered in favor of the plaintiff and against the bank defendant and the intervener as well, from which judgment the intervener alone, and in his own behalf, has appealed.

The trial court's finding as to the ownership of the money in suit is assailed upon the ground that it is contrary to the evidence. The evidence in so far as it related to the ownership of the money in suit is in substance as follows: On and prior to June 30, 1913, the Rothenberg Company, Incorporated, was an ordinary commercial corporation. At midnight on the last-mentioned date the life of the Rothenberg Company, Incorporated, of which the intervener was then a director and the president, expired because of the fact that it had reached the period of its corporate existence as prescribed in its amended articles of incorporation, which were prepared and filed with the secretary of state after the rendition but before the entry of the judgment against it in the prior action. The life of the corporation as thus shortened ended before said judgment was entered. During the life of the corporation, to wit, on June 24, 1913, there was recorded with the recorder of the city and county of San Francisco a paper writing signed, "The Rothenberg Co., by J. Hursa, Secretary, Intending Vendor," and "Louis Rothenberg, Intending Vendee," which purported to give notice that on Monday, the 30th day of June, 1913, at the hour of 4:30 p. m., the Rothenberg Company, Incorporated, would, as "intending vendor," at its place of business in the city and county of San Francisco, "consummate" a sale to Louis Rothenberg, "intending vendee * * * of all of the assets, property and effects of every kind and character belonging to the intending vendor." On June 30, 1913, a written bill of sale, as shown by secondary evidence after proof either of its loss or destruction by the intervener signed by Sanford Rothenberg, son of Louis Rothenberg, the intervener, and John Hursa, respectively the vice president and secretary of the corporation, was executed to Louis Rothenberg, the intervener, which contained the recital, according to the recollection of an attorney witness for the intervener who drafted it, that "for and in consideration of the sum of $10 gold coin in hand paid by Louis Rothenberg to the Rothenberg Company, receipt of which is acknowledged, it transferred to Louis Rothenberg all of the assets of the corporation." On the same day, June 30, 1913, pursuant to the sale thus attempted to be consummated, all of the assets of the corporation, save and except the corporation's money on deposit with the defendant bank, were thereupon delivered to the intervener. The corporation's money remained standing in the name of the corporation upon the books of the bank until the following day, July 1, 1913, when the account was transferred to Louis Rothenberg Company, "not incorporated."

The character and condition of this account prior and subsequent to July 1, 1913, and the circumstances attending its transfer on the books of the bank were shown, by a statement from the bank defendant, which was stipulated to be correct and admitted in evidence without objection, to be as follows: The account was originally opened as a corporation account prior to 1906 and, from that time, was carried under the title "The Rothenberg Co." upon the books of the Anglo California Bank, Limited, and was continued as a corporation account under the same title upon the books of the bank defendant which absorbed and succeeded to the business of the Anglo California Bank, Limited, until and including July 1, 1913, when "the balance in the account of the corporation amounting to $1,863.05 was withdrawn by a properly signed check," and on the same day deposited with the bank defendant to the credit of the "Rothenberg Company." Checks upon the account of the Rothenberg Company, Incorporated, were signed "The Rothenberg Co., Louis Rothenberg, President." The check dated July 1, 1913, drawn by the Rothenberg Company, a corporation, on the bank defendant for $1,863.05 and paid and canceled on that date by the deposit of the sum called for to the credit of the Rothenberg Company, "not incorporated," together with the closing statement of the account of the Rothenberg Company, Incorporated, was delivered to the Rothenberg Company, Incorporated, and is now in its possession. When this corporation account was thus transferred, it was represented to the bank that the new Rothenberg Company was not incorporated and the deposit tag for $1,863.05, made at the time of the transfer, read, "The Rothenberg Co., Not Incorporated." Checks against this new account were signed "The Rothenberg Co., Louis Rothenberg." There was $2,506.90 to the credit of this account on the books of the bank defendant on June 10, 1914, the date of the issuance of the execution out of the prior action, and on that date directed to be and levied upon "any funds to the credit of the Rothenberg Company, a corporation." No account appeared on the date last mentioned nor at any time subsequent thereto on the books of the bank defendant.

The foregoing practically undisputed facts fully support the trial court's findings and judgment.

[1] Assuming, as counsel for the intervener contend, that the bill of sale in question, which was the basis of the intervener's claim of title to the money in suit, covered and controlled the corporation bank account and operated in and of itself and without more ado to transfer such account to the intervener, nevertheless the very fact that it purported to transfer all of the assets of the corporation to the intervener must result in its own undoing. This is so because no showing was made or attempted that the purported sale was consummated in keeping with the provisions of section 361a of the Civil Code. In fact it is fairly inferable from the evidence adduced upon the entire case that the provisions of that section were altogether ignored when the sale was made. That section reads:

> "No sale, lease, assignment, transfer or conveyance of the business, franchise and property, as a whole, of any corporation now existing, or hereafter to be formed in this state, shall be valid without the consent of stockholders thereof, holding of record at least two-thirds of the issued capital stock of such corporation; such consent to be either expressed in writing, executed and acknowledged by such stockholders, and attached to such sale, lease, assignment, transfer or conveyance, or by vote at a stockholders' meeting of such corporation called for that purpose; but with such assent, so expressed, such sale, lease, assignment, transfer or conveyance shall be valid: Provided, however, that nothing herein contained shall be construed to limit the power of the directors of such corporation to make sales, leases, assignments, transfers or conveyance of corporate property other than those hereinabove set forth."

The quoted Code section was in force at the time of the sale in question and, as was said in the case of South Pasadena v. Pasadena Land, etc., Co., 152 Cal. 581, 93 Pac. 490:

> "This enactment is not, on its face, a mere negative or prohibitive statute, forbidding that which before was permitted. It is both affirmative and negative in its terms. * * * It expresses a consent to such transfer in the manner prescribed, as well as a prohibition against such transfer in any other mode. * * * It deprives ordinary private business corporations of the power they previously possessed to dispose of their entire property, franchises, and business, as a whole, at the will of a mere majority of the stockholders, or of less than two-thirds of them. * * *"

[2] We have no doubt but that the evidence shows that it was the intent and purpose of the purported sale in question to transfer the corporation "property as a whole" to the intervener. While the word "property" was not specifically employed in the bill of sale to designate the subject-matter of the transfer, nevertheless the phrase "all of the assets of the corporation" which was employed for that purpose in the bill of sale and the preceding notice of intention to consummate the sale comprehended, and, therefore, included, the entire property of the corporation in the sale. Vaiden v. Hawkins, 59 Miss. 406; Lowber v. Le Roy, 2 Sandf. 202; Rep. Life Ins. Co. v. Swigert, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328; In re Atty. Gen. v. Atl. Mutual Ins., 100 N. Y. 279, 3 N. E. 193; Fitzgerald v. Maxim Powder (N. J.) 33 Atl. 1064; Dauphin County v. Union, etc., Co., 2 Pears. (Pa.) 38.

Doubtless the trial court likewise construed the sale in question to be a transfer of the corporation's "property as a whole." If the sale in question had been made with the written consent of two-thirds of the stockholders of the corporation, such consent, by the express requirement of the statute, was necessarily an essential accompaniment of the instrument which evidenced the sale. And while such consent, if it had been expressed by a two-thirds vote of the stockholders at a stockholders' meeting called for that purpose, need not, perhaps, have accompanied the evidence of the sale, nevertheless such consent was not presumptively involved in the execution of the sale. Consequently, in the absence of a showing that such sale was consummated in conformity with the statutory requirements, the trial court correctly concluded that it was void as against the plaintiff, in the capacity of an execution creditor of the corporation, and therefore ineffectual as a transfer to the intervener of any right or title whatsoever in and to the money in suit. McShane v. Carter, 80 Cal. 310, 22 Pac. 178; Pekin Mining Co. v. Kennedy, 81 Cal. 356, 22 Pac. 679; Williams v. Gold Hill Mining Co. [C. C.] 96 Fed. 454; South Pasadena v. Pasadena, etc., Co., supra; Bennett v. Red Cloud Mining Co., 14 Cal. App. 728, 113 Pac. 119.

As previously pointed out, it is the intervener's contention that the transfer of the money in suit was made to him by virtue of the purported sale in question, and was consummated in full before the termination of the life of the corporation. No claim is made, and, indeed, none could be made in the face of the facts of the case, that the check, drawn and signed by the intervener on July 1, 1913, on the account of the Rothenberg Company, Incorporated, was a separate and independent transaction. The check referred to, having been an integral and inseparable factor in the attempted consummation of the sale of the corporation's property as a whole, possessed no greater force and effect as an evidence of the intervener's title to the money in suit than the bill of sale itself, and consequently must fall with the bill of sale. The conclusion which we have reached upon this particular phase of the case makes it unnecessary for us to discuss and decide the question as to whether or not the intervener was without authority to execute the check in question after the death of the corporation.

It is urged upon behalf of the intervener that there was no evidence to show that the money on deposit in the name of the Rothenberg Company, "not incorporated," at the time of the levy of the execution, was the same fund transferred to the intervener on July 1, 1913. This contention rests upon the fact that the evidence shows that the account originally credited to the Rothenberg Company, Incorporated, was, after its entry in the name of the Rothenberg Company, "not incorporated," materially increased by deposits made from time to time by the intervener and at various times thereafter materially decreased by checks drawn upon it by the intervener.

[3-5] Responding to this contention, it will be noted that, in conjunction with the facts previously narrated, the record contains some evidence to the effect that the account in question never at any time between July 1, 1913, the date of its transfer and January 10, 1914, the date of the levy of the execution, fell "below somewhere about $1,500." It will be remembered that the Rothenberg Company, Incorporated, died a natural death at midnight of June 30, 1913, and in as much as it was shown that the fund in the corporation's bank account, notwithstanding its attempted transfer to the intervener, was at the time of the dissolution of the corporation and thereafter continued to be, a corporation asset, the intervener, as a matter of law and in spite of himself, became a trustee of the fund represented by and credited to that account. Civ. Code, § 400. And if it can be said, in the face of the evidence upon this phase of the case to the effect that the intervener, after the dissolution of the corporation, continued the business of the corporation under its original name at its original place of business, that the money deposited by the intervener to the credit of the transferred account was his own or other than the corporation's money, then the trial court was confronted with the situation of the intervener as a trustee having intermingled his own or other moneys with a trust fund committed by law to his care and keeping and, in such a situation, it was the right and the duty of the trial court to disentangle the account. In so doing the trial court was permitted to presume that the several sums of money, from time to time added to or withdrawn by the intervener from the trust fund, were no part of the trust fund. If, as the evidence shows, and the trial court in effect found, at the time of the levy of the execution there remained of the original trust fund a sum equal to or in excess of the sum sued for and sought to be impressed with the trust, the legal presumption is that such sum, in the absence of a showing to the contrary, was part and parcel of the original trust fund. Elizalde v. Elizalde, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861.

[6] This disposes of all of the points worthy of discussion made in support of the appeal, save the point to the effect that no execution could have legally issued out of the prior action because that action had abated by the death of the corporation before the entry of the judgment therein. Inasmuch as this particular point was made only in the closing brief of counsel for the intervener, we are not disposed to notice it further than to say that, conceding the correctness of the contention, the validity of the judgment in so far as it concerns the bank defendant, in the absence of an appeal by that defendant, is not before us, and that, inasmuch as the intervener's interest in the action was only that of an individual seeking to establish a purely personal claim to the money in suit, the invalidity for any cause of the judgment against the bank cannot concern him as an individual in the absence of a showing that he had a valid individual claim to the money in suit.

The judgment appealed from is affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

177 Cal. 704

CHAMBERS, State Controller, v. GALLAGHER. (S. F. 7899.)

(Supreme Court of California. March 12, 1918. Rehearing Denied April 11, 1918.)

1. TAXATION ⚷905(1)—INHERITANCE TAXES—LIMITATIONS.

Inheritance Tax Law 1893 (St. 1893, p. 193) provided for appraisement and computation of the tax by the probate court. Section 14 provided that the court should cite persons owning the property to show cause why the tax should not be paid, and that hearing, judgment, and its enforcement should proceed in the manner prescribed by Code Civ. Proc. §§ 1704–1724, inclusive. Section 15 provided that if the tax was unpaid, the district attorney, on notice from the county treasurer, should prosecute the proceedings authorized by the previous section. *Held*, that an executor proceeded against by petition for the collection of the tax may demur to the petition, and thereby present the question of the statute of limitations.

2. LIMITATION OF ACTIONS ⚷34(7)—INHERITANCE TAXES.

Inheritance Tax Law of 1893 provided for appraisement and computation of the tax by the probate court. Section 4, as it existed in 1902, provided that, if the tax was not paid within 18 months, interest should be charged thereon. Section 6 provided that the executor should deduct the tax on distribution, or collect the same before property was distributed. Section 1 provided that administrators, executors, etc., should be liable for all taxes not collected. Section 8 provided that moneys retained by an executor for any such tax shall be paid by him within 30 days thereafter to the county treasurer. The amendment of 1913 (St. 1913, p. 1068) to section 4 provided that the provisions of the Code of Civil Procedure relative to the limitation of time of enforcing a civil remedy shall not apply to any proceeding or action taken to levy, appraise, or collect inheritance taxes. Code Civ. Proc. § 338, subd. 1, prescribes a limitation of 3 years for actions upon liability created by statute. Defendant's intestate died January 27, 1902, and his will was duly probated and the estate administered in the same year. More than 12 years after the decree of final distribution, the state controller filed a petition for the collection of such tax. *Held*, that the proceeding was barred by the statute of limitation at the time the amendment of 1913 to section 4 was enacted.

3. TAXATION ⚷859(7)—INHERITANCE TAXES—LIMITATIONS.

Inheritance Tax Act, § 4, as amended in 1913 (St. 1913, p. 1068), making inapplicable to suits thereunder the provisions of the Code of Civil Procedure relative to the limitation of time for enforcing a civil remedy, is inoperative as to suits to enforce payment of inheritance taxes which were barred at the time of its passage.

Department 1. Appeal from Superior Court, Fresno County; George E. Church, Judge.

Petition by John S. Chambers, State Controller, against James Gallagher, executor of the estate of Richard Hedinger, deceased, for the collection of an inheritance tax. From a judgment based on an order sustaining defendant's demurrer, plaintiff appeals. Affirmed.

Robert A. Waring and J. Paul Miller, both of Sacramento, for appellant. James Gallagher, of Fresno, in pro. per.

SHAW, J. The plaintiff appeals from a judgment in favor of the defendant.

The petition of the plaintiff shows the following facts: Richard Hedinger died on January 27, 1902. His will was duly probated, the executor appointed, the estate administered, and on July 29, 1902, a decree was duly made, distributing to August. Hedinger, the residuary legatee and devisee, the property remaining in the estate after the payment of $1,500 in charitable bequests. On September 25, 1914, more than 12 years after said decree of final distribution, the state controller filed a petition in the court which made said decree, alleging that no inheritance tax had been paid on the property so distributed to Augustus Hedinger, and praying that the court appoint an appraiser to appraise said property and ascertain the amount of such tax; that a citation be issued to the executor to appear before such appraiser and be examined, under oath, and show cause why he should not be held chargeable for the payment of said tax, and for judgment that the executor be declared liable for the payment, and be directed to pay such tax to the treasurer of the county.

To this petition the executor filed a demurrer, based upon the ground that the proceeding was barred by the statute prescribing 3 years as a limitation for actions upon a liability created by statute. Code Civ. Proc. § 338, subd. 1. The demurrer was sustained, and thereupon the judgment was given for the defendant.

[1] The inheritance tax act in force at the death of Hedinger in 1902 was the act of 1893 (St. 1893, p. 193). Some amendments thereto were made prior to 1902, but they do not affect the questions arising in this case. The act provided for an appraisement of the property subject to such tax, and that the court in which the administration of the estate was pending should therefrom compute the tax to be paid. Section 14 provided that when it appeared to the court that such tax had not been paid within the time allowed, it should cite the persons owning the property to show cause why the tax should not be paid, and that the hearing, the judgment of the court, and its enforcement, should proceed in the manner prescribed in the chapter of the Code of Civil Procedure embracing sections 1704 to 1724, inclusive. Section 15, as amended in 1895 (St. 1895, p. 33), provided that if the tax became due and was unpaid, the district attorney of the county, on notice of that fact from the county treasurer, should prosecute the proceeding authorized by section 14, as aforesaid, for the enforcement and collection of such tax. The sections of the Code referred to provide for a citation to the parties proceeded against, its personal service and return, the trial of the issues found in the proceedings, for judgment thereon, and for its enforcement by execution, and that the rules of practice prescribed in ordinary civil actions should be followed except as otherwise provided. It follows that the parties proceeded against, following the practice in civil actions, may demur to the petition filed against them, as provided in the Code (section 430, Code Civ. Proc.), and that the question of the statute of limitations was properly presented by the demurrer.

The appellant claims: First, that the provisions of the inheritance tax act in force at the death of the testator operated to continue the liability of the executor indefinitely and beyond the statutory period of limitation: and, second, that even if the statute would otherwise apply, that a provision in section 4 of the revised inheritance tax act of 1913 (Stats. 1913, p. 1068) removes the bar of the statute of limitations with respect to taxes which were barred at the time of this enactment.

Section 4 of the act, as it existed in 1902, provided that the tax imposed thereby should be due and payable at the death of the decedent; that, if not paid within 18 months thereafter, interest should be charged thereon at the rate of 10 per cent. per annum from the time of such death, and that thereupon such executor should give a bond for the payment of such tax and interest. Section 6 provided that the executor should deduct the tax from any money to be paid on distribution, or, if the property distributed was not money, should collect the tax thereon from the person to whom it was distributed, before such distribution, and that "he shall not deliver, or be compelled to deliver, any specific legacy or property subject to tax to any person until he shall have collected the tax thereon." Section 1 provided that:

> "All administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid, as hereinafter directed."

Section 8 provided that moneys retained by an executor for any such tax "shall be paid by him, within thirty days thereafter, to the treasurer of the county in which the probate proceedings are pending"; that the treasurer should transmit the money to the state controller, who should receipt therefor under seal; and that "an executor, administrator, or trustee shall not be entitled to credit in his accounts, nor be discharged from liability for such tax, nor shall said estate be distributed unless he shall produce a receipt so sealed and countersigned by the controller, or a copy thereof, certified by him." Prior to 1913 the inheritance tax was not declared to be a lien upon property. The amendment to section 4, enacted in that year and here relied on, is as follows:

> "The provisions of the Code of Civil Procedure relative to the limitation of time of enforcing a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine, or enforce the collection of any tax or penalty prescribed by this article, and this section shall be construed as having been in effect as of date of the original enactment of the inheritance tax law."

[2] 1. We do not think the provisions of the act as it stood prior to 1913 show an intent to prevent the running of the statute of limitations in favor of the executor after the distribution of the estate. The scheme of the act was that the executor should see that the taxes were paid before he had made final settlement of his estate, or within 30 days thereafter. His obligation became matured at the expiration of such 30 days at all events. The intention was that the court having charge of the administration should not order the settlement of the estate or the discharge of the executor until such tax had been paid. Nothing is said in the law regarding the operation of the statute of limitations or purporting to prevent it from running against such demand, or to differentiate it from any other matured obligation to the state. The act of 1913, expressly declaring such intent, is a strong indication that the Legislature itself did not suppose that it had previously done so. Doubtless the liability of the executor, under the terms of the act, continued after the settlement of

the estate, if the tax was not previously paid, and could be enforced in a proper proceeding by the district attorney for that purpose under the provisions of the act. But there is nothing in the language of the act which declares that the statute does not run against such liability, as in other cases. It is the duty of every person to pay his debts, but the existence of that duty does not prevent the running of the statute of limitations in his favor, upon his failure to pay them when due. The duty to pay this tax is no greater than the duty of every citizen to pay his ordinary taxes on property. It is, perhaps, even less burdensome, since the inheritance tax at the time in question was not a lien upon property, as in the case of ordinary taxes. Pol. Code, § 3716. In cases where the law also allowed a personal action to be maintained for the recovery of such taxes, we have uniformly held that the statute of limitations applies to such actions; that such tax is a liability created by statute, which, under section 338, subdivision 1, aforesaid, is barred after the expiration of 3 years from the time when the right of action accrued. San Diego v. Higgins, 115 Cal. 170, 46 Pac. 923; Los Angeles v. Ballerino, 99 Cal. 595, 32 Pac. 581, 34 Pac. 329; San Francisco v. Luning, 73 Cal. 610, 15 Pac. 311; Lewis v. Rothchild, 92 Cal. 625, 28 Pac. 805; Dranga v. Rowe, 127 Cal. 506, 59 Pac. 944; Clark v. San Diego, 144 Cal. 361, 77 Pac. 973. The same principle applies to a demand for inheritance tax under the act of 1893, and its amendments prior to 1902. This proceeding to enforce the personal liability of the executor for the payment of the tax in question was therefore barred by the statute at the time the amendment of 1913 was enacted.

[3] 2. We are also satisfied that the appellant is wrong in his contention that the act of 1913, purporting to take away the defense of the statute of limitations with respect to proceedings to enforce payment of inheritance taxes which were barred at that time, is constitutional, and operates to deprive the executor in this case of that defense. Mr. Wood, in his treatise on the statute of limitations, states the law on this subject as follows:

> "Statutes of limitation relate only to the remedy, and may be altered or repealed before the statutory bar has become complete, but not after, so as to defeat the effect of the statute in extinguishing the rights of action. * * * It has been held in a case decided by a majority of the Supreme Court of the United States (Campbell v. Holt, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483), that, in actions upon debt, contract, or any class of actions in which a party does not become invested with the title to property by the statute of limitations, the Legislature may by a repeal of the statute of limitations, even after the right of action thereon is barred, restore to the plaintiff his remedy thereon, and divest the other party of the statutory bar. The doctrine of this case is undoubtedly technically correct, and was suggested in the first edition of this work. It is, however, opposed to the great weight of authority in this country, and to the policy of these statutes. There can be no question that the Legislatures of the several states by the passage of the statute of limitations intended a permanent divestment of a right of action in all matters to which the statute relates, when it had run against them, and they had thereby become barred. And while it may be, as already suggested, that the reasoning of the court is correct, yet the wisdom of the doctrine announced is questionable." Wood on Limitations (4th Ed.) § 11, p. 46.

This proposition is supported by the almost universal course of decision in the United States. The courts of Arkansas, Colorado, Florida, Iowa, Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, New Hamphire, New Jersey, Tennessee, Utah, Virginia, Washington, and Wisconsin, all adhere to the doctrine. Couch v. McKee, 6 Ark. 492; Willoughby v. George, 5 Colo. 80; Bradford v. Shine's Administrator, 13 Fla. 393, 7 Am. Rep. 239; Board of Education v. Blodgett, 155 Ill. 441, 445, 40 N. E. 1025, 31 L. R. A. 70, 46 Am. St. Rep. 348; Stipp v. Brown, 2 Ind. 647; Bowman v. Cockrill, 6 Kan. 205; Lawrence v. Louisville, 96 Ky. 600, 29 S. W. 450, 27 L. R. A. 560, 49 Am. St. Rep. 309; Norris v. Slaughter, 3 G. Greene (Iowa) 116; Bigelow v. Bemis, 2 Allen (84 Mass.) 496; Atkinson v. Dunlap, 50 Me. 111; Whittier v. Village of Farmington, 115 Minn. 187, 131 N. W. 1079; Davis v. Minor, 1 How. (Miss.) 188, 28 Am. Dec. 325; Rockport v. Walden, 54 N. H. 173, 20 Am. Rep. 131; Ryder v. Wilson's Ex'rs, 41 N. J. Law, 10; Girdner v. Stephens, 1 Heisk. (48 Tenn.) 280, 2 Am. Rep. 700; Ireland v. Mackintosh, 22 Utah, 296, 61 Pac. 901; Kesterson, v. Hill, 101 Va. 739; City of Seattle v. De Wolfe, 17 Wash. 349, 49 Pac. 553; Eingartner v. Illinois Steel Co., 103 Wis. 373, 79 N. W. 433, 74 Am. St. Rep. 871.

The same doctrine has been announced in this state and applied to cases where rights of specific property were involved. Peiser v. Griffin, 125 Cal. 14, 57 Pac. 690. It has been stated in other cases where the precise question was not involved. Allen v. Allen, 95 Cal. 197, 30 Pac. 213, 16 L. R. A. 646; Swamp Land Dist. v. Glide, 112 Cal. 90, 44 Pac. 451; Weldon v. Rogers, 151 Cal. 432, 90 Pac. 1062. The question as applied to actions to enforce personal obligations has not heretofore arisen in this state, but upon the authority of the cases we have cited, and the practically universal rule on the subject, we feel no hesitancy in adhering to the doctrine as stated by Mr. Wood. The act of 1913 is therefore inoperative to revive the right of action of the controller which had become barred long before that time. It follows that the demurrer to the petition was properly sustained.

The judgment is affirmed.

We concur: SLOSS, J.; RICHARDS, Judge, pro tem.

178 Cal. 1

O'MELVENY et al. v. GRIFFITH et al.

(L. A. 4165.)

(Supreme Court of California. March 21, 1918.)

1. Municipal Corporations 🔑210—Parks—Ordinance Accepting Gift—Validity.

Los Angeles City Charter (St. 1911, p. 2051 et seq.) § 118, subsecs. (c), (d), and section 119, fully vest in the board of park commissioners the management of the park system of the city, and of all real and personal property devoted to that use, as well as the erection and maintenance of all buildings thereon. Section 12 vests all legislative power of the city in the council and mayor, but excepts to the board of park commissioners the power to accept gifts for parks on and in behalf of the city, to erect buildings thereon, and to manage and control their erection and their maintenance thereafter. Section 2, subd. 16, gives the city power to receive gifts and donations of all kinds of property in fee simple or in trust for charitable purposes, and do all things and acts necessary to carry out the purposes of such gifts and donations. *Held*, that ordinances of the city accepting gift to erect, in a certain park, two structures, and appoint, in accordance with the terms of the gift, three citizens to supervise the erection and manage and control the structures, were void.

2. Municipal Corporations 🔑992—Taxpayers' Suit—Enjoining Enforcement of Ordinance.

Plaintiffs, taxpayers, citizens, and members of the board of park commissioners of Los Angeles, had capacity to sue defendant commissioners claiming to act as officers of the city, under the ordinances as to said gift, from carrying out the provisions of such ordinances, and from interfering with plaintiffs' duties as park commissioners, and the remedy by injunction was proper, the ordinances requiring the furnishing, for the erection of the buildings by the city, free light, power, water, rocks, and gravel.

Department 2. Appeal from Superior Court, Los Angeles County; Louis M. Myers, Judge.

Suit by Henry W. O'Melveny and others against Griffith J. Griffith and others. Judgment for defendants on demurrer, and plaintiffs appeal. Reversed.

O'Melveny, Stevens & Millikin, of Los Angeles, for appellants. Albert Lee Stephens, City Atty., and Charles S. Burnell, Asst. City Atty., both of Los Angeles, for respondents.

WILBUR, J. [1] This is an appeal from a judgment in favor of defendants on demurrer. Plaintiffs sue as citizens and taxpayers, and also as members of the board of park commissioners of the city of Los Angeles, to enjoin the defendants, claiming to act as officers of the city under certain ordinances, from carrying out the provisions of such ordinances and from interfering with the powers and duties of the park commissioners. The defendant Griffith J. Griffith has offered to erect, at his own expense, for the city of Los Angeles, to become the property of the city, two structures, one a "Greek theater," costing not less than $50,000, in Vermont Canyon; the other a "Hall of Science and Observatory," costing not less than $150,000, on Mt. Hollywood both in a certain public park of the city of Los Angeles, known as "Griffith Park." The donor proposed that the plans for said buildings were to be furnished by him, subject to the approval of the city council and mayor, or a committee, and the structures were to be erected under the supervision of three citizens appointed for that purpose by the mayor of the city, thereto authorized by ordinance. The city was to furnish the light, power, and water necessary in the construction of said buildings from its supply of each. Rock and gravel in the park were also to be used in the construction of said buildings and the necessary trails and roadways constructed to make the same accessible. After the erection of said structures they were to be managed and controlled by the said appointees of the mayor. No point is made in the case as to the desirability of the acceptance of the gift, nor to the public character of the improvements proposed; nor is there any contention that the conditions attached to the gift are unreasonable, or in any way improper, save only in so far as they may interfere with the prerogatives of the plaintiffs as park commissioners. The city council passed an ordinance accepting the donor's gift, and in compliance with the conditions thereof established a board of three commissioners to erect and manage such structures. The respondents were appointed by the mayor as such commission, and appellants seek to enjoin them from carrying out the proposed plan, on the ground that the ordinance in question is in conflict with the charter powers of the appellants. The powers of the board of park commissioners and of the city council are derived from the charter of the city of Los Angeles and the several amendments thereto. The powers and duties of the park commission are, in part, defined as follows:

> "(c) To purchase and lease property for park purposes, or for the use and benefit of the park department, and to have general supervision, control, care and custody of all real and personal property owned by the city of Los Angeles and used in and about the parks or park system of said city, and generally to do any and all things that may be necessary to carry out the spirit and intent of this charter in establishing, maintaining, operating, improving and enlarging the public parks and park system of the city of Los Angeles; and
>
> "(d) Subject to such ordinances as may from time to time be adopted by the council, to have and exercise charge, superintendence and control of the design, location, construction, maintenance and use of all buildings, pavilions and other structures, and all fountains, statues, sculptures, monuments, arches or other structures in such park, pertaining to park purposes, and intended for the convenience of the public, or for the ornamentation of such parks." Section 118, subds. (c) and (d).
>
> "The board of park commissioners may, for and on behalf of the city of Los Angeles, receive donations, legacies or bequests for the improvement or maintenance of said parks or park system, or for the acquisition of new parks, and all moneys that may be derived from

such donations, legacies or bequests, shall, unless otherwise provided by the terms of such donation, legacy or bequest, be deposited in the treasury of the city of Los Angeles, to the credit of the park fund. * * * As to all such property, the board of park commissioners shall be deemed and considered a special trustee thereof for the city of Los Angeles." Section 119, Stats. 1911, p. 2051 et seq.

It will be observed, therefore, that the management and control of the park system of the city, and of all real and personal property devoted to that use, as well as the erection and maintenance of all buildings thereon, is very fully vested in the board of park commissioners. It is provided, with reference to the erection and control of buildings, that the same shall be "subject to such ordinances as may from time to time be enacted by the council." Section 118, subd. (d), supra. But here we do not have a case where the council sought by ordinance to direct the board of park commissioners as to the manner in which they should act in the location, maintenance, or use of buildings in a public park, but an ordinance by which it is sought to take from the board of park commissioners control over such improvements during erection and after they have been completed, and by which it is sought to make a contract with a private individual for the creation of public officers to have control thereover in accordance with his proposal for the erection and maintenance of the building. We have an acceptance by the city council for and on behalf of the city of a gift, the consideration for which moving from the city is a surrender by the city council of some of the powers of the board of park commissioners vested in them, not by the city council, a creature of the charter, but by the charter itself. That is to say, one of the boards created by the people seeks to take from another board, also created by the people through its charter, a power expressly vested by the people in the latter board. To justify this result two provisions of the charter are called to our attention—one, the provision that the city is given power to "receive gifts and donations of all kinds of property, in fee simple, or in trust, for charitable or other purposes; and to do all things and acts necessary to carry out the purposes of such bequests, gifts and donations, with power to manage, sell, lease, or otherwise handle and dispose of the same, in accordance with the terms of the bequest, gift or donation" (Charter, § 2, subd. 16); the other that the charter vests all the legislative power of the city, "except as hereinafter otherwise provided," in the council and mayor. If we consider that the acceptance of a gift in behalf of the city and a compliance with the terms of such gift is a legislative function, and therefore vested in the city council, and that for that reason and upon that basis the city council was empowered to accept the gift and comply with the conditions thereof, we are met with the express reservation of section 12 with reference to legislative powers, namely, that where "hereinafter otherwise provided" the city council have not such legislative power. Among the things "hereinafter otherwise provided" is that the board of park commissioners has power to accept gifts for the park for and on behalf of the city, to erect buildings thereon, to manage and control their erection and their maintenance thereafter. We are constrained to hold, therefore, that Mr. Griffith in his proposal to the city of Los Angeles imposes as a condition of his gift requirements which are violative of the fundamental law of the city and opposed to the wishes of the people thereof as declared in the fundamental law of said city; that the ordinances attempting to comply therewith are void as being in violation of the fundamental law of the city.

[2] One of the points raised by the demurrer in the court below was that the plaintiffs did not have the capacity to sue. They allege that they are citizens and taxpayers. The ordinance in question required the furnishing for the erection of the buildings by the city of free light, power, water, rock, and gravel. Inasmuch, therefore, as the property of the city was to be used in the proposed buildings, and for the further reason that the members of the board of park commissioners charged with the erection of buildings in the public parks is specially interested in the question, we hold that they had the capacity to sue in this case, and that the remedy by injunction was proper. Wheeler v. Herbert, 152 Cal. 224, 92 Pac. 353.

The judgment and order sustaining the demurrer are reversed; defendants to have 30 days after notice of filing of remittitur in the lower court in which to answer.

We concur: VICTOR E. SHAW, Judge pro tem.; MELVIN, J.

(177 Cal. 771)

EMPLOYERS' LIABILITY ASSUR. CORP., LIMITED, OF LONDON, ENGLAND, v. INDUSTRIAL ACCIDENT COMMISSION. (S. F. 8517.)

(Supreme Court of California. March 20, 1918. Rehearing Denied April 16, 1918.)

1. MASTER AND SERVANT 🔑361—MARITIME CONTRACTS—EMPLOYER'S LIABILITY—JURISDICTION.

The exclusive maritime jurisdiction of the United States does not extend to claims arising out of work done on vessels prior to launching, and where parties stipulated facts under Workmen's Compensation Law (St. 1913, p. 279) of the state, the commission had jurisdiction.

2. MASTER AND SERVANT 🔑383—INDUSTRIAL ACCIDENT COMMISSION—POWERS.

While the jurisdiction of the Industrial Accident Commission is limited to settlement of disputes arising under legislation contemplated by Const. art. 20, § 21, to create and enforce liability of employers to compensate for injuries, it may determine the question of breach of warranty of insurance policy arising in proceedings for compensation.

3. Insurance 🔑288(1)—Avoidance of Policy—Misrepresentations by Insured.

A statement of insured, neither included in policy nor made a part of it under Civ. Code, § 2605, as to existence or cancellation of other insurance, if false, will not avoid insurance under section 2611, unless the statement be material.

4. Master and Servant 🔑416—Workmen's Compensation—Findings of Commission.

An express finding that representation by insured was immaterial was not required, where such issue was not presented by insurer, and the Industrial Accident Commission found the policy of insurance was in full force and effect at time of injury.

In Bank. Charles F. Mann, while at work as ship joiner, sustained injuries resulting in death. Upon application of his widow, the Industrial Accident Commission made an award of compensation against his employer, J. A. Johnson, and the Employers' Liability Assurance Corporation, Limited, of London, England, as insurance carrier. The Employers' Liability Assurance Corporation brought certiorari. Award affirmed.

Redman & Alexander, of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondent.

SLOSS, J. While working as a ship joiner, Charles F. Mann sustained injuries which resulted in his death. Upon the application of his widow, the Industrial Accident Commission made an award of compensation against J. A. Johnson, as employer, and Employers' Liability Assurance Corporation, as insurance carrier. Upon the petition of the insurance company, a writ of certiorari was issued to review the award.

At the hearing the parties stipulated, among other things:

> "(2) That the employment that said employé was engaged in * * * was such as to subject both the employer and the employé to the compensation provisions of the Workmen's Compensation, Insurance, and Safety Act and to the jurisdiction of this commission; (3) that on March 9, 1917, Charles F. Mann met with injuries on the Oakland estuary in Alameda county, Cal., and that said Charles F. Mann died on May 14, 1917."

The application alleged that at the time of his injury Mann was engaged in work on a ship.

[1] By its petition to the commission for rehearing the petitioner advanced, for the first time, the contention that the claim of the applicant was maritime in character, and that, under the decision of the United States Supreme Court in Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, Ann. Cas. 1917E, 900, handed down while the proceeding was pending, the commission was without jurisdiction. A rehearing was denied, and the point is again presented here. But the record does not disclose a state of facts to which the rule invoked is applicable. The maritime jurisdiction does not extend to claims arising out of work done (prior, at least, to the launching of the hull) in the construction of vessels. Olsen v. Birch & Co., 133 Cal. 479, 65 Pac. 1032, 85 Am. St. Rep. 215. While it appears that Mann was injured while working on a ship, the stipulation and the evidence are entirely consistent with the possibility that the ship may have been in course of construction, and not yet launched. The statement in the stipulation that Mann met with injuries "on the Oakland estuary" does not necessarily mean that the ship on which he was working was floating on the water. The language was not inappropriate to describe a position on the bank of the estuary. Since the parties expressly conceded the jurisdiction of the commission, the specific facts admitted or proven should, so far as can reasonably be done, be interpreted so as to support the concession. It is recognized, of course, that jurisdiction of the subject-matter cannot be conferred by consent. But the parties may stipulate to the existence of facts which bring a case within the jurisdiction of the commission, and we think the stipulation in this case is fairly to be read as an agreement that such facts existed.

[2] The insurance carrier set up in its answer the defense that there had been a breach, on the part of Johnson, the employer, of certain warranties contained in the policy, and that upon learning of such breach the insurance company had canceled the policy. It is argued that the issues involved in this defense were such as could be determined only by a court of law in an action upon the policy, and that the commission was without jurisdiction to pass upon them. We do not agree to this contention. The Industrial Accident Commission is, no doubt, a tribunal of limited jurisdiction. Its powers do not extend beyond the "settlement of any disputes arising under the legislation contemplated by" section 21 of article 20 of the Constitution. Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 410, 156 Pac. 491, Ann. Cas. 1917E, 390. That section authorizes the Legislature to "create and enforce a liability on the part of all employers to compensate their employés for any injury incurred by the said employés in the course of their employment. * * *" This court is committed to the view that the language just quoted is to be read in the light of a liberal interpretation. A scheme of insurance for the protection both of the employer and the employé has been a part of virtually every workmen's compensation statute enacted in other jurisdictions prior to the adoption of our own constitutional provision. To permit the employer to limit his obligation by procuring an insurer—private or governmental—to assume the burden of payment, and at the same time to give the workman a direct right of recov-

ery against the insurer, is, we think, a mode of defining the extent of the employer's liability, and therefore embraced within the power to "create and enforce" such liability. The insurer, assuming the risk voluntarily, is in privity with the employer, and stands in his place. An adjudication of liability under the policy is a settlement of a dispute arising out of the liability of the employer to his employé. The right of the commission to make an award against the insurer, where the validity of the policy is conceded, has never been questioned. If the commission may, in any case, make an award against one who has agreed to stand in the employer's place and protect him against claims by his employés, it must have the power to determine all questions of law and fact upon which the liability of the alleged insurance carrier depends. To hold that the mere denial of the binding force of a policy deprives the commission of jurisdiction would introduce endless and unnecessary complications and difficulties into the administration of the law.

[3] The petitioner argues, finally, that, granting the commission's jurisdiction, the facts were such as to force the conclusion that the policy was not binding. In the application or "statement of particulars" furnished to the insurer, it was stated that no company had canceled or refused to issue workmen's compensation insurance in connection with the risk during the past three years, and that no company had insured the risk except the Hartford Company. It appeared that these statements were not true, in that a policy had been issued by the New Amsterdam Casualty Company, and had been canceled by said company shortly before application made to the petitioner. We may assume that any defense available to the insurance company as against Johnson, the employer, would be equally available against the employé or his dependents. The statement with reference to the existence or cancellation of other insurance did not constitute a warranty. It was not contained in the policy itself, nor was it in "another instrument signed by the insured and referred to in the policy, as making a part of it." Civ. Code, § 2605. There was no declaration in the policy that the violation of this provision should avoid it, and the breach therefore would not affect the validity of the insurance unless the statement or representation was material. Civ. Code, § 2611.

The evidence on the subject of materiality was somewhat vague. Certain correspondence was introduced, indicating that the New Amsterdam Company, in notifying the insured of the cancellation of the policy issued by it, had attributed its action to a ground which would probably have made the fact of cancellation immaterial, so far as it might affect another company to which application might subsequently be made. It may be, as petitioner contends, that the statement made by the New Amsterdam Company to Johnson was not evidence of the true ground which induced the cancellation. But it seems to be settled that the burden of proving the materiality of an alleged representation is upon the insurer. 2 Cooley, Briefs on Insurance, 1182. The petitioner did not meet the burden, and the commission was therefore authorized to find against it.

[4] It is objected that there was no express finding that the representation was immaterial. But no such issue was presented by the answer of the insurance company. The commission found that the policy of insurance was in full force and effect at the time of the injury, and we think this finding was sufficient for all purposes. We may, for the purposes of this proceeding, agree with the petitioner that the further finding that the policy had not been validly rescinded is not material, and does not of itself dispose of the defense attempted to be set up. But the answer alleged rescission, and the fact that an unnecessary finding was made does not impair the sufficiency of the findings made.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J., WILBUR, J.; VICTOR E. SHAW, Judge pro tem.; RICHARDS, Judge pro tem.

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177 Cal. 781

Ex parte WEINBERG. (Cr. 2142.)

(Supreme Court of California. March 21, 1918.)

BAIL ⚷42—MURDER—EVIDENCE.

Where petitioner was indicted for murder upon eight counts for participating in a bomb explosion during a preparedness parade, and was tried and acquitted on one count and on another ordered admitted to bail, and the prosecution urged delay of trial, and no claim was made that there was testimony other than that on which he was acquitted on the one count, *held* that under Const. art. 1, § 6, petitioner was entitled to bail.

In Bank. Petition by Israel Weinberg for writ of habeas corpus for admission to bail. Writ allowed.

See, also, 171 Pac. 110.

Maxwell McNutt and E. V. McKenzie, both of San Francisco, for petitioner. C. M. Fickert and Louis Ferrari, both of San Francisco, for respondent.

PER CURIAM. The petitioner, against whom eight indictments were returned August 2, 1916, for the crime of murder, and who is in custody under such of the indictments as have not been dismissed and one upon which he was tried and acquitted, instituted this proceeding for the purpose of obtaining his admission to bail. He is alleged to have been one of the participants in the bomb outrage in connection with the preparedness parade on July 22, 1916, described in our opinion in the case of People v. Mooney, 171 Pac. 690, and by the indictments he was charged with the murder of various persons killed thereby. He has been in custody ever since August 2, 1916. The indictments against him were assigned to three different departments of the superior court of the city and county of San Francisco. As to the indictments pending in two of the departments he was, after his trial and acquittal on one of the indictments hereinafter noted, ordered admitted to bail by one of the judges thereof. In one of these departments the indictments there pending against him have since been dismissed by the court. In the other of these departments the district attorney declares himself not ready to proceed immediately with the trial of the charge against him. In the third department admission to bail is denied, and it is claimed by petitioner that he is refused a speedy trial therein. Petitioner has been regularly tried upon one of the indictments, and the trial resulted, on November 27, 1917, in a verdict of not guilty. A transcript of the testimony given on this trial was submitted to us upon this application. No claim was made that the district attorney has any other testimony upon which he expects to rely upon another trial.

Under the Constitution all persons accused of crime are entitled to bail, "unless for capital offenses when the proof is evident or the presumption great." Const. art. 1, § 6. The provision has been interpreted in this court to mean that bail should be refused in a capital case when the evidence is such that a verdict of guilty based upon it would be sustained by a court. Ex parte Troia, 64 Cal. 152, 28 Pac. 231; Ex parte Curtis, 92 Cal. 188, 28 Pac. 223. In the cases just cited the application for bail was made before the accused had been put on trial before a jury. Where, however, there has been a trial, upon which the jury has disagreed, this is a circumstance which, while not conclusive, is entitled to weight in determining whether the prisoner should be admitted to bail. 3 Am. & Eng. Ency. of Law (2d Ed.) 670; Ex parte McLaughlin, 41 Cal. 220, 10 Am. Rep. 272; Alexander's Petition, 59 Mo. 598, 21 Am. Rep. 393. More persuasive, though still not controlling, is the acquittal of the prisoner on a trial of one of several indictments where, as is conceded to be the case here, all are founded upon a single transaction. State v. Summons, 19 Ohio, 139. See, also, Green v. Commonwealth, 11 Leigh (Va.) 677.

Upon a consideration of the evidence which has been presented against the petitioner, coupled with the fact that a verdict of acquittal has been rendered by a trial jury upon that evidence, and in view of the other circumstances set forth above, we think the application for bail should be granted.

It is ordered that petitioner be admitted to bail upon the indictments still pending against him, in the sum of $7,500 on each indictment, the bond to be approved in each case by the judge of the superior court in whose department the same is pending.

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177 Cal. 755

SEYMOUR v. SALSBERRY et al.

(S. F. 7906.)

(Supreme Court of California. March 19, 1918.)

1. CORPORATIONS 🔑123(1, 4)—TRANSFER OF STOCK—PLEDGES.

A pledgee of corporate stock is not bound to give notice of transfer to himself to the corporation, and transfer upon the books of the corporation is not essential to create a valid pledge.

2. CORPORATIONS 🔑123(10)—PLEDGES—ENFORCEMENT.

Where a valid pledge of corporate stock has been made the pledgee may claim the property so pledged from third persons by suit unless such persons establish a superior right thereto.

3. CORPORATIONS 🔑123(24)—PLEDGED STOCK—EVIDENCE.

Evidence *held* to show that defendant, as agent of pledgor and at his request, bid in such stock when sold for assessment, holding same in trust for pledgor.

4. PRINCIPAL AND AGENT 🔑69(7)—RIGHTS OF AGENT AND PRINCIPAL.

An agent, bidding in his principal's corporate stock sold for assessment, could acquire no right superior to that of his principal.

5. CORPORATIONS 🔑169—ASSESSMENTS ON STOCK—SALE.

Evidence *held* to show that defendant had purchased corporate stock under sale to enforce an assessment on the stock, under an understanding preventing competitive bids and in bad faith, for much less than real value.

Department 2. Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by George N. Seymour against John Salsberry and others. Judgment for plaintiff, and defendant named appeals. Affirmed.

J. P. O'Brien, of San Francisco, for appellant. Willard P. Smith and B. B. Blake, both of San Francisco, for respondent.

MELVIN, J. Defendant Salsberry appeals from an adverse judgment and from an order denying his motion for a new trial.

Defendant Sward, against whom judgment by default was entered, owned on November 27, 1909, 10,000 shares of the stock of the International Eucalyptus Association of California standing in his name upon the books of that corporation. On that day he pledged the stock by indorsement and delivery of the certificates, representing it to plaintiff Seymour as security for the payment of a note of even date. By the terms of the indorsement upon the certificates the transaction was nominally a sale, assignment, and transfer of the stock. No transfer of the stock to plaintiff was made on the corporation's books, and no notice of any sort was given regarding the hypothecation of the shares. In May, 1912, an assessment of one cent a share was levied upon the capital stock of the corporation, and the shares owned by Sward were sold to John Salsberry, appellant herein, on August 6, 1912, at a delinquent sale for nonpayment of this assessment.

It appears that Sward, absent from the state of California, learning of the assessment, sent to Salsberry the following telegram:

> "Chicago, Ill. Aug. 5th–12. John Salsberry, care Hotel Sacramento, Sacramento, Calif. Oakes stock has assessment one cent share payable tomorrow. Go fifty cents. Will you pay James Warrack secretary hundred ninety dollars assessment stock my name and Geo. Albert will send check full amount. Please wire today. John W. Sward. 4 p. m."

Salsberry did not reply to this communication, but he went to Sacramento admittedly for the purpose of buying certain shares known as the "Oakes Stock," and also with the intention of paying the assessment on the stock, owned by Sward; but on August 6, 1912, at a delinquent sale, he purchased Sward's stock which was accordingly transferred to him on the books of the corporation. It is admitted by the appellant that at the time of said sale there was a friendly understanding amongst the bidders present that Salsberry would bid in the Sward stock and the others would bid in the rest of the stock sold. But appellant's counsel say that no binding agreement was entered into having this effect, and none of the parties was bound by any such agreement. The following year another assessment was levied on the 10,000 shares, amounting to $125, and was paid by Salsberry.

On May 13, 1914, plaintiff tendered to Salsberry the aggregate of the amount paid at the delinquent sale and upon the subsequent assessment and also a sum asserted to be the equivalent for interests and costs, and demanded that Salsberry transfer the stock to him. Compliance with this demand being refused, plaintiff sued to compel such delivery and to require the corporation to reissue the stock to said plaintiff in his own name.

The findings and judgment were in favor of the plaintiff. Appellant contends that the evidence is insufficient to justify the court's determination that the defendant Sward directed or employed him to pay the delinquent assessment upon the stock, and that appellant promised to do so; that an agreement was made between the bidders at the delinquent sale to depress the price paid for the stock, and that such agreement amounted to fraudulent conduct which would vitiate the sale; and that Salsberry had notice, implied or otherwise, of Seymour's interest in the stock and of the invalidity of the sale under the assessment.

[1, 2] Preliminary to these objections, however, is the suggestion on the part of appellant's counsel that respondent's title to the stock is not good because of his failure to give notice of its transfer to him, but undoubtedly it is the rule that such a transfer as was here made of stock of a corporation is good as against all subsequent claimants except purchasers in good faith for value and without notice of the equities. For the operation of this rule it is not necessary that an entry of the transaction be made on the books of the corporation. Brown v. San Francisco Gaslight Company, 58 Cal. 426. The case of National Bank of the Pacific v. Western Pacific Railway Co., 157 Cal. 573, 108 Pac. 676, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391, is authority also for this rule as applicable to pledges. It follows as a logical consequence of this rule that, the transaction having effected a valid pledge as between the parties, the pledgee may claim the property so pledged from third persons by suit, if necessary, unless they have a higher equity or other superior right to his own. Herbert Kraft Co. Bank v. Bank of Orland, 133 Cal. 64, 65 Pac. 143, 31 Cyc. 842. As was said in Spreckels v. Nevada Bank of San Francisco, 113 Cal. 272, 45 Pac. 329, 33 L. R. A. 459, 54 Am. St. Rep. 348, by Mr. Justice Henshaw, who delivered the opinion of the court, in commenting upon the effect of section 324 of the Civil Code with reference to the necessity for an entry of a transfer of stock upon the books of a corporation:

> "Even without entry upon the books of the corporation, such a transfer is valid as against all but innocent purchasers, and transferees in good faith, for value, and without notice."

And in the same opinion he used the following language:

> "It is not the law of this state, nor is it the law generally, that a transfer upon the books of the corporation is essential to the creation of a valid pledge. Civ. Code, § 324; Graves v. Mono Lake, etc., Min. Co., 81 Cal. 303, 325 [22 Pac. 665]; National Bank v. Watsontown Bank, 105 U. S. 217 [26 L. Ed. 1039]; Cook on Stocks and Stockholders, § 465."

Therefore, if respondent proved a superior equity in the stock to that possessed by appellant, the judgment must stand.

[3] Turning now to the first finding attacked, we are of the opinion that it is amply supported by the evidence adduced at the trial.

From the testimony of appellant himself it appears that he met Sward in the fall or winter of 1911 and 1912, and that they were very friendly toward the latter part of their association. Sward proposed to Salsberry that the latter should furnish the money to purchase certain interests in the International Eucalyptus Association, which Sward believed he could get for a very small price. Speaking of their relations with reference to this matter the appellant, when on the witness stand, said:

> "He had to make a trip East, and on his return, why, I was going to take this proposition up with him of buying the stock, putting up the money, and we were to share alike in the profits

after I had received my interest and principal back. But somehow or another he was a little longer in the East than he had anticipated, and he sent me these wires. So I went over to Sacramento and purchased the Oak stock."

One of the telegrams to which appellant referred was the one from Sward quoted above. It also appears from Salsberry's testimony that the telegram was the first intimation which he had of the contemplated sale of Sward's stock for the delinquent assessment. The telegram, he said, was the inducement which caused him to stay over in Sacramento, where he had gone to buy shares at the sale of Oakes' property on August 5, 1912. He remained there until the following day in order to pay Sward's assessment or bid at the sale. Regarding his attendance at the sale on the 6th, he said:

> "I went over to pay, as you call it, the assessment on the Sward stock, but, in the meantime, I had found I was in bad with Sward. So in place of leaving the stock stand in Sward's name, I bought it outright."

Mr. Ennis, who was present at the sale, testified that Mr. Salsberry said he was in Sacramento "to act for Mr. Sward." To another witness appellant said, according to the testimony, that he originally intended to pay the assessment when he received the message from Sward.

Appellant's counsel contend that this evidence falls far short of proving that Salsberry in purchasing the stock constituted himself a trustee for Sward. Regarding the telegram they assert that it was "'a mere request from Sward, not accepted by Salsberry." We cannot assent to this view. That there had been negotiations between Sward and Salsberry regarding the purchase of stock of this very corporation was the statement of appellant himself. True, there was no written agreement between them, but there was an understanding. Asked to explain this understanding, Mr. Salsberry said:

> "The idea was for me to give the money; that I was to purchase the stock and get my money at plus 6 per cent., and half of the profits. That was all that was said outside of an alluring proposition to me."

It is argued by appellant's counsel that the mere receipt of the telegram by their client and his action upon it did not create an agency. But there was here present more than a mere request from a stranger for a favor. It related to the very stock about which there was an agreement that Salsberry would "take up the proposition of buying" it for their common benefit. Coupled with this request was another with reference to the payment of the assessment on Sward's shares. Under the circumstances, considering the relations between the parties, the prompt compliance with the part of the request which related to paying the indebtedness, coupled with the fact that there was no refusal to assent to the other part of the importunity, namely, that the payment should be for Sward's benefit—all of these things justified the court in holding that a constructive trust was created in favor of the sender of the telegram. True, there was no formal consent on Salsberry's part to act for Sward in compliance with the telegram. But this was a case where two homely maxims may be justly applied, namely, "Actions speak louder than words," and, "Silence gives consent." Salsberry's agreement to pay the assessment for the man with whom he had been negotiating was implied from the admitted facts of the case. Upon receipt of Sward's telegram it was his duty either to pay the assessment or to notify Sward that he declined to do so. Section 2224, Civ. Code; Frost v. Perfield, 44 Wash. 185, 87 Pac. 117; Samonset v. Mesnager, 108 Cal. 354, 41 Pac. 337. In Frost v. Perfield the essential facts were as follows: One of the plaintiffs had written from Alaska to the defendant in Washington to look up and pay her taxes upon certain property in Pierce county. The defendant went to Tacoma, and was informed that the property had been sold to the county for delinquent taxes. He did not answer plaintiff's letter; she again wrote to him the following year, making the same request, whereupon he again made inquiry and learned that the property would be sold by the county soon after. He then wrote to Mrs. Frost, telling her that he intended bidding in the property if it did not sell too high. He did bid in the property, taking it in his own name. Upon being tendered the amount which he had laid out, he claimed to hold the property in his own right. The court held, however, that by acting upon the information which he received from the plaintiff the defendant constituted himself her agent, and could not acquire interest in the land adverse to her. The language of the court is peculiarly applicable to the case at bar:

> "When he received that letter, it was optional with him whether he would comply with their request or not. He could have declined to do anything in the matter, or he could have written and told them to secure the services of some other person. Instead of doing this, he complied with the request to the extent of going to Tacoma and making inquiries at the county treasurer's office relative to these taxes. When he did this, he constituted himself the agent of appellants. Upon receiving the second letter, he again visited the treasurer's office and ascertained the condition of the property with relation to the taxes. When he wrote to Mrs. Frost and told her the condition in which he found the property, it was in answer to her letter, requesting him to investigate the matter, and she had a right to suppose that he was acting, not only at her request, but in her behalf. In view of the relationship existing between the parties, and of all the circumstances, we think that he was not justified in buying in the property for himself without plainly informing the appellants of that intention."

The relationship referred to in the above quotation was that of landlord and tenant, but it does not appear that it was any closer than the relationship existing between Sward and Salsberry.

[4] As Sward's agent Salsberry could acquire no superior right to that of Sward. Sward could not have acquired any interest in the property adverse to Seymour, and Salsberry, having accepted the duty of acting for Sward, could not obtain any such right. Smith v. Goethe, 147 Cal. 725, 82 Pac. 384.

[5] Our conclusion on this branch of the case makes it unnecessary to indulge in any extended discussion of the other two objections made by appellant to the sufficiency of the evidence. Indeed, as Salsberry purchased and held the stock here involved as trustee for Sward, it makes no real difference whether or not there was an agreement by the people present at the sale not to bid one against another. However, there was abundant evidence of such an understanding. Mr. Henderson, one of the witnesses, testified that he told Mr. Salsberry that people had come to the sale prepared to bid on the stock. Mr. Salsberry said that he would get the stock even if he had to take a mere hundred shares for the hundred dollar assessment, and that he would rather have the stock remain in Mr. Sward's hands than allow some of the others interested in it to purchase the stock. After some further talk, in which Mr. Salsberry said that he merely wanted to protect himself in view of the fact that he had already bought the stock formerly owned by Oakes, Mr. Henderson said that by suggesting that purpose to the people present, he thought he could prevent them from bidding on Sward's stock. "He finally decided that was pretty fair," said the witness. And, describing the result of the understanding established among the people present at the sale he said:

> "I bid on the parcels other than the Sward stock, and the stock was sold to me for the amount of the assessment, plus the accrued costs."

And speaking of appellant's benefit by the arrangement, he also testified:

> "When the 10,000 shares of stock belonging to Mr. J. W. Sward were put up for sale, Mr. Salsberry bid them in at the cost of the assessment, plus the accrued costs."

Appellant's story of the sale corroborates that of Henderson. He tells of mutual threats to engage in competitive bidding, but, finally, to use his own language, "We got together and compromised." There was also testimony to the effect that some one other than Henderson or appellant bid on some of the stock offered, but withdrew his bid "after everything was arranged." We are of the opinion that the evidence justified the court's conclusion that the arrangement to refrain from competitive bidding was collusive and inequitable. Equity will not permit parties to such a transaction to retain the fruits thereof. 2 Perry on Trusts, § 828; Scott v. Sierra Lumber Co., 67 Cal. 71, 7 Pac. 131. There was a conflict of testimony regarding the value of the stock, but sufficient basis appears in the evidence for the finding that the price paid by Salsberry was grossly inadequate to the real value.

The finding that Salsberry was charged with knowledge of respondent's title to the stock standing in Sward's name is not essential to the judgment, and therefore need not be discussed. Since appellant was not a purchaser of the stock in good faith and for value, he may not retain it as against respondent.

The judgment and order are affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

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177 Cal. 742

PEOPLE ex rel. BRADFORD v. LAINE et al.

(Sac. 2789.)

(Supreme Court of California. March 19, 1918.)

1. NUISANCE 🔑87 — ABATEMENT — APPEAL —SUPERSEDEAS—STATUTES.

Red Light Abatement Law (St. 1913, p. 22) § 9, providing that if the owner of the building being free from contempt appears and pays costs, fees, and allowances, which are a lien on it, and files bond to immediately abate any such nuisance that may exist there, the court may order the premises, closed under the order of abatement, delivered to him, and the order of abatement canceled, so far as it may relate to said property, but that such release of the property shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law, applies only to one who concedes the regularity of the judgment, and pays the costs, and has nothing to do with a defendant appealing from a judgment of abatement, contending, of course, that he had been improperly found guilty of maintaining a nuisance, and so does not furnish a process by which he may secure a supersedeas from the trial court.

2. APPEAL AND ERROR 🔑488(2)—SUPERSEDEAS—ABATEMENT OF NUISANCE—MANDATORY PROVISIONS.

While the part of the judgment enjoining use of the premises for purposes of lewdness amounts to a prohibitory injunction, which is not stayed by appeal, the part directing removal of the tenants and property and sale of the chattels is mandatory, and stayed by appeal.

3. APPEAL AND ERROR 🔑488(2)—SUPERSEDEAS—ABATEMENT OF NUISANCE—BOND.

Under Code Civ. Proc. §§ 941c, 949, right to stay of the mandatory part of the judgment of one appealing, by the new method, from a judgment enjoining the use of premises for purposes of lewdness, and directing removal of tenants and chattels and sale of chattels, is statutory, and no bond is required.

In Bank. Original application for supersedeas by Charles F. Gibney, the appealing defendant in a proceeding by the People, on the relation of Hugh B. Bradford, against Laura E. Laine and another. Demurrer to petition overruled, and writ granted.

Butler & Van Dyke, of Sacramento, for petitioner. J. R. Hughes and H. B. Bradford, both of Sacramento, for relator and respondent.

MELVIN, J. Petitioner was one of two defendants in an action brought by the people of the state of California upon the relation of the district attorney of the county of Sacramento, which resulted in a judgment perpetually enjoining the defendants from conducting or maintaining or using for purposes of lewdness certain described real property. By the judgment the sheriff of Sacramento county was directed forthwith to remove all occupants from the property, to keep the building closed for the period of one year, and immediately upon the entry of judgment to remove all furniture, fixtures, musical instruments, and other movable property situate in said building from the premises, and to sell the same in the manner provided for the sale of chattels under execution.

After judgment was rendered Charles F. Gibney, defendant in said action (petitioner here) appealed therefrom, and the appeal is still pending and undecided. The proper authorities having announced their intention of carrying out all of the provisions of the judgment on the theory that the appeal did not operate as a stay, Gibney petitioned this court for a writ of supersedeas. An order was made requiring respondents to show cause why a writ should not issue, and pending hearing and decision thereon all of the judgment was stayed except that part requiring petitioner to refrain from using the premises for immoral purposes. A general demurrer to the petition has been filed, and as the questions involved are of purely legal cognizance, there being no contest regarding the facts, we shall decide the essential questions involved by ruling on the demurrer.

The action was instituted under the statute commonly known as the "Red Light Abatement Law" (St. 1913, p. 20). Petitioner contends that, having appealed from the judgment by the "new method," that is having given notice of appeal under section 941b of the Code of Civil Procedure, the filing of such notice stays all proceedings appealed from except that part of the judgment which amounts to a prohibition against using the premises for purposes of lewdness.

[1] Respondents do not contend that a bond would be required to stay the judgment in an ordinary action wherein the judgment directs the disposal of personal property, but the point is made that the act itself provides for a method whereby the appellant may invoke the discretion of the superior court to suspend the operation of parts of the judgment pending appeal. It is argued that before petitioner may, in any view of the law on the subject, ask for a writ of supersedeas he must show that he has unsuccessfully pursued the statutory method of endeavoring to secure a stay of execution. The part of the statute to which the demurring party refers is section 9, which is as follows:

> "If the owner of the building or place has not been guilty of any contempt of court in the proceedings, and appears and pays all costs, fees and allowances which are a lien on the building or place and files a bond in the full value of the property, to be ascertained by the court, with sureties, to be approved by the court or judge, conditioned that he will immediately abate any such nuisance that may exist at such building or place and prevent the same from being established or kept thereat within a period of one year thereafter, the court, or judge thereof, may, if satisfied of his good faith, order the premises, closed under the order of abatement, to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty or liability to which it may be subject by law."

It will appear at a glance that, while this section does apply to requested relief from that part of the judgment enjoining the use of the premises for the purpose of acts of lewdness and that portion requiring the sheriff to remove all persons therefrom, it does not, in terms at least, empower the trial court to restrain the sale of the personal property during appeal upon the giving of a proper bond. Nor does it in substance, as respondents contend, amount to a process by which one who appeals from a judgment of abatement may secure a supersedeas from the trial court. Indeed, the statute has nothing to do with an appealing defendant who contends, of course, that he has been improperly and unjustly found guilty of maintaining a nuisance. The application provided in the act may only be made by one who concedes the regularity of the judgment and pays the costs. There is no force, therefore, in the contention of the demurring party that petitioner has no standing here because he failed to ask for relief in the court below under section 9 of the abatement act.

[2, 3] The only other point made by respondents is that the judgment amounts to a prohibitory injunction, an appeal from which does not stay its force. That this is true of that part of the injunctive relief prohibiting the maintenance of the premises for lewd purposes is conceded by petitioner. Indeed, he insists that he never has maintained the property for immoral uses, and that is why he is appealing from the judgment. As we have had occasion to state in the preceding discussion, there were three parts to the judgment; one enjoining the use of the premises for the purpose of acts of lewdness, another directing the sheriff to remove persons and property from the premises, and a third placing upon the sheriff the obligation of removing and selling furniture, fixtures, etc. Clearly the second and third parts of the judgment direct affirmative acts which would operate to the irreparable injury of appellant if he should be successful in his appeal. That part of

the decree which directs the removal of tenants and property and the sale of chattels is mandatory, and is stayed by operation of the appeal. Dewey v. Superior Court, 81 Cal. 64, 22 Pac. 333; Dulin v. Pacific W. & C. Co., 98 Cal. 304, 33 Pac. 123; Stewart v. Superior Court, 100 Cal. 543, 35 Pac. 156, 563; Schwarz v. Superior Court, 111 Cal. 106, 43 Pac. 580; United Railroads of San Francisco v. Superior Court, 172 Cal. 80, 155 Pac. 463.

If the sheriff should be permitted to sell the personal property, and if on appeal the judgment should be reversed, that result would be an ineffectual victory for petitioner. It is only just and proper that in such a case the personal property should be preserved to petitioner pending his appeal. To hold otherwise would work irreparable injury in those cases where the judgment of the lower court should be reversed on appeal.

The conclusion may not be escaped that under sections 941c and 949 of the Code of Civil Procedure petitioner's right to a stay is statutory and that no bond is required.

The demurrer is overruled. Let the writ issue as prayed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

177 Cal. 762

BLOCHMAN COMMERCIAL & SAVINGS BANK v. F. G. INVESTMENT CO. et al. (L. A. 4149, 4150.)

(Supreme Court of California. March 19, 1918.)

1. Banks and Banking 🔑176 — Excessive Loan.

St. 1911, p. 1014, § 13, amending Act March 1, 1909 (St. 1909, p. 87), regulating the business of banking, so that section 80 provides that no commercial bank shall make any loans to any person, company, corporation, or firm to an amount exceeding one-tenth part of the capital stock of such bank actually paid in and surplus, etc., does not render void and unenforceable a loan by a commercial bank in excess of the permitted amount.

2. Mortgages 🔑486—Guarantor—Personal Judgment—Exhaustion of Security.

Decree foreclosing mortgages directing entry of judgment for any deficiency which might exist after the sale of the mortgaged premises against the mortgagor company, and separately stating there was a personal judgment for the full amount of the two notes, with interest and costs against the individual guarantor of the notes, was not erroneous as permitting the collection of the whole amount of the two notes, interest, and costs from the individual guarantor without resort to the security.

Department 2. Appeals from Superior Court, San Diego County; T. J. Lewis, Judge.

Action by the Blochman Commercial & Savings Bank, a corporation, against the F. G. Investment Company, a corporation, Rex B. Clark, Pioneer Trust Company, a corporation, John Doe Company, a corporation, John Doe, Richard Roe, Mary Grab, Susan Keep, and Minna Brenner. From certain judgments, defendants appeal. Judgment affirmed on each appeal.

A. J. Morganstern and C. A. A. McGee, both of San Diego, for appellants. Sam Ferry Smith, of San Diego, for respondent.

MELVIN, J. The appeals of F. G. Investment Company, a corporation, and of Rex B. Clark are based upon records which are identical, and may therefore be considered in a single opinion. The action was one to foreclose two mortgages and to enforce the liability of Rex B. Clark as a guarantor on two notes. The corporation, defendant, appeals from the judgment against it, which resulted in a decree of foreclosure, and defendant Clark takes an appeal from a personal judgment against him.

On October 10, 1912, the F. G. Investment Company made and executed two certain promissory notes, each secured by a mortgage on real property in San Diego county. One note was payable to Rex B. Clark, who immediately indorsed it to the Blochman Banking Company, and guaranteed the payment thereof, and one direct to the Blochman Banking Company. This was also guaranteed by Rex B. Clark, so that the F. G. Investment Company was the maker and Rex B. Clark was the guarantor of both notes. The aggregate amount of the two notes is $17,500 and the money was paid by the bank to the F. G. Investment Company with the knowledge and consent of the defendant Clark. At that time the Blochman Banking Company was a banking copartnership with a capital of not exceeding $50,000 and a surplus not to exceed $7,000. Subsequently the Blochman Commercial & Savings Bank, a corporation, plaintiff in this action, acquired the notes and mortgages in question. This action was brought to foreclose both mortgages, and to enforce the defendant Clark's liability. The banking act in force at the time of this transaction (Stats. 1911, p. 1014, § 13) provides:

> "No commercial bank shall make any loans to any person, company, corporation or firm to an amount exceeding one tenth part of the capital stock of such bank actually paid in and surplus, excepting that no commercial bank shall be prohibited by this act from loaning to any person, company, corporation or firm any sum not exceeding five thousand dollars without security: Provided, however, that a bank may loan to any person, company, corporation or firm a sum not exceeding twenty-five per centum of its capital stock actually paid in and surplus upon security worth at least fifteen per centum more than the amount of its loans."

[1] Appellants contend that the loan being in excess of the amount permitted by law, the obligation based thereon is void and may not be enforced. They cite sections 1667 and 1607 of the Civil Code and authorities, of

which Berka v. Woodward, 125 Cal. 119, 57 Pac. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31, Moore v. Moore, 130 Cal. 110, 62 Pac. 294, 80 Am. St. Rep. 78, and Howell v. City of Hamburg Co., 165 Cal. 172, 131 Pac. 130, are types. In the first of these cases it was held that a contract between a city and one of its officers which was expressly prohibited by law was void; in the second, that an agreement based upon the completion of a fraudulent homestead entry would not be enforced; and in the third that a lease on a building maintained in violation of a municipal ordinance is invalid.

The cited Code sections are general expressions of common-law rules, but they have no application to the case at bar. Nor do the authorities to which appellants call our attention support their contention. There is a vital distinction between contracts based upon fraud or made in violation of laws passed for the benefit of one of the contracting parties and those made in violation of statutes designed to aid the sovereign power in the regulation of certain kinds of business. The act which, according to the contention of appellants, was violated by plaintiff's assignor in making the loan does not declare such a loan a void obligation. A penalty for the violation may be inflicted under certain circumstances by the superintendent of banks, but no part of the penalty in any way inures to the borrower of the excess. It is not denied that the money was loaned, and that the notes and mortgages were executed to secure its repayment. In principle this case is quite similar to Brittan v. Oakland Bank of Savings, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58, wherein it was held that the provisions of section 578 of the Civil Code that no director of a savings bank shall borrow its funds, and that for so doing his office shall become vacant, cannot be invoked to defeat a pledge made by such director for money borrowed from the bank. Commenting upon the transaction whereby the director and the bank violated this statute, the court said:

> "This, however, is of no advantage to the appellant, as the violation of the provision in question could only be availed of at the instance of the state or sovereign power. Jones v. Guaranty, etc., Co., 101 U. S. 628 [25 L. Ed. 1030]; National Bank v. Matthews, 98 U. S. 621 [25 L. Ed. 188]."

See, also, People's Trust Co. v. Pabst, 113 App. Div. 375, 98 N. Y. Supp. 1045; Id., 190 N. Y. 534, 83 N. E. 1130.

In Gold-Mining Co. v. National Bank, 96 U. S. 640, 24 L. Ed. 648, it was held that a defendant sued by a national bank for moneys loaned to him cannot set up as a bar the circumstance that the corporation in violation of statutes exceeded in the amount of the loan one-tenth of its capital stock actually paid in. After citing Harris v. Runnels, 12 How. 79, 13 L. Ed. 901, which holds that when a statute prohibits an act or annexes a penalty for the commission of such act it does not follow that the unlawfulness of the act was meant to avoid a contract made in contravention of it, and after a review of some of the leading cases Mr. Justice Hunt, who delivered the opinion of the court, said:

> "We do not think that public policy requires or that Congress intended that an excess of loans beyond the proportion specified should enable the borrower to avoid the payment of the money actually received by him. This would be to injure the interests of creditors, stockholders, and all who have an interest in the safety and prosperity of the bank."

The Supreme Court of Illinois, commenting upon a similar contention under a like statute, held that the purpose of the enactment was to protect the interests of depositors and stockholders, and that, in the absence of an express declaration that loans in excess of the statutory limitation shall not be collectible, to hold in accordance with the appellant's contention would be to defeat the very legislative purpose underlying the law. Murry Nelson & Co. v. Leiter, 190 Ill. 414, 60 N. E. 851, 83 Am. St. Rep. 142.

The Supreme Court of Pennsylvania, dealing with the same sort of question, held that the excess of indebtedness over one-tenth of the paid-in capital was a matter aside from the loan, not entering into its terms, and therefore collateral. O'Hare v. Second National Bank of Titusville, 77 Pa. 96. This subject was very ably discussed in Beach & Weld v. Wakefield, 107 Iowa, 567, 76 N. W. 688, 78 N. W. 197. In the opinion a citation is made to another Iowa case (Twiss v. Guaranty Life Association, 87 Iowa, 733, 55 N. W. 8, 43 Am. St. Rep. 418) to support the general rule that the doctrine of want of power to contract may not be invoked to aid any one in the perpetration of wrong and injustice. The opinion is also valuable because of the many authorities collected and cited. Undoubtedly the overwhelming weight of authority is against the contention which the appellants make in this case.

[2] Appellants also make the contention that the court erred in pronouncing a personal judgment before exhausting the security under the mortgage. Among the conclusions of law was one to the effect that plaintiff was entitled to judgment against both defendants for the amounts of the notes, and that defendants were and each of them was personally liable for said sums. But there was also a finding that the plaintiff was entitled to have the mortgages enforced and foreclosed, the premises sold, and the proceeds applied to the payment of the debt. These conclusions were carried substantially into the decree. The proper form of judgment was entered in accordance with the practice in this state. Section 726, Code Civ. Proc.; Leviston v. Swan, 33 Cal. 480; Sichler v. Look, 93 Cal. 600, 610, 29 Pac. 220.

It is true that there is a direction in the decree for the entry of any deficiency which may exist after the sale of the mortgaged premises against the F. G. Investment Company, and separately stated there is a personal judgment for the full amount of the two notes with interest and costs against defendant Clark. But this does not mean that the whole amount of the two notes, interest, and costs might be collected under the judgment from Clark without resort to the security. As was said in Sichler v. Look, supra:

> "In the ordinary action of foreclosure, the judgment need only determine the amount of the debt, the defendant who is personally liable therefor, and direct a sale of the mortgaged lands and an application of their proceeds to satisfy this amount, with such provision for the rights of the defendants between themselves as may be presented in the case."

In each appeal the judgment is affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 730)

HODGKINS v. PEOPLE'S WATER CO.

(S. F. 7546.)

(Supreme Court of California. March 18, 1918.)

1. ADVERSE POSSESSION 🔑51 — JUDGMENT PLAINTIFF—EXECUTION.

Code Civ. Proc. § 865, authorizing the issuance of a writ of execution for possession upon judgment in ejectment after lapse of five years from entry on leave of court, does not bar judgment defendant from in the meantime gaining title to the land by adverse possession against the judgment plaintiff.

2. ADVERSE POSSESSION 🔑51—STIPULATIONS 🔑14(2)—OPERATION—EXECUTION.

Stipulation in ejectment suit between plaintiff's predecessor, purchaser of possessory claim, and defendant's predecessor, that no execution would be taken out on the judgment pending the motion for new trial, and that occupants of land held by consent of the successful plaintiff ceased to have any effect where motion for new trial was abandoned, so that possession of plaintiff's predecessor assumed its hostile character, and where no further proceedings were had until 15 years after rendition of judgment, and other elements of adverse possession were present, plaintiff procured title by adverse possession in view of Code Civ. Proc. §§ 322–325, as to possession under title founded on written instrument, and as to possession not founded on written instrument.

In Bank. Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by Harriet Hodgkins against the People's Water Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Tom M. Bradley and Harry E. Leach, both of Oakland, for appellant. Milton S. Hamilton, of San Francisco, Herbert L. Breed, of Oakland, and J. P. O'Brien, of San Francisco, for respondent.

SHAW, J. This case was transferred to the District Court of Appeal of the First District for consideration and decision, and in due time that court rendered its decision affirming the judgment, upon an opinion by Mr. Justice Kerrigan. Upon petition of appellant to this court that decision was vacated and the case was transferred here for a rehearing. After further consideration we have reached the conclusion that the opinion of Mr. Justice Kerrigan and the judgment of the District Court thereon was correct.

[1] The principal point urged in the petition for rehearing was that, inasmuch as section 685 of the Code of Civil Procedure authorizes the superior court to issue a writ of execution for possession upon a judgment in ejectment after the lapse of 5 years from its entry, it must of necessity follow that the defendant in such judgment cannot, in the meantime, gain a title to the land by adverse possession against the judgment plaintiff. This conclusion does not necessarily follow. An adverse claim of title to the land may be asserted by the defendant as well against the plaintiff in such judgment as against any other person. The essence of an adverse claim of title is that it is made against the whole world, and there is nothing in the rule which exempts the plaintiff in ejectment from its operation, provided the claim is made against him as well as others. The provision of section 685 allowing execution to issue after 5 years has no bearing upon the question whether or not the defendant against whom the execution is to be issued has or has not in the meantime acquired a new title to the property which is good against the plaintiff. As stated in the opinion of the District Court, that question cannot be litigated upon the motion for execution. This does not mean that such title cannot be acquired, either by a conveyance from a true owner of a title paramount to both the parties in a judgment suit, or by an adverse possession initiated after the entry of the judgment. The opinion of the District Court is hereby approved and adopted. It is as follows:

This is an appeal by defendant from a judgment in an action to quiet title which awarded a part of the land sued for to the plaintiff. The facts are briefly as follows:

In the year 1880 John Hodgkins purchased a possessory claim to the land described in the amended complaint from one John H. Scott, and took the title to same in the name of Joe Hodgkins, his son, who, with his father and mother, went into immediate possession. In 1896 the Central Pacific Railway Company, defendant's predecessor in interest, claiming legal title to said land, commenced suit against Joe Hodgkins and May Hodgkins, his wife, to recover its possession. Thereafter, and prior to the trial of said action, Joe Hodgkins made a deed, conveying to his mother, Harriet Hodgkins, plaintiff herein, a part of said property designated in the record herein as parcel A, and she at once went into possession of that parcel. On August 25, 1897, after trial, judgment was entered in said suit against Joe Hodgkins declaring that the Central Pacific Railway Company was entitled to possession of the premises. On August 28, 1897, he, together with his wife, served and filed notice of their intention to move for a new trial in that action, whereupon the parties entered into stipulation by which the Central Pacific Railway Company agreed not to take out execution, pending the hearing and determination of the motion for a new trial. Said motion, however, was never brought on for hearing, no appeal from the judgment was taken, and no further proceedings were had in the case until 15 years after rendition of the judgment, when, in May, 1913, upon motion the stipulation referred to was set aside, the motion for a new trial was dismissed and a writ of possession issued, pursuant to which the sheriff ejected all persons from the land, and this defendant was put in possession as successor in interest of the Central Pacific Railroad Company. On May 26, 1913, Joe Hodgkins conveyed to plaintiff herein the land described in parcel B. Subsequently Harriet Hodgkins, plaintiff herein, brought this action to quiet title, claiming title to parcel A by prescription and also by virtue of the deed from her son Joe, made after the commencement of the former action and prior to its hearing and determination; and to the part of the land known as parcel B by deed to her from her son made after the ejectment in May, 1913.

From the record it further appears that the plaintiff and her grantors and predecessors in interest, for more than 15 years prior to May, 1915, were in the peaceable, visible, and uninterrupted possession of the property described in the findings; that while so in possession she and her son Joe erected on the respective parcels of land A and B barns, outhouses, and other improvements, inclosed portions of said land with substantial fences, which at all times thereafter they maintained and kept in good order and repair; that they cultivated the land, raising crops and pasturing stock thereon, and generally using the land for the purposes for which it was adapted and for their ordinary purposes; that during the entire period they paid all taxes levied and assessed thereon each year.

Upon these facts the court found that the plaintiff was the owner and entitled to a portion of the two parcels of land embraced within the description set forth in the amended complaint. It is from that portion of the judgment in favor of the plaintiff that the defendant prosecutes this appeal.

[2] The Central Pacific Railway Company in the original action failed to file a lis pendens; and the plaintiff in the present action claims that she had no notice, actual or constructive, of the pendency of the suit, and that therefore her claim to parcel A is unaffected by the judgment in that case. Under all the evidence in this case such claim is clearly untenable, and her right to either parcel A or B depends upon the circumstances of the possession thereof after the judgment in the ejectment suit.

The evidence supports the findings of the court that the possession of both parcels by the plaintiff and her grantors and predecessors was not only open, peaceable, and notorious for the period of over 15 years, but that it was also adverse and hostile. The character of the possession of the property as hereinbefore described raised the presumption that it was held adversely (Code Civ. Proc. §§ 322 to 325; Wheatley v. San Pedro, etc., Ry. Co., 169 Cal. 505, 515, 147 Pac. 135; Gray v. Walker, 157 Cal. 381–385, 108 Pac. 278; Gurnsey v. Antelope, etc., Co., 6 Cal. App. 387, 391, 92 Pac. 326), which presumption it cannot be held was successfully rebutted by the stipulation entered into by the parties in the ejectment suit staying execution on the judgment. That stipulation was to the effect that pending the making and determination of a motion for a new trial the occupation of the land by the defendants therein was by consent of the plaintiff; but when the motion was abandoned—as it was when the moving parties failed to take the necessary steps to perfect it—it ceased to have any such operative force and effect, and the possession thereafter resumed its hostile character.

The only point seriously relied upon by the defendant for a reversal of the judgment is the claim that the plaintiff could not have obtained title by adverse possession between the time of the entry of judgment in the former action and the issuance of execution thereon. In other words, defendant asserts that the running of the statute of limitations was suspended from the filing of the action or the entry of judgment therein up to the time when an execution might rightfully be issued. Of course, it is conceded that title to real property cannot be litigated upon an application for a writ of possession (Landregan v. Peppin, 94 Cal. 465, 29 Pac. 771; Kirsch v. Kirsch, 113 Cal. 56, 45 Pac. 164; Fox v. Stubenrauch, 2 Cal. App. 88, 93, 83 Pac. 82); so the action of the court in the ejectment suit in issuing the writ of possession more than 10 years after the defendant was entitled to the same as a matter of right has no bearing upon the question now under discussion. We do not think, as defendant contends, that the judgment in the former action arrested the running of the statute of limitations until the writ of possession actually issued. The judgment in that action merely gave to the plaintiff therein the right to re-enter the property, but did not prevent actual occupants thereof from obtaining title to the land by adverse possession after the judgment became final, which it did in February, 1898. Persons not parties to the action might after judgment have acquired title to the property by adverse possession; and we fail to see any good reason why one who is a defendant in an action to recover property may not acquire title by adverse possession against a plaintiff who for more than 5 years after the judgment therein becomes final fails to exercise his right to reenter the property. A grantor may acquire title by prescription against his grantee. Baker v. Clark, 128 Cal. 181, 60 Pac. 677. In the case of Carpenter v. Natoma M. & W. Co., 63 Cal. 616, it was expressly held that a judgment in ejectment does not create a new estate or vest a new title in the plaintiff so as to interrupt the running of the statute of limitations, but that an actual entry is necessary to effect that object. That case was approved in Gould v. Carr, 33 Fla. 533, 15 South. 262, 24 L. R. A. 130. The Court of Appeals of Texas, in Pendleton v. McMains, 32 Tex. Civ. App. 575, 75 S. W. 349, decided that adverse possession of land for 10 years after the rendition of judgment in an ejectment suit where no writ of possession was issued established a title against the plaintiff independent of and subsequent to the right of possession adjudicated in the ejectment suit. That was an action of trespass to try title to land, and was based upon a judgment rendered in a former suit decreeing that the plaintiffs therein were entitled to possession. The decision contains a recital that "a writ of possession and execution for costs were awarded, but it was not shown that either had ever been issued." In its opinion the court assumes that no writ upon the former judgment was ever issued. 32 Tex. Civ. App. 575, 75 S. W. at page 349 of the opinion the court says: "It was established by uncontroverted evidence that the land in controversy has been inclosed by a fence since 1881, and defendants in error have been in the peaceful, continuous, open, and adverse possession of the same, cultivating a portion of it, and using the other portion as a pasture, for more than 10 years after the judgment was obtained by W. W. Sloan and others, and before this suit was instituted. The judgment obtained by Sloan and others against defendants in error in 1888 divested them of all title owned by them in the land in controversy at that time, but did not prevent them from obtaining title to it again by adverse possession after that time. More than 13 years had elapsed after the rendition of the judgment before this suit was instituted, and during all those years defendants in error had been in possession of the land, and claiming title to it against the world. There is no peculiar sacredness in a title to land obtained through a judgment that lifts it out of the scope and purview of statutes of limitation, and, if the possession be adverse for 10 years, whether it be by the defendant in the judgment or any one else, it will perfect a title. * * *"

In Mabary v. Dollarhide, 98 Mo. 198, 204 [11 S. W. 611], 14 Am. St. Rep. 639, the court said: "We cannot see how the mere recovery of a judgment in an action of ejectment can suspend the running of the statute of limitations. To have that effect there must be possession under it, or something done to make the defendant's possession subordinate to the plaintiff's title." And in Smith v. Trabue, 1 McLean, 87 [Fed. Cas. No. 13,116], the court declared: "A judgment in an action of ejectment against a defendant who holds adversely does not of itself suspend the statute of limitations. To do this, there must be a change of possession. It is true, the judgment fixes the right of entry in the lessor of the plaintiff, if he can make entry without force, but if he fail to make his entry, either with or without a writ of possession, the statute of limitations will continue to operate against the right. * * * Nothing short of this will stop the statute." See, also, Dupont v. Charleston, etc., Bridge Co., 65 S. C. 524, 44 S. E. 86, and note to Snell v. Harrison (Mo.) 52 Am. St. Rep. 648.

Here the court did not find that the property was held by consent of the owner of the legal title nor in subordination to the judgment in the former action; but upon sufficient evidence it found that the property was held adversely to and in denial of the title of the defendant for more than the full statutory period after the judgment became final. We therefore hold that the statute is a complete bar to defendant's claim, and that plaintiff's prescriptive title was fully established.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; WILBUR, J.; RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

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177 Cal. 752

WILCOX v. HARDISTY et al. (Sac. 2814.)

(Supreme Court of California. March 19, 1918. Rehearing Denied April 16, 1918.)

1. APPEAL AND ERROR 🔑2 — APPEALABLE ORDERS—DENIAL OF NEW TRIAL—STATUTES.

Code Civ. Proc. § 963, in which is incorporated amendment St. 1915, p. 209, impliedly abolishing appeals from order denying new trial, is applicable to proceedings for new trial pending when the amendment took effect.

2. APPEAL AND ERROR 🔑2—ORDER DENYING NEW TRIAL—TIME FOR APPEAL—EFFECT OF STATUTES.

Under Code Civ. Proc. § 939, providing that if proceedings for new trial are pending time for appeal from judgment shall not expire until 30 days after order determining motion, section 956, authorizing review of orders on motion for new trial on appeal from judgment, and section 963, impliedly abolishing appeals from orders denying new trial, where a cause was pending on a motion for new trial and time had elapsed for appeal from judgment as law stood before amendments (St. 1915, pp. 205, 209, 328) incorporated in above Code provisions, it was intent of Legislature that on denial of such motion an appeal could be taken from the judgment within 30 days from the order, limited in scope to that of former appeals from orders denying new trial.

In Bank. Action by Ida I. Wilcox against Etta Hardisty and others. Motion to dismiss an appeal from the judgment and from order denying a new trial. Appeal from order denying new trial dismissed; motion to dismiss appeal from judgment denied.

Robt. L. Beardslee and Nutter & Hancock, all of Stockton, for appellants. Snyder & Snyder, of Stockton, for respondent.

ANGELLOTTI, C. J. This is a motion to dismiss an appeal from a judgment and an order denying a new trial, on the ground, as to the appeal from the judgment, that the appeal was taken too late, and, as to the order denying a motion for a new trial, that the same is not an appealable order.

[1] The order denying a new trial was made December 1, 1917, and in view of the law as it then existed it must be held that no appeal lay therefrom. Woodruff v. Colyear, 172 Cal. 440, 156 Pac. 475.

[2] As to the appeal from the judgment: The judgment was entered April 27, 1911. The appeal therefrom was not taken until December 21, 1917. At the time of the entry of the judgment and until August 8, 1915, the time within which an appeal might be taken from a judgment was limited to six months. Therefore on August 8, 1915, the time for appeal from the judgment had long since elapsed. There was, however, pending at that time a proceeding on motion for a new trial which had been duly instituted, and the law up to that time provided for an appeal from any order that might be made denying or granting the motion. On December 1, 1917, the bill of exceptions to be used on said motion for a new trial was settled, and on the same day the motion for a new trial was heard and denied, and the appeal was taken within thirty days thereafter. At its session in 1915, the Legislature so changed our law as to abolish the right of appeal from an order denying a motion for a new trial and to provide that such order might be reviewed on an appeal from the judgment, and to further provide in regard to the time within which appeals from the judgment might be taken that:

> "If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or other termination in the trial court of the proceedings upon such motion." Sections 939, 956, 963, Code Civ. Proc.

This change became effective August 8, 1915, at a time when the appellant's right to appeal from the judgment had long since lapsed. We think it was the clear intent of the Legislature, as indicated by this statutory provision, in taking away the right of appeal from the order denying a motion for a new trial, to provide for a review of all matters that might be considered on such an appeal on an appeal from the judgment, and that the plain purpose of the provision that we have quoted was to give to the party an opportunity for such a review in any and every case in lieu of the review previously afforded. Although there was no appeal from the judgment in this case within the time allowed by law, there was initiated in due time and pending until after the change in the law a proceeding on motion for a new trial. By failing to appeal from the judgment and relying entirely on the proceeding on motion for new trial the appellants waived all right to attack the judgment on any other ground than such as was afforded by their new trial proceeding, and the judgment had become final and immune from attack except in such respects as it might be affected by the determination of the new trial proceeding. With the change in the law the Legislature took away all right of appeal from the order that might be made in such new trial proceeding, but in taking away that right we think, in view of the statute, that it was the intention to give the party substantially the same review on appeal that he would have had on the appeal from the order. It did this by giving in such a case a right of appeal from the judgment within the specified time after the order on the new trial proceedings. It was given as we have heretofore expressly held for the purpose of allowing the action of the court on the motion for new trial to be reviewed on an appeal from the judgment. It was simply a change in the method of review. It follows that the appeal from the judgment was taken within the time allowed by law.

The appeal from the order denying a new trial is dismissed. As to the appeal from the judgment, the motion to dismiss is denied.

We concur: WILBUR, J.; MELVIN, J.; RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

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177 Cal. 777

BENSON v. SOUTHERN PAC. CO. et al.
(S. F. 7299.)

(Supreme Court of California. March 20, 1918. Rehearing Denied April 16, 1918.)

1. RAILROADS 🔑392—ACTION FOR INJURIES—GROUNDS OF LIABILITY—"JOINT TORT-FEASORS."

If the train of defendant company was, without its express direction, operated by defendant motorneer at an excessive speed, in a crowded thoroughfare, the employer would be liable only under the rule of respondeat superior; defendants being in no sense "joint tort-feasors."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Joint Tort-Feasors.]

2. RAILROADS 🔑266—JOINT TORT-FEASORS—LIABILITY.

If the negligent speed of the train was maintained by the express direction of defendant employer, it would be negligent, and its negligence would concur with that of defendant motorneer who obeyed the instruction, and the right to recover against defendants would be joint.

3. APPEAL AND ERROR 🔑1070(1)—FAILURE TO FIND AGAINST JOINT TORT-FEASORS—PREJUDICIAL ERROR.

In a suit for damages for death of a child caused by defendant company's train operated by defendant motorneer, if the verdict was based on the fact that the responsibility of defendants was joint, defendant company would not be prejudiced by failure of the jury to find against defendant motorneer; a verdict in favor of one of two joint defendants not being a verdict in favor of the other.

4. APPEAL AND ERROR 🔑930(4)—VERDICT—INTENDMENTS IN FAVOR OF.

All intendments being in favor of the verdict, it must be assumed on appeal that the jury based the same on a finding of joint liability, unless there is something in the record which prevents that conclusion; the verdict being against defendant employer and no reference made therein to its servant and codefendant.

5. TRIAL 🔑328—VERDICT—JOINT LIABILITY OF MASTER AND SERVANT.

If the jury determined that defendant employé was negligent in operating a train at an excessive speed in obedience to the orders of defendant master, then under the instruction that the jury could not find for plaintiff against the employer, unless they found that the employé was negligent, the verdict can stand, although there was a failure to find a verdict against the employé.

6. TRIAL 🔑426—VERDICT—CODEFENDANTS—FAILURE TO OBJECT—WAIVER.

Where the attention of the court was not called to the jury's failure to bring in a verdict for or against defendant employé, at the time when verdict against defendant employer was returned, defendants waived the error, if any.

Department 2. Appeal from Superior Court, Alameda County; W. H. Waste, Judge.

Action by Susie Benson against the Southern Pacific Company and another. From a judgment for plaintiff and from an order denying motion for new trial, defendants appeal. Affirmed.

A. A. Moore and Stanley Moore, both of San Francisco, for appellants. R. L. Leatherwood, of Daly City, and Aitken & Aitken, of San Francisco, for respondent.

WILBUR, J. This is an appeal from judgment and motion denying a new trial. Plaintiff sued the defendant company and its motorneer to recover damages for the death of her infant child, caused by a train of the defendant company, operated by the defendant motorneer. The verdict in the case was against the defendant Southern Pacific Company, and no reference was made therein to the other defendant, the motorneer. The defendants appeal, and it is claimed that the judgment and order must be reversed because of the failure to find upon the issue of liability of the defendant motorneer.

[1-4] It has been held in this state that a verdict of the jury in favor of one of two defendants is not a verdict in favor of the other defendant (Rankin v. Central Pacific, 73 Cal. 93, 15 Pac. 57; Benjamin v. Stewart, 61 Cal. 605), but as to him is merely a failure of the jury to find upon the issues. Appellants' claim of error is based upon the contention that the only liability alleged in the complaint or shown on the trial on the part of the defendant company is the liability for the negligence of its motorneer upon the rule of respondeat superior, and that if the jury were unable to agree that the motorneer was guilty of negligence, it could not properly hold his employer liable. The defendant company bases its claim that the error was prejudicial, in part, upon the doctrine that where it is held responsible for the negligence of its employé it has an action over against the employé to indemnify itself for such loss, and is therefore interested in the determination of that question. As is well stated in appellants' brief:

> "The initial premise to be established by the appellant is that the two defendants herein sued are not joint tort-feasors in the generally accepted sense. Where the liability of one defendant is occasioned solely by the operation of law, and where this defendant is not an active participant in the actionable negligence alleged in the complaint, but is held under the doctrine of respondeat superior for the acts of its servants, such defendants are in no sense joint tort-feasors."

The complaint in this case is obviously framed in part upon the negligence of the defendant employé, and the responsibility of the employer therefor. It is, however, alleged in the complaint that the defendants were negligent in operating the train at an excessive speed in a crowded thoroughfare. In so far as this was done without express direction of the employer it would be liable therefor only on the rule of respondeat superior. If, however, the negligent speed was maintained by the express direction of the employer, the latter would, on that account, be negligent, and its negligence would concur with that of the employé who obeyed the instruction by operating at such negligent speed and the right to recover against them would be joint. In Chesapeake & Ohio R. R. Co. v. Dixon, 179 U. S. 131, 139, 21 Sup. Ct. 67, 71 (45 L. Ed. 121), the court, in passing upon a somewhat similar question, said:

> "The negligence may have consisted in that the train was run at too great speed, and in that proper signals of its approach were not given; and, if the speed was permitted by the company's rules, or not forbidden, though dangerous, the negligence in that particular and in the omission of signals would be concurrent."

In the case of Bradley v. Rosenthal, 154 Cal. 420, 97 Pac. 875, 129 Am. St. Rep. 171, where the verdict was in favor of the employé and against the employer, the judgment was reversed, but the opinion makes it clear that the court was dealing with an act of an agent "which the principal did not direct and in which he did not participate, where, thus, his responsibility is simply the responsibility cast upon him by law by reason of his relationship to his agent," and cites with approval the statement in Cooley on Torts (3d Ed.) vol. 1, p. 255, in which the distinction between negligent acts of the servant done by direction of the principal, and on his own initiative, is clearly pointed out. In the instant case evidence was introduced on the trial tending to prove that the train was being operated on schedule time and at a rate of speed predetermined by the defendant corporation. If the verdict was based upon that view of the case, the responsibility of the parties defendant being joint, the defendant company would not be prejudiced by the failure to find against its codefendant. All intendments being in favor of the verdict, it must be considered that the jury based the same upon a finding of joint liability, unless there is something in the record which prevents that conclusion.

[5] Appellants point out that instructions were given by the court to the effect that the jury could not find in favor of the plaintiff and against the railroad company unless they found that the defendant employé was guilty of negligence. If, however, the jury determined that the defendant employé was guilty of negligence in operating the train at an excessive speed, in obedience to the orders of the defendant company, then, under the instructions, the verdict can stand, although there was a failure to find a verdict against the defendant employé.

[6] Respondent claims that if the defendants desired to take advantage of the jury's failure to bring in a verdict for or against the defendant employé, the attention of the court should have been called to the matter at the time when the verdict was returned, in order that it might have been corrected before the jury was discharged. The Code expressly provides for the sending out of the jury where the verdict announced fails to determine the issue submitted. In the case of Van Damme v. McGilvray Stone Co., 22 Cal. App. 191, 133 Pac. 995, the jury brought in a general verdict against the defendant, but "the jury declined to answer" the question specially submitted as to whether or not the employés, for whose negligence the plaintiff sought to hold the defendant, were negligent. It was held that the error was waived by a failure to request that the jury be directed to find on that issue. For the same reason it must be held that the defendants waived the error, if any, committed here.

Judgment and ordered affirmed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

177 Cal. 746.

Ex parte RALEIGH. (Cr. 2116.)

(Supreme Court of California. March 19, 1918. Rehearing Denied April 16, 1918.)

STATUTES ⟹81—SPECIAL LEGISLATION—EXEMPTIONS—REAL ESTATE BROKERS.

Act June 1, 1917 (St. 1917, p. 1579), defining and providing for regulation and licensing of real estate brokers, by reason of the exemption therefrom of persons who have secured from the insurance commissioner or the bureau of building and loan supervision a certificate or license to do business, amounting to substantial discrimination, with no reasonable basis for the classification, is invalid as special legislation.

In Bank. Original application by L. A. Raleigh for writ of habeas corpus. Writ upheld, and petitioner discharged.

Fred W. Fry and O. R. Wood, both of Oakland, for petitioner. W. H. L. Hynes, of Oakland, and U. S. Webb, of San Francisco, for respondent.

RICHARDS, Judge pro tem. This is an application for a writ of habeas corpus wherein the petitioner seeks to test the validity of the act of the Legislature approved June 1, 1917 (St. 1917, p. 1579), entitled "An act to define real estate brokers, agents, salesmen, solicitors; to provide for the regulation, supervision and licensing thereof; to create the office of real estate commissioner and make an appropriation therefor." The act in question makes it unlawful for any person, copartnership, or corporation to engage in the business or act in the capacity of a real estate broker or real estate salesman within this state without first obtaining a license therefor. It proceeds to define who are to be considered such brokers or salesmen within the meaning of the act. These definitions are followed by the proviso that the act shall not apply to certain designated classes of persons, copartnerships, or corporations performing any of the acts enumerated in the aforesaid definitions of brokers or salesmen. The act proceeds to create a state real estate commissioner's department, the chief officer of which shall be a commissioner appointed by the Governor, who shall hold office at his pleasure, with his office at Sacramento, with an annual salary of $5,000, payable out of the state treasury, with power to appoint such clerks and deputies as may be necessary for the proper discharge of the duties of his office, and with an annual allowance from the state treasury of a sum not to exceed $50,000 a year for the expenses of the department. All persons, copartnerships, or corporations other than those exempted from the requirements of the act, seeking to do business in this state as real estate brokers or salesmen, are required to first obtain a license from the real estate commissioner so to do, by making an application therefor in the manner and with the credentials specified in the act, and by the giving by real estate brokers of a bond payable to the people of the state of California, with sufficient surety or sureties, to be approved by the commissioner, in the sum of $1,000, conditioned for the faithful performance by such brokers of their duties as defined in the act. An annual license fee of $10 is also required of brokers, and of $2 from salesmen and solicitors. The commissioner is given power to temporarily suspend or permanently revoke these licenses after hearing upon charges presented against the holders thereof for any violation of their duties as defined in the act; and from the decision of the commissioner in respect to these matters a method of appeal is sought to be provided to the superior court. Real estate brokers are also required to have and maintain offices for the transaction of business.

The first assault which the petitioner makes upon the validity of this act relates to the exemptions of certain classes of persons, copartnerships, and corporations from its terms, which, according to the contention of the petitioner, are based upon not proper distinctions or classifications, and which therefore take away from the act its necessary quality as a general law. The provisions of the act thus assailed read as follows:

> "The provisions of this act shall not apply to any person, copartnership or corporation who shall perform any of the acts aforesaid with reference to the buying, selling or exchanging of property owned by such person, copartnership or corporation, or renting, collecting rents, or negotiating a loan on such property; nor shall the provisions of this act apply to salaried employés other than salesmen or solicitors of a licensed real estate broker: And provided, further, that the provisions of this act shall not apply to persons holding a duly executed power of attorney from the owner for the sale of real estate, nor shall this act be construed to interfere in any way with services rendered by an attorney-at-law, nor shall it be held to include a receiver, trustee in bankruptcy, or any person selling real estate under order of any court, nor to a trustee selling under a deed of trust, nor apply to any corporations, associations, copartnerships, companies, firms and individuals now or hereafter subject to the jurisdiction or authority of the railroad commission, nor to corporations now or hereafter organized under the laws of this state for the purpose of conducting the business of banking within this state, nor to corporations, associations, copartnerships, companies, firms and individuals after they have secured from the insurance commissioner or the bureau of building and loan supervision a certificate of authority or license to do business within this state, nor to corporations, associations, copartnerships or companies, subject to federal regulation or not organized for profit, nor to mutual water companies and irrigation districts."

It is conceded by the petitioner that some of the foregoing exemptions from the operation of the act are based upon easily discerned distinctions and proper classifications, as for instance, that of persons, copartnerships, or corporations buying, selling, exchanging, renting, and negotiating loans upon their own property, also that of receivers or trustees in bankruptcy, or other persons selling real estate under orders of court; but as to certain other classes of those exempted from its terms, the petitioner insists that the absence of any real basis for classification is so clear, and the want of an equal distribution of the burdens imposed by the act so obvious and wide-spread in its application, as to render the statute void. The clause in the foregoing provision of the act which appears to be most obnoxious to this criticism is that which provides for the exemption from its terms of "corporations, associations, copartnerships, companies, firms and individuals, after they have secured from the insurance commissioner or the bureau of building and loan supervision a certificate of authority or license to do business within this state." The very general terms in which this exemption is phrased give it application to everybody, whether corporation, association, firm, or individual, who holds from the insurance commissioner of the state a license to engage in any form or kind of insurance business, whether as insurance companies issuing policies of insurance of any kind, or insurance agents of such companies doing an insurance business as such, or as insurance brokers soliciting and placing business with such agents or companies. It is therefore broad enough in its terms to provide that whoever holds in any of these capacities any form of license from the insurance commissioner is, by virtue of the holding of such license, exempted from the provisions of the act under review when engaged in the performance of any of the acts relating to the buying, selling, exchanging, leasing, or incumbering of real estate, for the doing of which identical acts real estate brokers and salesmen not being also the holders of licenses as insurance companies, brokers, or agents, must be licensed under and must conform to the provisions of this act. When the laws relating to the procurement of licenses of insurance companies, agents, or brokers are consulted it is found that their requirements for the obtaining of licenses from the insurance commissioner are much more simple and far less burdensome than those which, by the terms of the act in question, are imposed upon real estate brokers and salesmen. Had these burdens been equal or in any degree equivalent, had the safeguards cast about the business of insurance agents or brokers to insure honesty of character and fair dealing in business been the same as or similar to those which this act requires of real estate brokers or salesmen, it might well be argued that the possession by a corporation, firm, or individual of a license to engage in any form or department of the insurance business would suffice as an acceptable substitute for the license, bond, recommendations, and other safeguards provided for in the real estate agent's act.

But such is not the case. The Statutes of 1917, either in the form of amendments to sections 596 and 633 of the Political Code (St. 1917, pp. 147, 1617), or in the form of the addition of section 633a (St. 1917, p. 1615) to said Code, embrace the requirements for obtaining from the insurance commissioner certificates of authority or licenses to do the business of insurance companies, agents, brokers, or solicitors within this state. Section 633 of said Code, as amended, and section 633a thereof, as newly enacted, have special reference to insurance brokers and agents, and to the licenses to be obtained by each. In neither of said provisions is there to be found any requirement that the person seeking such license must produce recommendations of other persons as to his character or fitness in point of moral qualification for the business he desires to engage in; nor is there any requirement as to the giving of bonds in any amount to insure his fidelity therein—both of which requirements are made of real estate brokers seeking licenses under the act herein assailed. Neither are insurance brokers or agents required to maintain offices for the transaction of business, as are real estate brokers under this act. In other important particulars the burdens cast upon these respective classes of persons are unequal, the inequality resting most onerously upon those not being insurance brokers or agents, who seek to engage in the business of real estate brokers or salesmen. We can discover no reason, and we are given none by those attempting to uphold this act, for this obvious discrimination, nor for the exemption of insurance brokers and agents engaging in the real estate business, from the provisions of the act under review. It is a matter of common knowledge that the business of insurance broker or agent, and the business of real estate broker or agent, are combined and conducted by the same person, firm, or corporation, quite generally, and hence that the aforesaid exemption of such persons, firms, or corporations, so combining these two forms of business, from the provisions of this act, would have such a wide-spread effect as to not only render the act obnoxious to the claim that it was not a general law, but also to create a discrimination so sweeping in its scope and effect as to compel the conclusion that the act would not have secured its passage by the Legislature, save for the inclusion in it of this exemption; and hence, of necessity, that if such exemption is invalid the entire act must fail. We can perceive no escape from these conclusions. The foregoing reasoning and conclusions also apply to persons, firms, or corporations holding certificates of authority or licenses from the bureau of building and loan supervision, in so far as this act purports to exempt such persons, firms, or corporations from these provisions in case they or any of them engaged in the business of dealing in real estate in the capacity of brokers or salesmen, as defined in this act. The law is well settled that a statute which contains exemptions amounting to substantial discriminations between those attempted to be classified, where no reasonable basis for the classification exists, is violative of the provisions of the Constitution requiring the passage of general laws and forbidding special legislation in all cases where general laws can be made applicable. Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; Ex parte Bohen, 115 Cal. 372, 47 Pac. 55, 36 L. R. A. 618; Rauer v. Williams, 118 Cal. 407, 50 Pac. 691; Ex parte Sohncke, 148 Cal. 262, 82 Pac. 956, 2 L. R. A. (N. S.) 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475.

The petitioner herein assails certain other of the exemptions found in the provisions of this act above set forth. But one of these requires brief notice, namely, the clause relating to the exemption of attorneys at law. The language of the clause in question is as follows: "Nor shall this act be construed to interfere in any way with the services rendered by an attorney at law." In view of the fact that this clause occurs in the midst of a provision having relation to the exemption of persons performing the several acts of dealing in or with real estate, for which real estate brokers or salesmen, not being attorneys at law, must procure licenses, its purpose is, to say the least of it, obscure; and since the act itself is penal in its requirements that all persons not in the exempted classes who undertake to engage in the real estate business as brokers and salesmen shall possess licenses, and in its penalties to be imposed upon those not having licenses so to do, it might plausibly be argued that attorneys at law conducting transactions in relation to real estate in the capacity of salesmen, brokers, agents, or mortgagees or rent collectors, are by virtue of the above-quoted clause exempted from the provisions of the act. We do not, however, deem it necessary to finally pass upon this question, in view of what has been said of the clearer invalidity of the act upon the former ground; nor do we deem it necessary to discuss the other exemptions in the act which the petitioner herein assails, nor in fact to consider the other points of attack made by him upon the constitutionality of the act. If it is not in its present form a general law, then the question as to whether or not a general law dealing with the same subject-matter would be a valid exercise of legislative power is not at present before this court.

It is ordered that the writ be upheld, and the petitioner discharged.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

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177 Cal. 722

FRINIER v. C. J. KUBACH CO.

(L. A. 4064.)

(Supreme Court of California. March 18, 1918.)

1. Master and Servant 🔑258(10) — Injuries to Servant — Constructing Buildings—Maintaining Floors — Pleading — Sufficiency.

Complaint alleging that plaintiff was removing beams and lumber from third floor of a building under construction, that he stepped upon an imperfect plank and fell to the floor below, and that the accident was caused by the gross negligence of defendant in failing to provide a safe place to work, sufficiently calls defendant's attention to the question of the sufficiency of the floor under St. 1911, p. 1112, requiring temporary floors in buildings under construction.

2. Master and Servant 🔑293(6)—Injuries to Servant — Constructing Buildings — Maintaining Floors — Questions for Jury.

Under such complaint, and evidence that the plank which broke was 10 inches wide, that the planks were 10 inches apart, and that when the plank broke plaintiff fell through a 3-foot opening, and that work was being done on the floor above the one on which plaintiff was working, it was the duty of the court to instruct the jury as to the terms and effect of St. 1911, p. 1112, requiring temporary floors in buildings under construction.

3. Master and Servant 🔑296(3)—Injuries to Servant—Instructions—Contributory Negligence.

Where the servant's complaint charged violation of St. 1911, p. 1112, requiring temporary floors in buildings under construction, instruction on contributory negligence was properly refused in view of St. 1911, p. 796, creating the conclusive presumption that the employé was not guilty of contributory negligence if violation of statute contributed to the injury.

4. Appeal and Error 🔑1051(2)—Harmless Error.

Admission of opinion testimony showing that the platform on which servant was working was not strong enough to carry weight of lumber piled thereon, if error, was not prejudicial to master in view of the uncontested fact that the floor was sagging.

5. Master and Servant 🔑264(4)—Injuries to Servant — Constructing Buildings — Maintaining Floors—Evidence—Admissibility.

In servant's action for injuries when a plank broke and he fell to the floor below, it was not error to admit evidence that no floor was maintained, as required by St. 1911, p. 1112, though not alleged, since such violation contributed to the injury, because plaintiff could not have fallen, though a plank broke, had the floor been tight.

6. Master and Servant 🔑115(3)—Injuries to Servant—Construction of Buildings — Maintaining Floors — Statutes — Construction.

St. 1911, p. 1112, providing that any building more than two stories high in the course of construction shall have the joints, beams, or girders of each and every floor below the floor or level where any work is being done, or about to be done, covered by flooring laid close together, or with other suitable material to protect workmen engaged in such building from falling through joists or girders, clearly contemplates that when in construction of a building a floor level has been reached, and the

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

joists and beams installed upon which a floor is to be laid, they shall be "covered with flooring laid close together," before a continuance of work above the level of such floor.

7. STATUTES 🔑190—CONSTRUCTION.

When intent is given expression in plain and unambiguous language, courts cannot add to or subtract from the act, unless in order to obviate impracticable or absurd results.

In Bank. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Oliver P. Frinier against the C. J. Kubach Company. Judgment for plaintiff, and defendant appealed, and the judgment was affirmed in department, and hearing in bank was granted. Affirmed.

Haas & Dunnigan, of Los Angeles, for appellant. Leo V. Youngworth, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. Appellant, claiming that in the opinion of the department filed herein the court had erroneously held the statute found at page 1112 of the Statutes of 1911 applicable to the facts of the case, and that by reason thereof the court properly instructed the jury, as provided in the Roseberry Act, that if they found that defendant's violation of said act of 1911 contributed to plaintiff's injury, his contributory negligence was not a ground of defense, filed its petition for a hearing in bank. The application was granted, and upon further consideration given the claim of appellant we are satisfied with the decision made in department.

The opinion follows:

"This is an action brought by an employé to recover for injuries received September 30, 1913, in the course of his employment, by falling through the third floor and onto the second floor of a building under construction by his employer. It is required by statute (Stats. 1911, p. 1112) that, 'Any building more than two stories high in the course of construction shall have the joists, beams or girders of each and every floor below the floor or level where any work is being done, or about to be done, covered by flooring laid close together, or with other suitable material to protect workmen engaged in such building from falling through joists or girders,' etc. 'Such flooring shall not be removed until the same is replaced by the permanent flooring in such building.' This requires all floors below any floor under construction to be so covered. The main question in the case is whether or not the pleadings raised issues which justified the court in instructing the jury as to the duty of the employer under said law. The plaintiff's complaint alleges that he stepped upon a defective plank which broke, and that he was thereby precipitated from the third to the second floor of the building. It will be observed that while the complaint specifically points out the breaking of a defective plank, it also alleges a falling through a floor and onto a lower floor. Plaintiff alleges that he was engaged in removing beams and other lumber from a landing on the third floor of said building; that in so doing he was obliged to step upon the plank on said floor provided for the purpose, extending from girder to girder; that said plank was weak and defective, was knotty, cross-grained, and imperfect; that when plaintiff stepped upon the plank it suddenly broke 'and he was precipitated a distance of 15 feet to the floor below'; 'that the accident was caused by the gross negligence of the defendant in failing to provide a safe place to work, and failing to provide safe appliances.' In its answer the defendant admits the breaking of the plank and the fall of the plaintiff as aforesaid, but alleges that plaintiff either knew or should have known of said defects, if any, and should have known of the insufficiency of the plank to sustain the load placed upon it. It denies that the accident was caused by a failure to provide plaintiff a safe place to work. The complaint nowhere alleges that work was being done on the floor above the floor in question, and therefore defendant claims that it was not sufficiently advised by the allegations of the complaint that plaintiff would rely upon a violation of said statute; but the real issue in the case was as to the sufficiency of the floor upon which the plaintiff was working at the time he fell.

[1-3] "The attention of the defendant was sufficiently drawn by the pleading to that fact. If that question, under the law, depended upon whether or not the floor above was one 'where work is being done or about to be done,' that was a matter of evidence to be submitted to the jury with all other evidence concerning the sufficiency of the floor to support the plaintiff. The evidence shows that the plank that broke was 10 inches in width; that there was an interval of 10 or more inches between planks; that when this plank broke there was a space of about 2½ feet or 3 feet, through which the plaintiff fell; and that work was being done on the floor above the one on which plaintiff was working. Defendant's counsel stated on the trial that he would not rebut the above evidence as to the character of the construction of the platform. Under the issues and upon this proof it was the duty of the court to instruct the jury as to the terms and effect of the statute in question. Certain of defendant's instructions were refused, but each of them was based upon the theory that contributory negligence was a complete defense. But the Roseberry Act provides that 'it shall be conclusively presumed that such employé was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employés contributed to such employé's injury (Stats. 1911, p. 796), and therefore defendant's instructions were properly refused. For the same reason the modification of defendant's instructions, complained of, on the subject of contributory negligence and assumption of risk, was proper. Stats. 1911, pp. 796, 1112.

[4] "The only other error complained of is that of permitting a witness to state his opinion that the platform on which plaintiff was working was not strong enough to pile a weight of 1,200 or 1,400 pounds upon it. This evidence bore upon the sagging of the floor on which the lumber removed by plaintiff was piled. The evidence could not have prejudiced the defendant, in view of the uncontested fact that the floor was sagging, and that it was for this reason that plaintiff was directed to remove such lumber."

[5] In its petition for rehearing appellant insists that since the violation of the act (Stats. 1911, p. 1112) was not alleged, all testimony tending to establish such fact should have been excluded, and further, that notwithstanding the act (section 1) required that the "joists, beams or girders of each and

every floor below the floor or level where any work is being done" shall be "covered with flooring laid close together * * * to protect workmen engaged in such building from falling through joists or girders," it should, where one falls through such joists as in the instant case, be construed as having reference to the floor next below. As to the first proposition the cause of action is based upon the specific act of negligence alleged in the complaint, and which, notwithstanding the violation of the statute, it was necessary to prove as a contributing cause of the injury. The action was not based upon defendant's failure to comply with the statute, but defendant's act in supplying this defective plank upon which plaintiff was required to walk. Defendant's failure to comply with the statute is important only in that by reason of such fact it, in the opinion of the jury, contributed proximately to plaintiff's injury, and hence, as provided in the Roseberry Act, deprived defendant of the right which, but for such violation, it had to urge contributory negligence on the part of plaintiff as a defense to the action.

[6, 7] As to the second proposition, the purpose of the statute was clearly to prevent just such injuries as that sustained by plaintiff, and which, presumably, had the planks been laid close together as required by the statute, would not have occurred, even though this plank 10 inches in width had broken. The act clearly contemplates that when, in the construction of a building, a floor level has been reached, and the joists and beams installed upon which a floor is to be laid, they shall be "covered with flooring laid close together," before a continuance of work above the level of such floor, to protect all workmen engaged in the building. "Where the intent is given expression in plain and unambiguous language, the courts cannot add to or subtract from the act unless forced to do so in order to obviate impractical or absurd results." Estate of McDonald, 118 Cal. 277, 50 Pac. 399. It would be absurd to hold that the law had reference to the floor, not upon which the employé was at work and through which he fell, but to that next below, thus permitting him to fall the distance of one story. Hence in this action to recover damages due to the negligence of the employer where the failure to comply with the provision contributed proximately to the injury, no defense could be based upon the employé's contributory negligence for the reason that under the Employers' Liability Act, as then existing, such negligence afforded the employer no defense. Crabbe v. Mammoth Channel G. Min. Co., 168 Cal. 504, 143 Pac. 714.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; MELVIN, J.

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177 Cal. 737

WALKER v. INDUSTRIAL ACCIDENT COMMISSION. (Sac. 2713.)

(Supreme Court of California. March 19, 1918.)

1. MASTER AND SERVANT 🔑417(7)—WORKMEN'S COMPENSATION ACT—REVIEW OF COMMISSION'S FINDINGS.

The Industrial Accident Commission's conclusions on questions of fact are conclusive on the Supreme Court, except when without any evidence to support them.

2. MASTER AND SERVANT 🔑405(4)—WORKMEN'S COMPENSATION ACT—USUAL "COURSE OF BUSINESS OF EMPLOYER."

Within Workmen's Compensation Act (St. 1913, p. 279) § 14, excluding from its benefits one whose employment is "both" casual, "and not" in the usual course of business of the employer, testimony that the keeper of a lodging house was in the habit of employing some one off and on to help out the chambermaid, by taking up carpets and matting and cleaning walls, transoms, windows, and curtains, *held* to warrant conclusion that employment of one so engaged was in the usual course of business of the employer; "course of business of employer" covering the normal operations which form part of the ordinary business carried on, and not including incidental and occasional operations having for their purpose the preservation of the premises or the appliances used in the business.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Business.]

In Bank. Application by Pearl P. Walker for writ of review against the Industrial Accident Commission. Award affirmed.

Webster, Webster & Blewett, of Stockton, for petitioner. Christopher M. Bradley, of San Francisco (Warren H. Pillsbury, of Oakland, of counsel), for respondent. Max Grimm, of Stockton, for Louis J. Robinson.

SLOSS, J. Certiorari to review an award of the Industrial Accident Commission. The petitioner, Pearl P. Walker, conducted at Stockton a lodging house containing 17 rooms. The applicant, Louis J. Robinson, was employed by Miss Walker to do certain work in cleaning the house, and while so occupied met with an accidental injury which destroyed the sight of one of his eyes.

Section 14 of the Workmen's Compensation Act excludes from the benefits of the law any person "whose employment is both casual and not in the usual course of the trade, business, profession or occupation of his employer." The commission found that Robinson's employment was casual, but that it was in the usual course of the business or occupation of the petitioner. It is contended, and this is the sole point made, that there was no evidence to support the latter part of this finding.

[1] Our authority, with respect to the commission's conclusions on questions of fact, goes no further than to permit the annulment of an award where the commission's

finding of a fact is without any evidence whatever to support it. Where there is a conflict in the testimony, or where opposing inferences may reasonably be drawn, the commission is the final arbiter.

[2] The evidence embodied in the record indicates that it was a necessary part of petitioner's business to keep the rooms and hallways of her lodging house in a state of cleanliness and good order. A chambermaid was employed continuously. The maid was, however, not able to do all the work, and her efforts had to be supplemented by a man called in from time to time. The work for which Robinson was engaged was the taking up of carpets or matting, and the cleaning of walls, transoms, windows, and curtains. Miss Walker herself testified that she was in the habit of employing some one to do that kind of work occasionally, and the chambermaid stated that ever since Robinson's injury another man had been doing similar work off and on. This testimony warranted the conclusion that the employment of Robinson was in the "usual course of the business" of the petitioner. The case is not like those cited by petitioner, in which occasional repairs or overhauling were held not to be covered by this phrase. Various cases of this kind, involving a construction of the English act, were reviewed by us in London & Lancashire G. & A. Co., 173 Cal. 642, 161 Pac. 2, and we there said:

> "In cases arising under that act the expression ['course of business of the employer'] is held to cover the normal operations which form part of the ordinary business carried on, and not to include incidental and occasional operations having for their purpose the preservation of the premises or the appliances used in the business."

It would not be questioned that the chambermaid, in doing the cleaning which fell within her province, was engaged in normal operations forming part of the employer's ordinary business. There was no essential difference in character between her work and that done by Robinson. One was as necessary in the conduct of the business as the other, and neither was incidental, in the sense in which that term was used in the passage just quoted. The only distinction is that the maid's work was done daily, while that of the man was called for at intervals. But the intermittent character of the employment is not of itself sufficient to exclude it from the purview of the statute. Section 14 does not except employments that are casual simply, but those that are both casual, and not in the usual course of the business.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; MELVIN, J.; VICTOR E. SHAW, Judge pro tem.; RICHARDS, Judge pro tem.

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177 Cal. 740

RAWLINGS v. FUSTER. (L. A. 4131.)

(Supreme Court of California. March 19, 1918.)

1. Appeal and Error 🔑1011(1)—Findings of Fact—Conflicting Evidence.

There being ample evidence to support finding that injury to rider of motorcycle in collision with auto was caused by negligence in operation of auto, it cannot be disturbed on appeal, for conflicting evidence.

2. Appeal and Error 🔑1071(6)—Harmless Error—Absence of Finding.

Failure to find on the issue of plaintiff having paid out money for medical attendance, as alleged in complaint, there being no evidence in support thereof, could not prejudice defendant.

3. Appeal and Error 🔑1050(1)—Harmless Error—Admission of Evidence.

Any error in admission, in the case of collision of motorcycle and auto in a city, of county traffic ordinances, was not prejudicial; their provisions being substantially the same as those of the motor vehicle act.

Department 2. Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by Carroll Rawlings, a minor, by Mary Peck, his guardian ad litem, against Jos. Fuster. From adverse judgment and order, defendant appeals. Affirmed.

J. L. Fleming and W. S. Knott, both of Los Angeles, for appellant. J. Walter Hanby, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. Action to recover damages for personal injuries alleged to have been sustained by reason of defendant's negligence in operating an automobile with which plaintiff's motorcycle collided. Judgment went for plaintiff, from which, and an order denying his motion for a new trial, defendant appeals.

[1] The appeal is wholly without merit. As usual in such cases, there is a sharp conflict of evidence. That of plaintiff, in accordance with which the court made its findings, clearly tends to show that the accident, in the absence of any negligence on the part of plaintiff, was due to defendant's act in negligently operating his car on the wrong side of the highway contrary to the provisions of the motor vehicle act. Since we cannot weigh conflicting evidence, it would be an idle task to review the same. Suffice it to say there is ample testimony to support the finding that the injury was, as alleged in the complaint, caused by defendant's negligence in operating his car, and that plaintiff was not chargeable with any negligent act contributing to his injury.

The court fixed the damage sustained by plaintiff at the sum of $1,000. The injuries sustained by plaintiff appear to have been of a serious and permanent nature, and, other than the bare suggestion of appellant, there is nothing in the record to indicate that the sum so awarded is excessive.

[2] While plaintiff alleged that he paid out $50 for medical attendance, no evidence was

offered in support thereof; hence the failure of the court to find upon such issue could in no event prejudice the rights of defendant.

[3] Conceding, as claimed by appellant, that since the accident occurred in the city of Burbank the court erred in admitting in evidence parts of certain traffic ordinances of the county of Los Angeles, nevertheless no prejudice resulted therefrom, for the reason that the provisions of the ordinance so received in evidence related to matters covered by the motor vehicle act and as to which the provisions are substantially the same.

The judgment and order are affirmed.

We concur: WILBUR, J.; MELVIN, J.

177 Cal. 728

HOUSEL v. PACIFIC ELECTRIC RY. CO.

THOMSON v. SAME.

(L. A. 4147, 4148.)

(Supreme Court of California. March 18, 1918.)

APPEAL AND ERROR ⚷1008(2)—REVIEW—FINDINGS OF NEGLIGENCE.

Whether the motorneer of a car, passengers in which were injured by its collision with a wagon, was negligent in proceeding, rather than standing still or retreating, when confronted with meeting a heavily loaded runaway team on a steep grade, was a question for the court trying the case without a jury; its finding on which cannot be disturbed, it being impossible to say it is not supported by substantial evidence.

Department 2. Appeals from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Actions, one by Dora R. Housel, the other by Lydia A. Thomson, against the Pacific Electric Railway Company. From adverse judgments and orders, defendant appeals. Affirmed.

Frank Karr, R. C. Gortner, A. W. Ashburn, and W. R. Millar, all of Los Angeles, for appellant. F. McD. Spencer, Thomson & Spencer, Hickcox & Crenshaw, and Foster C. Wright, all of Los Angeles, for respondents.

WILBUR, J. The plaintiffs were injured in a collision between a runaway hay wagon and the street car of the defendant corporation, upon which they were riding as passengers. The cases were tried before the court without a jury; judgment was rendered for the plaintiff in each case, and the matter is before us on appeal from the judgments and orders denying motions for a new trial. These cases have been before this court on a previous appeal, and the facts are stated at some length in the opinion on that appeal. Housel v. Pacific Electric Ry. Co., 167 Cal. 245, 139 Pac. 73, 51 L. R. A. (N. S.) 1105, Ann. Cas. 1915C, 665. See, also, Thomson v. Pacific Electric Ry. Co., 167 Cal. 795, 139 Pac. 75.

The car upon which the plaintiffs were riding was proceeding easterly along Temple street, Los Angeles, up a 9 per cent. grade from Fremont street. A wagon loaded with 9,600 pounds of baled hay was coming down the hill on the left-hand side of the street. The brake of the wagon broke, the horses ran down hill, the wheel horse on the left-hand side fell, the wagon then swerved to the left toward the street car track upon which defendant's car was approaching, a collision occurred, and plaintiffs were thrown from the car and injured. As we held upon the former appeal, there was, under the circumstances, a prima facie presumption of negligence against the carrier. The findings state in great detail the evidentiary facts. It is argued that certain of these "findings" are not supported by the evidence; that if we consider what the court did find with reference to certain of the evidentiary facts as true, and hold, as appellant claims we should, that other findings of the trial court were erroneous because unsupported by the evidence, then the case must be reversed. The ultimate question in the case was as to whether or not the defendant was negligent. The court found that it was negligent. If specific findings made by the court were in conflict with that general finding, the question would be different from that presented here. The defendant's motorneer, confronted with the fact that he was compelled to meet a runaway team with nearly five tons of hay, on a steep grade, could have done one of three things—go ahead, stand still, or retreat down hill. He decided to go ahead. The trial court held that if he had not gone ahead, but had stood still, plaintiffs would have escaped injury, and therefore held that he was negligent. Appellant claims that it can be mathematically demonstrated that this is incorrect, and that if the car had stopped as soon as possible after the horse fell and the wagon began to swing to the left, it would have been hit anyway, and that therefore the accident was inevitable. The question whether or not the motorneer was negligent in adopting the course that he did was for the trial court. We cannot say that its conclusion is not supported by substantial evidence. An analysis of the testimony would serve no useful purpose.

The judgments and orders are affirmed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

177 Cal. 699

BRANDON v. ANGLO-CALIFORNIA TRUST CO. et al. (S. F. 7654.)

(Supreme Court of California. March 12, 1918. Rehearing Denied April 11, 1918.)

BUILDING AND LOAN ASSOCIATIONS ⚷42(16)—LIQUIDATION BY COMMISSIONER—COMPENSATION OF CUSTODIAN.

St. 1911 (Ex. Sess.) p. 8, under which the building and loan commissioner is empowered to act, after defining his duties as to an association deemed unsafe, and providing for a judgment approving or disapproving his action, provides that if the court shall approve and affirm his action, it shall operate as a permanent injunction against further prosecution of its business followed by liquidation until completed, but that if his action be disapproved, he shall cause expenses incurred during his occupancy or possession, including a per diem compensation of the custodian, to be paid from such association's funds. Code Civ. Proc. § 1049, provides that an action shall be deemed pending until final determination on appeal. *Held*, that the custodian's cause of action for compensation did not accrue till a judgment of disapproval became final on determination of an appeal therefrom, and that action therefor pending appeal was prematurely commenced.

Department 2. Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Amanda C. Brandon, administratrix of the estate of Franc J. Brandon, against the Anglo-California Trust Company and others. From a judgment for plaintiff, and from an order denying motion for new trial, the Trust Company and another defendant appeal. Reversed.

Gavin McNab and R. P. Henshall, both of San Francisco, for appellants. Leon Martin, U. S. Webb, and Robert W. Harrison, all of San Francisco, for respondents.

MELVIN, J. Two of the defendants, Anglo-California Trust Company and Continental Building & Loan Association (corporations), appeal from the judgment and an order denying their motion for a new trial.

The facts, which are undisputed, are as follows: On the 8th day of August, 1912, following a report made to him dealing with the status of the Continental Building & Loan Association, the building and loan commissioner of California made an examination of the affairs, business, and condition of that corporation, and found and determined that it was conducting its business and affairs in an unsafe manner, so as to render its further proceedings hazardous to the public and to those doing business with it and to those having funds in its custody. This determination was made under the authority of section 9 of an act of Legislature, found in the Statutes of 1911 at page 607, as amended, Extra Session 1911, p. 6. In further attempted compliance with the act the commissioner appointed Franc J. Brandon—who was the original plaintiff in this action, but who has since died and is here represented by the administratrix of his estate—custodian of all the property and assets of the building and loan association. Thereafter the Attorney General, pursuant to the statute, commenced and conducted a proceeding for approval and confirmation of the action of the commissioner. The result after trial was a judgment and decree disapproving of the action of the commissioner in taking possession of the business and affairs of the building and loan association.

The custodian claimed, and this is a suit to recover, compensation for 93 days during which he had controlled the property, at the rate of $8 per day, which was the amount fixed by the commissioner. This, after deducting a credit of $20 collected and retained by the custodian, amounted to $724. The court gave judgment for this sum, and it was further found that while the commissioner was in possession of the Continental Building & Loan Association he deposited with the Anglo-California Trust Company certain funds of the said Continental Building & Loan Association; that he gave an order in writing that said Anglo-California Trust Company pay to plaintiff from said funds the sum of $724, but that the trust company refused to comply with said order.

Both appellants contend that the judgment and order are erroneous because: (1) The fees claimed cannot be due until the judgment of the superior court disapproving the action of the commissioner has become final; (2) because the act under which plaintiff's predecessor was appointed is unconstitutional in that it permits the taking of property without due process of law, and in that it is a legislative exercise of judicial functions; and (3) because if any cause of action for the recovery of fees exist it is vested not in the custodian or in his representative, but in the commissioner.

The statute under which the building and loan commissioner is empowered to act, after defining his duties subsequent to taking possession of the affairs of a building and loan association deemed unsafe, and after providing that the judgment of a court shall be invoked for the approval or disapproval of his action, contains the following provisions:

> "If the court shall approve and confirm the action of the commissioner, such approval and confirmation shall operate as a permanent injunction against the further prosecution of business by such association, corporation or society, and the commissioner shall proceed immediately to liquidate the business and affairs thereof, and so continue until such liquidation has been completed. If the action of the commissioner shall be disapproved by the court, the commissioner shall cause all reasonable expenses incurred by him during his occupancy or possession including not exceeding eight dollars per diem, for each business day, as the compensation of the custodian, to be paid from the funds of such association, corporation or society, and immediately restore the balance of the property and assets thereof to the possession of the proper officers." Stats. 1911 (Extra Sess.) p. 8.

When the action at bar was instituted an appeal from the judgment of disapproval had been taken and was and still is pending. Appellant insists that until a final judgment in that proceeding the respondent here has no standing, because in the event of a reversal of that judgment now on appeal any possible cause of action which plaintiff might otherwise have will be vitiated. The very basis of the claim of the custodian, say appellants, is a judgment of the court disapproving the action of the commissioner. Without such a judgment, they say, the commissioner has no power under the law to order payments for the custodian's services.

Section 1049 of the Code of Civil Procedure provides that an action shall be deemed pending until its final determination on appeal. Accordingly it has been held that a cause of action upon a judgment does not accrue until the judgment becomes final and admissible in evidence. Feeney v. Hinckley, 134 Cal. 467, 66 Pac. 580, 86 Am. St. Rep. 290. An action will not lie upon the bond of a guardian until the order settling his account becomes final either by lapse of time for appeal or determination of the appeal, if one be taken (Cook v. Ceas, 143 Cal. 221, 77 Pac. 65), nor upon the bond of an administrator prior to an order of the probate court determining his liability (Nickals v. Stanley, 146 Cal. 724, 81 Pac. 117). It has even been held that a deposition de bene esse may be taken after trial and before determination of the appeal. San Francisco Gas & Electric Company v. Superior Court, 155 Cal. 30, 99 Pac. 359, 17 Ann. Cas. 933. The same principle is illustrated in such cases as Bruce v. Bruce, 160 Cal. 28, 116 Pac. 66, and Dunphy v. Dunphy, 161 Cal. 87, 118 Pac. 445. We can see no escape from the conclusion supported by the foregoing authorities and the cited section of the Code of Civil Procedure that the custodian would have no ripened cause of action until the judgment of disapproval should become final.

The clear purpose of the statute is to provide that if the action of the commissioner be approved by the court, he shall liquidate the affairs of the corporation. He is in effect the receiver acting in pursuance of the injunction against the further prosecution of business by the corporation, and after liquidation he must submit his report thereof for final approval by the court. As an officer of the court he acts in such case under the supervision of that tribunal, but if his action be disapproved by the court he is given the right under certain restrictions contained in the act itself to compensate the custodian. His powers respecting payment of that functionary are entirely different under a judgment approving and one disapproving of his assumption of control of the corporation's affairs. Hence it follows that his direction for payment of funds made without order of the court is only finally enforceable when there has been a final decision that his original exercise of authority was disapproved.

Respondents' counsel say that were it true that a judgment is effective for no purpose and inadmissible in evidence until it has become final, a judgment creditor would be unable to recover by action the judgment debtor's property in the hands of a fraudulent transferee, until the ultimate decision of the original case on appeal. Such action, they say, may be commenced immediately upon the entry of the original judgment, citing Sewell v. Johnson, 165 Cal. 762, 134 Pac. 704, Ann. Cas. 1915B, 645, and Jenner v. Murphy, 6 Cal. App. 434, 92 Pac. 405. But those cases and other authorities along the same line are not in point. This is not an action by a party to enforce a judgment in his favor or to protect his rights as a creditor from spoliation by a fraudulent transfer of the debtor's property. Plaintiff here is suing to enforce the order of the commissioner for the payment of money to him—an order which the commissioner had the power under the statute to make only in the event of a certain sort of judgment being entered in the proceeding provided by the act in question. If another sort of judgment should be entered the commissioner would be powerless to order the payment of any of the expenses of his management of the corporation's business except by approval of the court having supervision of the proceedings for liquidation. Until the judgment becomes final the powers of the commissioner are undefined.

As we are persuaded that the action has been prematurely commenced, it is not necessary for us to discuss the other points made by counsel in their briefs.

The judgment and order are reversed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

(177 Cal. 690)

Ex parte LEE. (Cr. 2126.)

(Supreme Court of California. March 8, 1918.)

1. Constitutional Law 🔑55—Indeterminate Sentence—Validity of Statutes.

Pen. Code, § 1168, providing for indeterminate sentences in offenses punishable by imprisonment in a reformatory or in a state prison, and giving the reformatory or prison authorities power to determine after expiration of the minimum term what length of time such prisoner shall be confined, does not violate Const. art. 3, § 1, providing for the division of the state into the executive, legislative, and judicial departments, and prohibiting the exercise of the powers of one department by either of the others; such act constituting neither a delegation of legislative nor judicial functions.

2. Constitutional Law 🔑203—Criminal Law 🔑1206(3)—Indeterminate Sentences—Ex Post Facto Laws.

Such provision is ex post facto as to a person convicted for a crime committed prior to its enactment, since it substitutes the discretion of the board of prison directors for the statutory right formerly existing to credits for good behavior during imprisonment.

3. Criminal Law 🔑1184—Indeterminate Sentences—Resentence.

Pen. Code, § 1168, effective July 27, 1917, provides for the imposition of indeterminate sentences. Sections 12 and 13 provide that the term of imprisonment shall be fixed by the court. Section 1588 provides deductions from the terms so fixed of credits for good conduct when earned. Defendant was convicted and given an indeterminate sentence for a crime committed prior to the passage of section 1168, which therefore was ex post facto as to him. *Held* that, section 1168 not repealing sections 12, 13, and 1588 by implication, as to him, defendant might be sentenced thereunder as though no sentence under the indeterminate sentence law had been imposed.

In Bank. Petition by Charles Lee for writ of habeas corpus. Petition denied.

See, also, 172 Pac. 158.

W. D. L. Held, of Ukiah, and Fred S. Howell, of Petaluma (Edwin V. McKenzie and Hyman Levin and William F. Herron, all of San Francisco, amici curiæ), for petitioner. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for respondent.

WILBUR, J. On October 5, 1917, the petitioner was sentenced after verdict for manslaughter committed May 16, 1917. This sentence is what is known as an indeterminate sentence, and was that the petitioner be punished by imprisonment "in the state prisson at San Quentin for the term of from one to ten years." This sentence was obviously imposed under the provisions of section 1168 of the Penal Code (Stats. 1917, p. 665), approved May 18, 1917, and which went into effect July 27, 1917, providing that:

> "Every person convicted of a public offense, for which public offense punishment by imprisonment in any reformatory or the state prison is now prescribed by law, if such convicted person shall not be placed on probation, a new trial granted, or imposing of sentence suspended, shall be sentenced to be confined in the state prison, but the court in imposing such sentence shall not fix the term or duration of the period of imprisonment."
>
> "(b) It is hereby made the duty of the warden of the state prison to receive such person, who shall be confined until duly released as provided for in this act; provided, that the period of such confinement shall not exceed the maximum or be less than the minimum term of imprisonment provided by law for the public offense of which such person was convicted. * * *
>
> "(d) The governing authority of the reformatory or prison in which such person may be confined, or any board or commission that may be hereafter given authority so to do, shall determine after the expiration of the minimum term of imprisonment has expired, what length of time, if any, such person shall be confined, unless the sentence be sooner terminated by commutation or pardon by the Governor of the state; and if it be determined that such person so sentenced be released before the expiration of the maximum period for which he is sentenced, then such person shall be released at such time as the governing board, commission or other authority may determine.
>
> "(e) The state board of prison directors shall make all necessary rules and regulations to carry out the provisions of this act not inconsistent therewith," etc.

[1] Petitioner's first contention is that this statute is violative of article 3, § 1, of the Constitution of California, providing for the division of the state government into three separate departments, executive, legislative and judicial, and prohibiting the exercise of the powers of one of these departments by either of the others. In determining this question and the other questions raised by the petitioner it is necessary to consider the nature and purposes of the indeterminate sentence law. It is generally recognized by the courts and by modern penologists that the purpose of the indeterminate sentence law, like other modern laws in relation to the administration of the criminal law, is to mitigate the punishment which would otherwise be imposed upon the offender. These laws place emphasis upon the reformation of the offender. They seek to make the punishment fit the criminal rather than the crime. They endeavor to put before the prisoner great incentive to well-doing in order that his will to do well should be strengthened and confirmed by the habit of well-doing. Instead of trying to break the will of the offender and make him submissive, the purpose is to strengthen his will to do right and lessen his temptation to do wrong. If the purpose of the law is to mitigate the punishment, the law is not ex post facto, unless it can clearly be seen that, notwithstanding the beneficence of the law, it may result in the individual case in depriving the prisoner of some well-defined right. It has uniformly been held that the indeterminate sentence is in legal effect a sentence for the maximum term. It is on this basis that such sentences have been held to be certain and definite, and therefore not void for uncertainty. State v. Perkins, 143 Iowa, 55, 60, 120 N. W. 62, 21 L. R. A. (N. S.) 931, 20 Ann. Cas. 1217, and cases there cited; State v. Tyree, 70 Kan. 203, 209, 78 Pac. 525, 3 Ann. Cas. 1020; Woods v. State, 130 Tenn. 100, 113, 169 S. W. 558, L. R. A. 1915F, 531; Commonwealth v. Kalck, 239 Pa. 533, 542, 87 Atl. 61, and cases there cited. In answering the claim that the authority vested by the indeterminate sentence law in the board of prison directors is a delegation of either legislative or judicial powers to an executive body, it is pointed out that the legislative function is filled by providing the sentence which is to be imposed by the judicial branch upon the determination of the guilt of the offender. This is done by the enactment of the indeterminate sentence law. The judicial branch of the government is intrusted with the function of determining the guilt of the individual and of imposing the sentence provided by law for the offense of which the individual has been found guilty. The actual carrying out of the sentence and the application of the various provisions for ameliorating the same are administrative in character, and properly exercised by an administrative body. In answering the contention that the indeterminate sentence law delegated judicial authority to the prison directors, the Supreme Court of New Jersey said:

> "The foundation underlying the argument is palpably unsound. The pronouncing of a sentence is, undoubtedly, a judicial act. But the punishment which the sentence pronounces comes from the law itself. As Blackstone truly expressed it, under the head of 'Judgment and Its Consequences,' 'the court must pronounce

that judgment which the law hath annexed to the crime.'" State v. Dugan, 84 N. J. Law, 603, 609, 89 Atl. 691, 694.

The Supreme Court of the state of Tennessee in answering the contention that the indeterminate sentence law delegated the legislative authority to the board of prison directors said:

> "The powers conferred are in no sense a delegation of legislative authority. The act does not attempt to confer on the board the power to fix the punishment that any given crime shall bear. The act itself, in effect, becomes a part of every judgment, and the board only one of a series of agencies for the execution of the judgment. The Legislature declared by previous statutes that the period of confinement, aside from certain crimes not pertinent here, should lie between a maximum and a minimum; the ascertainment of the exact period between the two being left for the jury in each case. Under the present statute the punishment is fixed at a maximum, subject to diminution below that number of years, after the minimum shall have been served, through the operation of a certain discretion vested in the board of prison commissioners. * * * It is impossible to see any element of legislation in the power so to be exercised by the commissioners. There is a striking similarity between the powers here conferred on the board and the authority granted to prison officials under good time statutes, which have generally been held constitutional. It is true the Legislature of our state fixes the terms on which the prisoner is entitled to good time, and how much good time shall be allowed each year (Acts of 1897, c. 125, § 24), and it has been held to be a right which cannot be denied him; but still there may be a deduction from good time earned for subsequent bad conduct, and there is a discretion in the officers, depending on their judgment as to whether he has obeyed the rules of the prison."

For the foregoing reasons the weight of authority is to the effect that indeterminate sentence laws do not violate constitutional provisions such as ours (article 3, § 1) providing for a segregation of governmental powers into the three departments, legislative, executive and judicial. Territory of Hawaii v. Armstrong, 22 Hawaii, 526; Kansas v. Page, 60 Kan. 664, 57 Pac. 514; State v. Dugan, supra; Woods v. State, supra; George v. People, 167 Ill. 647, 47 N. E. 741; State of Iowa v. Duff, 144 Iowa, 142, 122 N. W. 829, 24 L. R. A. (N. S.) 625, 138 Am. St. Rep. 269; People v. Adams, 176 N. Y. 351, 68 N. E. 636, 63 L. R. A. 406, 98 Am. St. Rep. 675. These decisions were rendered before the enactment of the law in California, and this fact should be considered in determining whether the statute is so clear a violation of this general provision in regard to the division of the government into departments as to require us to hold it to be unconstitutional. For the foregoing reasons we hold that the provisions of section 1168 of the Penal Code do not violate article 3, § 1, of the Constitution.

[2] Petitioner claims that the indeterminate sentence law (section 1168, Pen. Code) is unconstitutional as to him for the reason that it is ex post facto. This contention is based upon the fact that at the time the offense was committed section 1588 of the Penal Code provided for a reduction from the full term of the sentence imposed by the court of certain credits for good behavior during imprisonment, which, in the case of the petitioner, would reduce the maximum term of imprisonment from ten years to six years and five months in the event that he earned full credit for good behavior. The question resolves itself into this, Does the indeterminate sentence law substitute the will and discretion of the board of prison directors as to the time when the prisoner is to be released for the fixed right to a deduction from his term for good conduct? If it substitutes the discretion of the board of prison directors for the statutory right, then we must hold the law ex post facto, even though the board of prison directors in the exercise of their discretion might deal more favorably with the prisoner than he would be entitled to under the law giving him definite credits for good conduct. We are satisfied that it was the intention of the Legislature in adopting the plan of indeterminate sentence to do away with the legislative plan theretofore in force, by which certain fixed credits for good conduct were given. This law provides that:

> "The governing authority of the * * * prison * * * shall determine * * * what length of time * * * such person shall be confined, unless the sentence be sooner terminated by commutation or pardon by the Governor of the state; and if it be determined that such person so sentenced be released before the expiration of the maximum period for which he is sentenced, then such person shall be released at such time as the governing board, commission or other authority may determine."

If the board of the prison does not fix the length of time which the prisoner is to serve until the time they are ready to grant him his discharge, there is obviously no opportunity for the operation of the good credit system, for the prisoner is immediately and completely released. On the other hand, if they fix a future time for his release, if the law concerning credit for good conduct applies, then the prisoner will not be released "at such time as the governing board may determine," but at some time before that time has arrived. Subdivision "f" provides for a release in any event "on serving the maximum punishment provided by law for the offense of which such person was convicted." This law then provides that the prisoner shall serve the maximum term unless before that time the board fixes a shorter time and grants a release. For this reason the law is unconstitutional and ex post facto as to the petitioner, whose offense was committed before the enactment of the law. Murphy v. Commonwealth, 172 Mass. 264, 52 N. E. 505, 43 L. R. A. 154, 70 Am. St. Rep. 266; State v. Tyree, supra.

[3] It does not follow, however, that the petitioner is entitled to his discharge, for if, as we hold, the indeterminate sentence law is not applicable to him because ex post facto,

there remains ample provision for his sentence and imprisonment under the law as it stood at the time of the commission of the crime. Sections 12 and 13 of the Penal Code provide that the term of the imprisonment shall be fixed by the court. Section 1191 et seq., Penal Code, provide the method and manner of imposing sentence, and section 1588 of the Penal Code provides deductions from the term so fixed by the court of credits for good conduct when earned. None of these sections is expressly repealed by section 1168, Penal Code, and they are repealed by implication only so far as section 1168 is inconsistent therewith. As we hold that this latter section does not apply to persons convicted of offenses committed previous to its enactment, because ex post facto as to them, it follows that as to such persons there is no repeal by implication of sections 12, 13, and 1588. Having been tried and found guilty of the crime of manslaughter, as appears from the return to the writ, the petitioner is not entitled to an absolute discharge, but must be returned to the superior court of Mendocino county for sentence. Section 1493, Pen. Code. Section 1202, Penal Code, providing that a new trial should be granted unless judgment is pronounced within the time limited in section 1191, Penal Code, has no application to a case of this kind, in which a sentence has been imposed.

It is ordered that the warden of the state prison at San Quentin deliver the petitioner to the sheriff of the county of Mendocino, to whose custody he is remanded, for judgment by the superior court upon the conviction.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; RICHARDS, Judge pro tem.

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177 Cal. 783

LALLY v. KUSTER. (L. A. 4129.)

(Supreme Court of California. March 21, 1918.)

1. Attorney and Client 🔑108—Duties of Attorney—Instructions of Clients.
It is the duty of an attorney to follow the specific instructions of his client, except in mere matters of detail in conduct of suit; and he is liable for loss from failure to follow such instructions with a reasonable promptness and care.

2. Attorney and Client 🔑112 — Duties and Liabilities of Attorney — Actions for Negligence—Findings.
That an attorney, instructed by his client to push a suit to judgment as quickly as possible, delayed the same more than four years, the suit being dismissed for lack of diligent prosecution, establishes negligence, making the attorney liable for attending loss.

3. Attorney and Client 🔑129(2)—Liability of Attorney—Actions for Negligence—Pleading and Evidence.
The burden rests upon a client, suing his attorney for negligent failure to collect a mortgage, to allege and prove every fact necessary to establish such liability, including proof of successful termination of foreclosure suit and collection of judgment, but for attorney's negligence.

4. Attorney and Client 🔑129(2)—Liability of Attorney to Client—Actions for Negligence—Damages.
Evidence, in suit by client against attorney for negligence in permitting a foreclosure suit to be dismissed for want of prosecution, *held* insufficient to sustain a finding that plaintiff could not have secured judgment of foreclosure.

5. Attorney and Client 🔑129(2)—Liability of Client—Action for Negligence—Defense.
In an action by client for attorney's negligence in permitting dismissal of foreclosure suit for want of prosecution, the defense that the proximate cause of loss was client's failure to appeal from dismissal is not sustained, where such dismissal was proper.

6. Mortgages 🔑475 — Foreclosure — Dismissal for Want of Prosecution.
It is proper for the court, upon motion to dismiss foreclosure suit for want of prosecution, to consider that delay may have been for unfair advantage, and to consider the merits.

7. Damages 🔑62(4)—Duty to Prevent or Reduce Attorney's Negligence.
A client, asking damages from attorney for negligent dismissal of foreclosure suit for want of prosecution, was not bound to bring a new foreclosure suit in hope of avoiding statute of limitations and being successful.

8. Attorney and Client 🔑129(4)—Liability of Attorney to Client—Actions for Negligence—Measure of Damages.
The measure of damages to client for loss caused by attorney's negligence in permitting dismissal of foreclosure suit is the amount that could have been recovered, less the actual value, if any, to the client of the note and mortgage barred by limitations, to be determined from the evidence.

Department 2. Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Marie Lally, formerly Marie Fleming Everest Brown Eastes, against Edward G. Kuster. Judgment for defendant, and plaintiff appeals. Reversed.

Sidney J. Parsons, of Los Angeles, for appellant. Edward G. Kuster, Gilbert A. McElroy, and H. M. Young, all of Los Angeles, and G. W. Butterworth, for respondent.

WILBUR, J. This is an appeal from a judgment in favor of the defendant. The action was brought by the plaintiff to recover damages for neglect by said respondent as appellant's attorney in the collection of a note and mortgage. Two questions are presented by the appeal: Was the respondent guilty of neglect, and, if so, was the appellant damaged thereby? These issues having been determined by the lower court in favor of the respondent, we are to determine whether or not there is substantial evidence to support its findings.

[1, 2] On June 10, 1907, appellant employed respondent to collect an overdue note and mortgage for $1,767.38, against which the statute of limitations would run, unless suit was brought, October 16, 1907. This note and

mortgage were placed in respondent's hands July 20, 1907. Suit was begun on October 16, 1907. Defendant therein demurred to an amended complaint June 17, 1909; the demurrer was never presented to the court, and defendant was never required to answer. Four years and seven months after suit brought, on May 16, 1912, the suit was dismissed by the superior court for lack of diligence in the prosecution thereof, and for lack of merit. During all this time the appellant was pressing respondent to bring said case to a determination, on April 7, 1908, writing:

> "I wish you would push the case and get judgment as soon as possible."

On June 2, 1909, Mr. Tomlinson wrote respondent:

> "Both Mr. and Mrs. Eastes [now Lally, appellant] are exceedingly anxious to have this case brought to an early trial. Of course they desire to win it, but the main point is to get a decision."

> "An attorney's duty, where he is specially instructed, is to follow the instructions of his client, except as to matter of detail connected with the conduct of the suit, and he is liable for all losses resulting from its failure to follow such instructions with reasonable promptness and care." 6 Corpus Juris, p. 204, § 234.

Respondent's position is that in his best judgment as an attorney at law, the policy of delay was deliberately adopted, owing to the strength of an anticipated defense, hereinafter stated at length, and the prospect that the defendant therein, her own principal witness in the case, would die, and that thereafter the suit could be prosecuted with a better prospect of success, and that such policy of delay was adhered to with deliberate purpose, notwithstanding the ever-growing prospect of a dismissal for lack of diligent prosecution; that his judgment was fairly exercised and reasonably skillful, and that he is not therefore chargeable with negligence. Respondent relies upon the rule that:

> "Where an attorney is given full discretion to pursue any such course to secure the collection of a debt as he may deem best, he is not liable for adopting a course that he may consider proper under the circumstances, although the debt may be thereby lost, unless it is shown that his error of judgment was due to a lack of knowledge of plain and elementary principles which every attorney should know." 6 Corpus Juris, p. 701.

Respondent also relies upon the rule that:

> "An attorney must be held to undertake to use a reasonable degree of care and skill, and to possess to a reasonable extent the knowledge requisite to a proper performance of the duties of his profession. If injury results to the client as a proximate consequence of the want of such knowledge or skill, or from the failure to exercise such care, he must respond in damages to the extent of the injury sustained by his client. * * * An attorney, however, is not liable for every mistake that may occur in practice. If he is fairly capacitated to discharge the duties ordinarily incumbent upon one of his profession, and acts with a proper degree of attention, with reasonable care, and to the best of his skill and knowledge," he will not be responsible for a mere error of judgment when he consults his client, and the latter, after being informed of the legal status of the case, approves the course the attorney proposes to pursue. 6 Corpus Juris, pp. 696, 697.

Without attempting to analyze in detail the voluminous correspondence between the parties, it seems sufficient to say that respondent fully disclosed his plan of delay to appellant in a letter of May 27, 1909, and also fully and fairly presented the hazard of such a course, and, if appellant had acquiesced in that position, or left it to respondent's judgment, we would unhesitatingly affirm the lower court. Instead of such approval, Mr. Tomlinson wrote the above-quoted letter of June 2, 1909, in addition stating therein:

> "I trust you will leave no stone unturned to get a very early decision, and above all, no time should be lost in getting service on Mrs. Brown" (the defendant in the foreclosure suit).

Respondent apparently acquiesced in these instructions, and on January 13, 1910, wrote. advising appellant not to pay taxes payable in April (1910), "before which time I hope this case will be tried and decided." On January 31, 1910, respondent wrote that he would try to get Mrs. Brown's attorney to file an answer. "Thereupon I will have it set for trial at the earliest possible date." Nothing was done in court for more than two years thereafter, when, in response to respondent's motion to restore the demurrer to the calendar, the defendant, Mrs. Brown, succeeded in having the case dismissed. We have here, then, a direct loss due to disobedience of the client's instructions, for which respondent is liable. We have not quoted respondent's testimony nor other evidence concerning the wisdom of his course. The appellant sought a decision of the court on the merits of the case; with the best of motives no doubt, this was prevented by respondent's course. The lower court was in error in deciding against the appellant on this undisputed testimony.

[3] As to damages. The lower court found appellant's mortgage was uncollectible, as it had been paid. In considering the evidence on that subject, it is necessary to bear in mind the rule as to the burden of proof.

> "In a suit by a client against an attorney for negligence in conducting the collection of a claim, whereby the debt was lost, the burden rests on the former to allege and prove every fact essential to establish such liability. He must allege and prove that the claim was turned over to the attorney for collection; that there was a failure to collect; that this failure was due to the culpable neglect of the attorney; and that, but for such negligence, the debt could, or would, have been collected. Hence, where a claim is alleged to have been lost by an attorney's negligence, in order to recover more than nominal damages it must be shown that it was a valid subsisting debt, and that the debtor was solvent." 6 Corpus Juris, p. 710, § 260, cited as authority in Vooth v. McEachen, 181 N. Y. 28, 73 N. E. 488, 2 Ann. Cas. 601.

[4] The question here, then, is whether or not there was substantial evidence to justify the trial court in holding that there was no debt which could have been collected by the respondent, and therefore that the appellant

was not injured by the conduct of the respondent. In determining this matter, in view of the decision of the trial court against the validity of the claim, the question being a mixed one of law and fact, we are bound to take the view of the evidence most strongly against the appellant. This view of the evidence tends to show the following state of facts: That Mrs. Brown, the defendant in the foreclosure suit, had known one George Brown, appellant's deceased husband; had been present at his birth; at his mother's death; had from time to time cared for him, and had maintained such friendly relations with him that he addressed her as "mother"; that during the last few years of his life he came to her home in Los Angeles and lived with her as a boarder in her home upon the premises secured by the mortgage sought to be foreclosed by the appellant; that he never paid his board bill, although he had agreed to do so; that, learning that she was being pressed by the holder of a mortgage upon her premises, he told her that he would take care of the matter and see that it was paid off. For that purpose he requested that she deed the property to him; that he accepted the deed and later reconveyed the same to her, with the information that she would never be troubled by the mortgage again. He had in fact secured the release of the mortgage in question by making the renewal mortgage upon the premises, later assigned to and sought to be foreclosed by appellant, his widow. Upon the deed reconveying the property to her being delivered, she discovered that it provided that she "assumed and agreed to pay" a mortgage of $1,767.38, the mortgage here in question. She therefore corresponded with George Brown, who had left her home and married the appellant, asking him to do something for her, and finally received information from him that it had been paid. In order to explain what had actually occurred it will be necessary to give some of the details concerning the source from which the mortgage was "paid." George Brown's father had died, leaving him property in trust to three trustees, one of whom, his stepmother, having married a man named Johnson, after the death of the father of George Brown, was named Sarah Johnson. By the terms of the trust the property was to be held for George Brown until he was 30 years old, during which period, after arriving at the age of 25, he was to receive the income therefrom, and upon attaining the age of 30 years it was to be turned over to him, or if he died before that age it was to be turned over to his surviving wife. The trustees, upon the request of George Brown, paid out from this trust fund the face value of the mortgage and interest, and took an assignment thereof from the mortgagee to themselves as trustees. It was undoubtedly the expectation of all concerned that upon George attaining 30 years of age, the mortgage would be turned over to him, he would satisfy the same of record, and the whole matter would be disposed of. No collection of interest was made from Mrs. Brown, the defendant in the foreclosure proceeding. George Brown died at the age of 28. In pursuance of the above-mentioned will and trust thereunder the trustees turned over all the balance of the property held by them in trust for the deceased and his surviving wife to the appellant herein, his surviving wife, including, among other assets, the mortgage in question. The plaintiff, of course, secured no greater rights against Mrs. Brown, the defendant in the foreclosure suit, than the trustees had; but the mortgage note was not extinguished by payment thereof or by operation of law. George Brown, as against the appellant, was entitled to the interest on the fund represented by his mortgage note, and to that extent the interest may be considered as paid or extinguished, but he had no right to the principal fund invested in said note unless he lived to be 30 years of age. Upon his death it belonged to his surviving wife. The trustees accepted and treated the mortgage as an asset in their hands, and accounted for the same to the court in the trustee's proceedings. So far as the defendant in the foreclosure proceedings, Mrs. Brown, was concerned, she was not entitled to complain of the failure of George Brown to make her a gift. It was not claimed that he owed her the amount of the mortgage. We cannot assume in this case that the court in the trial of the mortgage foreclosure proceeding would have come to an erroneous conclusion because of sympathy for the defendant, Mrs. Brown. The utmost that we can assume on the appeal of the instant case is that the most favorable decree she could have secured would have been one based upon the truth of her testimony and all the inferences properly deducible from that testimony. On this appeal this court is substantially in the situation that it would be in reviewing the decision of the trial court in the mortgage foreclosure proceeding had the evidence offered here been introduced in that case and the decision therein been favorable to the defendant, Mrs. Brown.

[5-7] Respondent claims that the judgment of dismissal for lack of diligence was erroneous; that he was prepared to seek a rehearing upon that matter, and in case of failure thereon to appeal from the order. He contends that such an appeal would have been successful, and that therefore the proximate cause of the loss to the appellant was the failure to take such an appeal. He also claims that appellant should have brought a new suit to foreclose the mortgage in question, and should not rest upon the proposition that the mortgage was barred by the statute of limitation; that until she had actually been defeated in a new proceeding to foreclose by a plea of the statute of lim-

itation she cannot be heard to say that a loss had actually accrued to her.

[8] With regard to the failure to appeal from the judgment of dismissal: The appellant abandoned the appeal after being advised by the respondent that, in his judgment, the appeal would be successful, but, even if successful, that she would ultimately lose the case and that she consented thereto. In support of the judgment of the trial court we must accept the testimony of the respondent on this matter and consider the effect of such abandonment, and whether or not the loss resulted therefrom. Respondent contends, and it is true, that the merits of a case ought not to be decided on a motion to dismiss. But it is proper for the court upon a motion to dismiss for lack of diligence in prosecution to take into consideration the fact that the delay may have been intentional and to secure an unfair advantage. In that view of the case it was proper for the trial court to consider the nature and character of the case and the nature of the proposed defense, and the probability or possibility of such defense being successful. We hold that the judgment of dismissal in that case was proper. Was the applicant bound to bring a new action of foreclosure in order to have it formally adjudicated that her claim was barred, or in the hope that the defendant therein would not plead the statute? In this connection it may be noted that the respondent is relying upon two entirely inconsistent defenses: One, the statute of limitations, on which he claims that appellant's right of action against him accrued at the time of the first disobedience of the orders of his client in 1907 or 1908; and the other, that it never accrued, as, he contends, appellant was bound to await the result of a second foreclosure suit. Neither question is free from difficulty, and yet where the disobedience complained of consists in delay only, the cause of action cannot be said to arise until such delay has resulted in some injury, as it did when the court dismissed the case because of the delay. The question then is, What damage accrued to the appellant at the time of the dismissal of her suit to foreclose the mortgage? If we assume, as respondent contends we should, that there was a possibility that the defendant in the new foreclosure proceedings might not plead the statute of limitations, and that therefore the suit might be successful, or if we assume that the cloud upon the record title, due to the recordation of the mortgage, was of some value, it does not follow that the appellant would have to wait until it was finally determined in court that these rights were valueless; for at the time her right of action accrued she would be entitled to recover whatever damages she had then suffered. The measure of damages then accruing to the appellant would be the loss caused by the dismissal, which would be the amount that could have been recovered in foreclosure proceedings, less the actual value, if any, in the barred note and mortgage to the appellant. This value was to be determined by the trial court from the evidence on that subject before it.

Judgment and order reversed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

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36 Cal. App. 258

RATTRAY v. WICKERSHEIM IMPLEMENT CO. (Civ. 2034.)

(District Court of Appeal, Second District, California. Feb. 11, 1913.)

1. APPEAL AND ERROR ⇨757(1) — BRIEF — TYPEWRITTEN RECORD—EXTENT OF REVIEW.

Where the only record on appeal consists of a typewritten transcript, the court need go no further than to those portions of the record which have been printed in the briefs, since it is presumed that by their briefs counsel have submitted all portions of record which they desire to call to attention of court, in view of Code Civ. Proc. § 953c, providing that on such appeal the parties must print in their briefs such portions of the record as they desire to call to the attention of the court.

2. APPEAL AND ERROR ⇨927(3) — REVIEW — MOTION FOR NONSUIT—PRESUMPTION.

To determine whether the case presented was sufficient to defeat motion for nonsuit, the court on appeal must allow plaintiff the benefit of all facts admitted by the answer, together with all other facts which the evidence tends to prove.

3. CORPORATIONS ⇨300—EMPLOYING AGENT TO SELL STOCK—AUTHORITY OF PRESIDENT.

That W. was president and manager of defendant corporation did not authorize him to sell shares of stock, to determine the price for which they should be sold, or to employ an agent to find purchasers.

4. CORPORATIONS ⇨432(12)—SALE OF STOCK AT LESS THAN PAR — AUTHORITY OF PRESIDENT.

That after president of defendant corporation had employed plaintiff to sell corporate stock, and before plaintiff had found a purchaser, the board of directors authorized the president to sell the stock at par, does not tend to establish the president's authority to accept offer made by such purchaser to buy stock at less than par.

5. BROKERS ⇨49(3) — VARIANCE BETWEEN CONTRACTS TENDERED AND AUTHORIZED.

To entitle plaintiff to commission in accordance with an alleged oral agreement to procure a purchaser of stock, it was necessary to show that defendant corporation had given authority to sell stock at a price corresponding to the offer made by the purchasers procured by plaintiff.

6. BROKERS ⇨49(3) — ACTION FOR COMMISSION—PROOF.

Where purchaser's offer was to purchase stock at less than par, and the proof failed to show that defendant corporation ever offered to sell stock at less than par, the defect in plaintiff's case was not cured by answer which stated that defendant entered into negotiations for sale of stock to such purchaser, but that he failed to purchase.

7. **Brokers** ⚷49(3) — **Action for Commission—Estoppel.**

Neither the admissions in defendant's answer that defendant corporation entered into negotiations with purchaser of stock procured by plaintiff nor the knowledge of the president or secretary that plaintiff was endeavoring to procure investors in the corporation are sufficient to estop defendant from relying upon defense that plaintiff was not authorized to procure a purchaser at the price which the purchaser procured proposed to pay.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by W. S. Rattray against the Wickersheim Implement Company. Judgment for defendant, and plaintiff appeals. Affirmed.

James E. Mahon and Alfred H. McAdoo, both of Los Angeles, for appellant. Head & Marks, of Fullerton, for respondent.

CONREY, P. J. At the trial of this action the court granted the defendant's motion for a nonsuit. Plaintiff's appeal is from the judgment.

By his action the plaintiff seeks to recover commissions in accordance with an alleged oral agreement. William J. Wickersheim was the president and general manager of defendant company. A condensed statement of the plaintiff's testimony is as follows:

> "In August, 1914, Mr. Wickersheim came to my office and asked me if I could get him a man who would invest some money in his company. He said if I would put him in touch with a party who was able and willing to invest some money, he agreed he would give me 5 per cent. He preferred to get a man who would put in $10,000."

Thereafter Mr. Wickersheim sent to the plaintiff a letter, which the plaintiff received on March 26, 1915, as follows:

> "This is to confirm our verbal agreement in which we agreed to pay you 5 per cent. on $10,000 or more, if you are successful in securing an investment with this amount for our business."

This letter was signed "Wickersheim Implement Company, by Wm. J. Wickersheim." The plaintiff introduced to Wickersheim one F. S. Moore, who, on March 23, 1915, submitted to Wickersheim a written offer to purchase 150 shares of capital stock of defendant company for the consideration of $10,000. In response to that offer Wickersheim signed an acceptance in which it was stated that:

> "In consideration of the agreement by F. S. Moore, made this 23d day of March, I hereby agree to deliver him, upon fulfillment of the agreement, 150 shares of the capital stock of the Wickersheim Implement Company (and until such stock is issued and delivered I will deposit the same number of shares of my stock in the company in lieu of said stock)."

This acceptance was signed "Wm. J. Wickersheim, Pres. Wickersheim Implement Company." William J. Wickersheim, called as a witness for the plaintiff, testified that at the time above mentioned he owned 344 or 346 shares of the 440 shares of stock of the corporation at that time issued. On March 29, 1915, a letter was sent to the plaintiff, signed by the company by Wickersheim, as follows:

> "I herewith cancel our verbal agreement in which we agreed to pay you 5 per cent. on the sale of $10,000 worth or more of our stock, with or without services, and which was confirmed in our letter of March 25, 1915."

S. J. Laporte was the secretary of defendant company. In connection with the testimony of Laporte, called as a witness for the plaintiff, the plaintiff introduced in evidence a record, which we will assume was part of the minutes of the board of directors, although that fact does not distinctly and positively appear. Those minutes show that on February 15, 1915, a motion was adopted to the effect that the president, Wickersheim, was authorized to sell the treasury stock of the corporation at the par value of $100 per share. Laporte testified that none of the directors except Wickersheim and himself, knew of the Moore transaction.

The motion for nonsuit was based upon the grounds, first, that the plaintiff failed to show any authority on behalf of the corporation to authorize the employment of an agent, or the sale of stock, or the authorization by the corporation of the contract upon which the plaintiff bases his action; second, that the plaintiff failed to show that Moore was at any time able to make any investment in the corporation or to perform his alleged contract.

The complaint counted upon an oral contract made between the plaintiff and the defendant by the terms of which it was covenanted and agreed that, in the event that plaintiff would procure an investor or investors with $10,000 or more to invest in the business of the defendant, the defendant would pay to the plaintiff for said services 5 per cent. on the amount so procured. It was alleged that pursuant to that contract plaintiff procured Moore as such investor, who was ready, willing, and able to invest the sum of $10,000 in said business of the defendant, "which said investment was, on or about the 23d day of March, 1915, accepted by the defendant herein." There were other counts in the complaint which we omit to describe, since they cannot affect the merits of this appeal.

The answer of defendant denied that plaintiff and defendant entered into the contract stated in the complaint, and denied—

> "that defendant agreed to pay any sum as commission or bonus or any payment for the services of the plaintiff in securing an investor or investors to invest in the business of defendant, except that defendant agreed with plaintiff to pay plaintiff a commission of 5 per cent. upon the stock of defendant sold by plaintiff, providing that plaintiff sold treasury stock of the defendant corporation in a total amount of $10,000 or more."

The answer denied that the plaintiff procured Moore to invest $10,000 or any other sum in the business of defendant, and denied that Moore or any person was willing, ready, or able to invest in the said business of defendant the sum of $10,000 or any other sum. The answer alleged that said Moore and defendant entered into negotiations for the sale of certain stock of defendant to said Moore, but that Moore failed and refused to purchase any stock of defendant corporation or invest any money with it. The answer further alleged that, after the 1st day of September, 1914, and before the commencement of this action, it was agreed between plaintiff and defendant that if the plaintiff sold treasury stock of the defendant corporation in a total amount of $10,000 or more, defendant would pay plaintiff a commission of 5 per cent. on all stock so sold by the plaintiff, providing said sales aggregated an amount of $10,000 or more.

[1] The only record on appeal consists of a typewritten transcript. The foregoing statement of facts and of the issues presented in the case is a substantially complete statement of all of those portions of the record which have been printed in the briefs. We need not go further, since it is presumed that by their briefs counsel have submitted to us all portions of the record which they desire to call to our attention. Code Civ. Proc. § 953c.

[2-4] In order to determine whether the case presented was sufficient to defeat a motion for nonsuit upon the grounds stated, we must allow to the plaintiff the benefit of all facts admitted by the answer, together with all other facts which the evidence tended to prove. The fact that Wickersheim was president and general manager of the corporation did not authorize Wickersheim to sell shares of stock or to determine the price for which they would be sold, or to employ an agent to find purchasers for stock. Such transactions are not within the scope of the business which either a president or a general manager is, by virtue of his office, qualified to transact for the corporation. Northwestern Packing Co. v. Whitney, 5 Cal. App. 105, 89 Pac. 981. The fact that afterward, and before the plaintiff had found Mr. Moore, the board of directors authorized the president to sell the treasury stock at par, does not tend to establish the president's authority to accept the offer made by Moore, for that was a proposition to buy stock at less than par.

In order to make even a plausible argument, appellant finds it necessary to resort to facts admitted in defendant's answer. These admitted facts were, that defendant agreed to pay plaintiff a commission of 5 per cent. upon the stock of defendant sold by plaintiff, if plaintiff sold treasury stock of defendant corporation in the total amount of $10,000 or more. Since the evidence shows that in all of the negotiations Wickersheim was the only person who acted for defendant, the answer may fairly be understood as admitting that he was authorized to make the agreement with plaintiff as it was admitted that it was made. But it should also be understood from the pleading and proof thus made that the plaintiff would not be deemed to have "sold" stock until he produced a purchaser who was able, ready, and willing to buy the stock on terms of sale authorized by the corporation.

[5-7] To establish complete performance on the part of plaintiff, it was necessary to show that the corporation had given authority to sell the stock at a price corresponding to the offer made by Moore. That offer was to pay for the stock only two-thirds of its par value. There is no admission in the answer, nor is there any evidence, that the corporation ever offered to sell stock at less than par, or that it authorized Wickersheim to arrange for a sale at less than par. This defect in the plaintiff's case is not cured by the statement which was made in the answer that Moore and the defendant entered into negotiations for the sale of certain stock of defendant to Moore, but that he had failed and refused to invest any money in the corporation or purchase any of its stock. Neither these facts admitted by the answer, nor the knowledge by Wickersheim and by the secretary of the corporation that the plaintiff was endeavoring to secure investors in the corporation, are sufficient to estop the corporation from relying upon its defense that it was not shown to have authorized the plaintiff to secure a purchaser of stock at the price which Moore proposed to pay. It is directly established by the evidence that a majority of the board of directors did not know of the Moore transaction. It does not appear that the board of directors, or that any of its directors other than Wickersheim and Laporte, knew that any effort was being made to sell stock at a price less than its par value. We agree with the rule to which counsel direct our attention that:

> "Where the special character of the agency is not known and the principal has clothed the agent with apparent powers, strangers in dealing with the agent may assume that such apparent powers are possessed. The principal cannot by private communications with his agent limit the authority which he allows the agent to assume." Eddy v. American Amusement Co., 21 Cal. App. 487, 132 Pac. 83.

This doctrine of ostensible agency is fully recognized, but we think that it is not illustrated by the facts of the case before us.

The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

(36 Cal. App. 225)

SKINKLE v. AMERICAN NAT. BANK OF SAN FRANCISCO. (Civ. 2189.)

(District Court of Appeal, First District, California. Feb. 8, 1918.)

1. GUARANTY ⟹36(8)—CONSTRUCTION—SEPARATE INSTRUMENTS.

Where a landlord assigned lease with rents due thereunder to his grantee, and a third person guaranteed payment of all rents, the guaranty by express terms operating prospectively only, it applied only to rentals thereafter accruing, though the contemporaneous assignment expressly included prior due rents.

2. APPEAL AND ERROR ⟹704(2)—REVIEW — FINDINGS.

On an appeal on the judgment roll alone, where the court found that the guaranty was to secure payment of rent accruing after its date, the court on appeal must accept such finding in the absence of attack as conclusive and final.

3. GUARANTY ⟹107—RIGHTS OF GUARANTOR — DEPOSITS AS SURETY — WRONGFUL PAYMENT.

Where payment of rentals to become due was guaranteed and the money deposited to secure payment, the bank, which on demand paid out money for rent accruing prior to guaranty, was liable to the guarantor, since the doctrine of strictissimi juris applied.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by A. Skinkle against the American National Bank of San Francisco. From the judgment rendered, the defendant appeals on the judgment roll. Affirmed.

Carter P. Pomeroy, of San Francisco, for appellant. Houghton & Houghton, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from the judgment rendered herein on the judgment roll alone. The sole question involved is the proper construction of a guaranty agreement.

The facts as disclosed by the pleadings and findings are as follows: On the 3d day of August, 1915, one Thomas W. Butcher, being then the owner of certain real property situated in the city and county of San Francisco, conveyed the same on said day to the Cutting Packing Company, a corporation. At the time of the conveyance the property was subject to a lease for a period of five years from the 1st day of December, 1914, and the rent thereunder at the time of the conveyance and until the expiration thereof was $500 a month. By a written instrument executed at the same time as the deed, Butcher formally assigned to his grantee the rents due under the lease that had accrued subsequent to July 1, 1915. On the date of the sale and assignment installments of rent accruing on the 1st day of July and on the 1st day of August, 1915, aggregating the sum of $1,000, were due and unpaid and the right thereto passed by the assignment to the grantee named. Contemporaneously with the execution of these instruments, one George Downing, the assignor of the plaintiff herein executed and delivered to the Cutting Packing Company a written guaranty in respect to certain rents due under this lease. This instrument recited at length the terms of the lease and the assignment thereof, the extent of the liability thereunder, and also provided for the deposit of the sum of $6,000 with the American National Bank as security for the fulfillment of its terms, and authorized the bank, upon receiving written notice from the lessor that any installment of rent was due from the lessees, to pay the same out of the moneys so deposited with it. Thereafter, on the 3d day of November, 1915, the Cutting Packing Company notified the bank by a written communication that the installments of rent due under the lease for the months of July, August, September, and October, 1915, were in default, and demanded payment of the same out of the said sum of $6,000 so deposited with it, and the bank thereupon paid the amount to the packing company. The present action was brought by the plaintiff as assignee of Downing, the guarantor, against the bank, to recover $1,000 being a portion of the amount so paid by the bank on account of the installments of rent for the months of July and August, 1915.

[1] The action proceeds on the theory that the guaranty by its terms was only intended to cover installments of rent that might become in default under the terms of the said lease subsequent to the 3d day of August, 1915, the day of the execution of the guaranty, and that the bank in paying the installments for the months of July and August exceeded its authority, and, consequently, was liable to plaintiff for the amount of such payment. The trial court so construed the guaranty, and gave judgment to the plaintiff for the amount sued for. We are of the opinion that the conclusion reached by the trial court was correct. By its express terms the guaranty operated prospectively only. Counsel for the appellant insists, however, that the guaranty agreement should be read in connection with the assignment of lease, and that the two documents should be construed together. Whether the guaranty agreement be so read or not, it is plain that the intention of the parties was that the guaranty should operate prospectively, and no other effect can be given to its terms and provisions. The assignment of the lease contains express provisions which operate retroactively and prospectively so as to comprehend within its terms monthly rentals from the 1st day of July, 1915, which passed to the packing company. On the other hand, the guaranty agreement, drawn and executed contemporaneously with the assign-

ment, though between different parties, contains express provisions which operate prospectively alone. If the parties intended that the guaranty agreement was to extend to arrears in rent, they certainly would have adopted the same explicit language as they used in the assignment, namely, "all and singular the rents that have or may accrue under and by reason of the terms of said lease or of any part thereof." The difference in the phraseology of the two instruments, considering the circumstances of their execution, shows that the parties had the subject in mind, and affords almost conclusive evidence that it was not the intention to have the guaranty agreement operate retroactively. Therefore, giving the two instruments the construction asked for affords appellant no relief; and, standing alone, the language of the guaranty agreement is plain and unambiguous, and is prospective merely in its operation. In either case, the contract is susceptible of but one construction, and we fail to see how the trial court could have come to a different conclusion upon the subject.

[2] Aside from this, the findings of the court are to the effect that the guaranty was "to secure the payment of rentals to thereafter become due." This appeal is on the judgment roll alone, and we cannot know upon what evidence, aside from the lease and assignment, the finding may be based, and we must upon this appeal accept such finding, in the absence of attack, as conclusive and final.

[3] It is further argued that, irrespective of the construction that may be given to the guaranty agreement, the bank cannot be held liable for making payment of the installments of rent in question, for the reason that its action in so doing was based upon a mere misapprehension of the proper legal effect of the guaranty, the instructions in which, it is claimed, were ambiguous. As we have before stated, the terms of the guaranty agreement, upon which alone the bank was authorized to act, were clear and explicit and free from ambiguity. It bound the guarantor to pay rentals that "shall become in default" under the lease upon the amount deposited, and did not purport to guarantee the payment of all rentals therein reserved. The only interpretation permissible by the bank in respect to this provision was that the rentals to be paid were those accruing after the date of the guaranty of August 3, 1915, the date as to which that agreement speaks. The doctrine of strictissimi juris applies.

Again, it is contended that the bank was absolved from liability for making the disputed payment by the express terms of the guaranty. What we have already said applies with equal force to this objection. The July installment was due and payable on July 1, 1915, and was in default upon the expiration of that day; the August installment was in default upon the expiration of August 1, 1915. Both these defaults were suffered prior to the guaranty agreement becoming operative, and the bank had no authority to make the payment, nor was it absolved in so doing by the agreement.

For the reasons given, the judgment is affirmed.

We concur: LENNON, P. J; BEASLY, Judge pro tem.

36 Cal. App. 233

BASHORE v. LAMBERSON. (Civ. 1789.)

(District Court of Appeal, Third District, California. Feb. 9, 1918.)

1. APPEAL AND ERROR 🔑429—NOTICE OF APPEAL—DEFECTS—WAIVER.

Where service of notice of appeal was acknowledged by respondent's attorney, the appeal is properly before the court, although notice was signed by attorney in fact; acknowledgment of service being a waiver of objection that notice of substitution of attorney had not been served.

2. APPEAL AND ERROR 🔑195—MATTERS NOT RAISED IN COURT BELOW—PARTIES.

Objection as to change of parties plaintiff and that leave of court was not obtained to file amended complaints cannot be raised for the first time on appeal.

3. TRUSTS 🔑61(3)—TERMINATION.

Under trust agreement whereby defendant trustee was to convey land when plaintiff paid amount due trustee, the trust relation ceased when, having procured judgment against plaintiff and wife, defendant caused an execution to be levied on the land to satisfy the judgment notwithstanding defendant bought the land at the execution sale.

4. JUDGMENT 🔑721—CONCLUSIVENESS—COLLATERAL ATTACK.

Where defendant trustee brought suit against plaintiff and his wife to determine amount due from them, a judgment determining what such amount was, as reduced by court on appeal, is, in the absence of fraud, conclusive as to amount due in a subsequent suit to adjust accounts between plaintiff and defendant.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by John Bashore against Charles G. Lamberson. Judgment dismissing action, and plaintiff appeals. Affirmed.

See, also, 167 Cal. 387, 139 Pac. 817.

J. C. Thomas, of Oakland, for appellant. Power & McFadzean and Jas. M. Burke, all of Visalia, for respondent.

HART, J. This action was brought to enforce an alleged trust as to the land described in the complaint in favor of the plaintiff, the legal title, it is alleged, being in the defendant, to have a commissioner appointed for the purpose of ascertaining and adjusting the accounts between the plaintiff and the defendant, and to sell said land "to satisfy the demands of the trustee and the residue thereof, amounting to something over $10,000.00, be paid to this plaintiff"; that a temporary injunction be granted, enjoining the defendant from selling the land in dispute, etc. The court sustained a demurrer to the complaint without leave to amend, and thereupon rendered judgment dismissing the action. The appeal is by the plaintiff from said judgment. The notice of appeal in this case was signed:

> "Rachel D. Bashore, Attorney in Fact for John Bashore. John Bashore, by Rachel D. Bashore, His Attorney in Fact."

[1] Respondent raises the question as to whether this is a valid notice of appeal, citing authorities to the point that the notice of appeal must be signed by the attorney of record in the trial court. Beardsley v. Frame, 73 Cal. 634, 15 Pac. 310; Prescott v. Salthouse, 53 Cal. 221; Whittle v. Renner, 55 Cal. 395; Ellis v. Bennett, 3 Pac. 801[1]; Harrigan v. Bolte, 8 Pac. 184[2]. But in Withers v. Little, 56 Cal. 370, where a notice of appeal was signed by substituted attorneys, respondent's attorneys not having been served with notice of the substitution, it was held, as stated in the syllabus:

> "That the plaintiff's attorneys, in acknowledging service of the notice, waived the objection that the notice of the substitution had not been served upon them."

In the present case service of the notice of appeal was acknowledged by respondent's attorneys, and therefore the appeal is properly before us.

[2] As to the objection regarding the change of parties plaintiff in the different pleadings and as to the point that leave of the court was not obtained to file the two amended complaints, we think such objections should have been made in the court below, and that it is too late to raise them now for the first time.

It appears that the complaint, without leave, was amended on two several occasions. In the original complaint John Bashore and his wife Rachel Bashore were the plaintiffs; in the first amended complaint Rachel D. Bashore was sole plaintiff; and in the second amended complaint John Bashore is sole plaintiff.

The second amended complaint is in two counts. In the first count it is alleged:

> That in 1900 plaintiff executed a deed of trust by two certain persons as trustees to secure an indebtedness owing by him, the property conveyed being 80 acres of land in Tulare county; that he defaulted in the payment of interest and principal of said indebtedness, and that said trustees sold said property, under the provisions of the trust deed, to one George W. Zartman, to whom plaintiff had delivered the money with which to purchase the property, and, on June 7, 1906, "the said George W. Zartman, acting for, and as the agent of this plaintiff, took a deed for the aforesaid real estate in his own name," which deed was duly recorded; "that the said sale by the said trustees, and the holding of the said land under said deed by said G. W. Zartman, was all done and performed through, under, and by the direction of the defendant Charles G. Lamberson, who was acting as the attorney for this plaintiff"; that on the 2d day of January, 1907, "without having paid for the said premises with his money, or refunding the money delivered to him by this plaintiff, the said George W. Zartman conveyed the land to defendant * * * without any consideration whatever passing from the said Zartman to this plaintiff; * * * that concurrently with the execution of said deed by the said Zartman to the defendant, and as part of the said transaction, the said defendant last aforesaid delivered to the plaintiff herein the following declaration of trust, which was duly executed by him: 'Know all men by these presents that I hereby agree to sell to John Bashore at any time within five years from the date hereof all that certain property [describing it], upon payment to me by the said John Bashore of all amounts which may be due me at such time by said John Bashore upon book accounts or promissory notes, and upon receiving such payment in full of all such book accounts or promissory notes, I agree to transfer said property to said John Bashore free and clear from all incumbrances done or suffered by me. 'I also agree that said John Bashore shall have the possession and use of said real property during the time this contract remains in force, and shall pay as a rental therefor all state, county, and district taxes of every kind which may be levied or assessed against said property. Dated January 4, 1907. [Signed] Chas. G. Lamberson.'"

It is alleged:

> That "before the term of four years next after the said trust agreement was executed by the said Charles G. Lamberson, plaintiff and his wife, Rachel D. Bashore, brought suit to terminate the terms and conditions of the said trust, and to have the said real estate sold and the proceeds applied on the debts, if any, by the said Lamberson, and the balance to be applied to the said cestui que trust; that pending the said proceedings it was discovered by the said plaintiff that he had sold and delivered to and by deed of conveyance had given to the said Rachel D. Bashore, his wife, the aforesaid real estate, by deed dated January 2, 1910."

The complaint then alleges that plaintiff and defendant attempted to settle their accounts, but were unable to do so, and that Lamberson brought suit against plaintiff and his wife to determine the amount due from them; that on the trial of said action the superior court gave judgment in favor of the plaintiff therein, Lamberson, in the sum of $12,195.97, which amount, on appeal to the Supreme Court, was reduced to $8,900.50. It is then stated:

> That both the superior court and the Supreme Court "indulged in much obiter dictum," but that the sole point decided was as to the amount due; "that said judgment as modified and corrected was made and entered on the 27th day of March, 1914, and thereafter the said defendant herein abandoned his said trust, disregarded the fact that this action was pending to adjudicate and to determine the relation of trust, * * * and caused an execution to be entered," under which the property was sold and bought by the defendant, Lamberson; that, on "the 22d day of July, 1915, and within less than a year after the sale aforesaid, the said Rachel D. Bashore redeemed the real estate described in the said trust signed by the

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[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 65 Cal. xix.

[2] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 67 Cal. xix.

said Lamberson and in this complaint, by paying the amount bid for the said real estate by the said Lamberson and interest thereon at the rate of 1 per cent. per month, which is evidenced by a certain certificate of redemption duly made, executed and signed by the sheriff of Tulare county, and delivered to Rachel D. Bashore, then the cestui que trust, and the beneficiary thereof; that the said certificate of redemption described the aforesaid real estate (giving the description and the fact of the recordation of said certificate), and the same (the land) is and remains the property of the said Rachel D. Bashore and those who hold under her, and specially this plaintiff, who, by virtue of that certain quitclaim deed duly executed by Rachel D. Bashore on the 22d day of July, 1915, and admitted to record in the office of the county recorder of Tulare county on the 22d day of July, 1915, * * * and by virtue thereof this plaintiff is the owner thereof."

It is next alleged:

"The plaintiff therefore pleads as a bar to any further acts of ownership by the said defendant the provisions of the statute of redemption, section 703 of the Code of Civil Procedure of the state of California, and alleges that under and by virtue of said section, and the provisions thereof, the effect of the said sale is terminated, and forever barred; that the provisions of the trusted estate have been by virtue of the various acts of the said defendant, Chas. G. Lamberson, violated and abandoned; that the deed made by the said Geo. W. Zartman to the said Chas. G. Lamberson ought to be set aside, held for naught, and without a valuable, or any, consideration therefor, and that this court ought to appoint a commissioner to make and execute a good and proper deed to the said real estate named in this complaint."

The second count "reincorporates" the allegations of the first cause of action as to the facts culminating in the making of said "declaration of trust on the 4th day of January, 1907," and proceeds:

"That the reason and consideration of and for the said trust was, and is, in the fact, that the said Chas. G. Lamberson had procured a deed for the said real estate, as the attorney for this plaintiff, and was acting for and in lieu of the said plaintiff, and in his room and stead, and after obtaining the said deed, simultaneously with the receipt thereof from the said Geo. W. Zartman, he, the said Chas. G. Lamberson, then and there created the said trust by making and executing the same."

The value of the property is stated to be $16,000, and it is alleged that defendant, knowing its value, "made exorbitant and inequitable charges that he might involve the same in controversy," and that said charges were made to embarrass plaintiff "and to prevent a settlement till the statute of limitations had barred the action on his trust." There is then an allegation to the effect that defendant never disputed the title of plaintiff to the property until he, the defendant, brought suit and that said Lamberson "acknowledged the rights and title to the said tract by making out, as attorney for this plaintiff a homestead on said property." There is an allegation that defendant has collected $288.50 for wheat and barley grown on the premises which should be paid to plaintiff. There is also an allegation, substantially the same as the one above quoted herein, as to the redemption of the property by Rachel D. Bashore from the sale of said property under execution to satisfy the judgment of the defendant and the quitclaiming of the land by said Rachel to the plaintiff, John Bashore. There are many other allegations in both counts to which, under our view of the case as presented, it is not necessary to refer.

As we understand the complaint, we gather therefrom that what the plaintiff is complaining of is that the judgment in the former action, even as reduced by the decision of the Supreme Court, is for a much larger sum of money than is or was actually due from the plaintiff and his wife to the defendant, and that the object of this suit is to have the trust relation once existing between the parties as to the land in question established and continued, and thus secure a readjustment of their financial differences and a reduction of the judgment.

It may parenthetically be observed that, although Lamberson held the legal title to the property at the time he obtained the judgment referred to, he caused execution to be issued upon said judgment against the property in question for the purpose of satisfying said judgment. This course was doubtless adopted for the purpose of selling and disposing of any equity either the plaintiff or his wife might have in the land, particularly the wife, to whom, it is alleged, as seen, the plaintiff by deed conveyed the property on January 2, 1910.

[3] It may be conceded that Lamberson took the conveyance of the land from Zartman for the purpose of securing the payment to him of all moneys due from the plaintiff and his wife to him, and that the written agreement whereby he agreed to convey to the plaintiff upon the payment of all such moneys created as to the said real estate a trust relation between him and the plaintiff and his wife. But, according to the complaint itself, that relation ceased to exist when Lamberson caused the land to be sold under an execution issued in the case of Lamberson v. John Bashore and Rachel D. Bashore (see 167 Cal. 387, 139 Pac. 817), to satisfy the judgment obtained by him therein, as modified by the Supreme Court. When that sale took place, the agreement creating the trust was at an end, and so, of course, was the trust relation, notwithstanding that Lamberson himself bought the land at the execution sale. Moreover, Rachel D. Bashore, as a redemptioner, redeemed the land, and thereafter conveyed it to her husband, the plaintiff in this action. When, therefore, this action was instituted, the title to and possession of the corpus of the trust had passed out of the defendant, and finally passed to the so-called cestui que trust himself.

[4] The judgment in the case between Lamberson and the Bashores is, of course, conclusive as to the amount due the former

from the latter, and cannot be attacked or challenged legally, except upon some fraud or other sufficient matter collateral or extrinsic to the questions necessarily involved, examined, and adjudicated in the proceeding or action in which said judgment was rendered. Certainly learned counsel will not contend that the testimony upon which the findings supporting the judgment were predicated could be re-examined in this action for the purpose of determining whether the judgment was thus supported, or that a judgment in a collateral action could be vitiated or set at naught even if it could be shown that it was the culmination of insufficient or perjured testimony.

The complaint here does not directly allege that the judgment was procured through the fraudulent acts or conduct of the defendant. The objection to the judgment is merely that it is for an amount in excess of the sum actually due, a question which was presumptively litigated and finally determined in the action in which the judgment was obtained.

It is very clear that the complaint states no cause of action for the relief prayed for or any relief, and that the demurrer was properly sustained.

It may be added that the opinion of Mr. Justice Melvin in the case of Lamberson v. John Bashore et al., 167 Cal. 387, 139 Pac. 817, supra, presents a full statement of the facts as found by the trial court leading to the judgment in said action, to satisfy which the real estate herein involved was sold.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

36 Cal. App. 116

PERKINS v. EDINBURG et ux. (Civ. 2038.)

(District Court of Appeal, Second District, California. Feb. 1, 1918. Rehearing Denied by Supreme Court April 1, 1918.)

1. Appeal and Error 🔑757(1) — Scope — Record—Sufficiency.

The court on appeal will assume that appellant has brought up in briefs such portions of the record as he desires to call to the court's attention, as required by Code Civ. Proc. § 953c, and will confine its statement of facts to the matters so called to its attention.

2. Appeal and Error 🔑935(2)—Presumptions—Opening Default.

Where the court granted motion to set aside an order opening default, and the record on appeal did not show the facts, the court will assume that they supported the ruling, since they may have been in dispute.

3. Judgment 🔑173—Default—Vacation.

Where default was entered in June, 1913, and in October a "copy" of stipulation for vacation thereof was filed, and a few days later a second default was entered, and in May, 1915, the original stipulation for vacation was filed and the default vacated, and answer filed, which had been verified in September, 1914, an order setting aside the order vacating the default cannot be held error without affirmative showing of good reason why the answer was not sooner filed.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Geo. H. Perkins against Everett Edinburg and wife. From an order setting aside an order opening default, defendants appeal. Affirmed.

Cates & Robinson, of Los Angeles, for appellants. Cass & Shelton, of Los Angeles, for respondent.

CONREY, P. J. This is an action to recover a sum of money alleged to be due upon contract. Judgment by default was duly entered on the 23d day of June, 1914. On October 3, 1914, there was filed in the action a document marked "copy," purporting to be a stipulation between the attorneys for the plaintiff and the attorney for the defendants to the effect "that the judgment heretofore entered therein upon default may be vacated without prejudice to either party, the said default set aside, and the defendants permitted to file their answer therein within five days after said judgment is so vacated and said default set aside." Said copy was dated September 23, 1914. On October 14, 1914, a second entry of default of the defendants was indorsed upon the complaint and a second entry of judgment was made by the clerk on October 22, 1914. On May 28, 1915, a document purporting to be the original stipulation, of which a purported copy had been filed as above stated, was filed in this action. Thereupon on the same day, May 28, 1915, the court made its order reciting the terms of said stipulation and ordered:

> "That the judgment heretofore entered in the above-entitled action, in favor of the plaintiff and against the defendants, is hereby vacated and set aside without prejudice to either party to said action, and the default of the defendants which was entered in said action is hereby set aside and the defendants are hereby given five days from this day within which to serve and file their answer to the complaint in said action."

On the same day the answer (which had been verified on September 14, 1914), was filed. Thereafter, on July 12, 1915, upon due notice, the plaintiff moved the court to set aside the order of the court made on the 28th day of May, 1915, upon the following ground:

> "That the said stipulation was given to the attorney for the defendants upon the agreement that it be filed immediately, on or about the 15th day of July, 1914, and that a duplicate of the said stipulation was thereafter filed on the 3d day of October, 1914, and the terms of the said stipulation have been fully complied with by plaintiff."

The motion was granted by order made on said 12th day of July, 1915, and the appeal is by the defendants from that order.

[1] Only a typewritten transcript on appeal has been filed herein. We assume that appellants have printed in their brief such

portions of the record as they desire to call to the attention of the court, and our statement of facts is confined to the matters thus brought to our attention. Code Civ. Proc. § 953c. There is no brief for the respondent.

[2] Counsel for appellants inform us in their brief that the motion of July 12, 1915, was heard upon affidavits and the records of the case. The minute order as printed in the brief shows that at least one affidavit was presented by the plaintiff's attorney. There has not been printed with the brief a copy of the affidavits or any portion thereof. Counsel suggest that the motion could not have been granted upon the ground that the stipulation was given in July, and they further insist that the document filed on October 3, 1914, was not an original of the stipulation, but only a copy. As to these matters the facts may have been disputed, or may have been entirely favorable to the plaintiff as shown by the affidavits; and we must assume that they did support the motion, since the court granted that motion.

[3] Appellants contend that judicial action was necessary to vacate the judgment or set aside the default, and that since there was no judicial action to that effect until May 28, 1915, appellants were entitled under the stipulation to file their answer within five days after that date. Assuming that the filing of a copy or duplicate of the stipulation did not alone vacate the judgment or set aside the default, it does not necessarily follow that the court erred in setting aside the order of May 28th. The court may have found in the affidavits ample reason to be satisfied that the stipulation had been granted by plaintiff's attorneys actually on July 14, 1914, upon the agreement stated in the motion; and that, under the circumstances shown, no good reason existed for allowing the defendants to have their default set aside in order that they might then file an "answer and cross-complaint," which on its face had been verified and ready for filing ever since the previous September.

The order is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

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36 Cal. App. 258

BEEM et al. v. REICHMAN et al. (Civ. 1776.)

(District Court of Appeal, Third District, California. Feb. 12, 1918.)

EASEMENTS ⚷61(3) — WAY OF NECESSITY — ACTION FOR ESTABLISHMENT — PLEADING AND EVIDENCE.

Under Civ. Code, § 1104, providing that a transfer of real estate creates in its favor an easement to use other real estate of the grantor in the same manner and to the same extent as it was obviously and permanently used by the grantor, for the benefit of the estate transferred, when the transfer was agreed on or completed, a grantee of land having no access to a highway, without trespassing on land of strangers, except over other land of the grantor, seeking to establish a way of necessity, must allege and prove that the road claimed to be appurtenant to the granted land was in use as such by the grantor when he conveyed to plaintiffs, and is the only road by which they can pass to and from the granted land, and is necessary to the beneficial use thereof, besides definitely locating it, and stating its width.

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by M. C. Beem and others, trustees of the town of Ft. Jones, against G. A. Reichman and another. From an adverse judgment and order, defendants appeal. Reversed, with direction.

Taylor & Tebbe, of Yreka, for appellants. H. V. Ley, of Yreka (Wm. V. Cowan, of Sacramento, of counsel), for respondents.

CHIPMAN, P. J. This is an action to have a right of way declared from plaintiffs' land over defendant Reichman's land to a highway.

It is alleged in plaintiffs' verified amended complaint: That on June 16, 1909, defendant Reichman was the owner of a certain tract of land described as follows:

> "Commencing at the northwest corner of said S. W. ¼ of S. E. ¼ of section 35, in township 44 north, of range 9 west, M. D. M., and running thence south for the distance of 600 feet to a rock set in earth; thence running east for the distance of 100 feet to a rock set in earth; thence running a little east of north for the distance of 600 feet more or less, to the north boundary line of said forty acres; and thence west along said line for the distance of 250 feet to the place of beginning"

—together with the tenements, appurtenances, etc.; that on the 16th day of June, 1909, defendant Reichman conveyed said tract of land to plaintiffs, by the above description, and that plaintiffs are now and for a long time have been in possession thereof. That defendant Reichman was on said day "also owner of the land lying on the east and south sides of said tract and between said tract and the county road leading from Ft. Jones to Yreka. That said tract is bounded on the north and west sides by lands of the Southern Pacific Company" (amended to read Central Pacific Railroad Company). It is then alleged in paragraph 6 as follows:

> "That the sole and only way from said tract to a public highway is over and across the land of said defendant G. A. Reichman from the east boundary of said tract in a southeasterly direction to the division fence between the land of said defendant G. A. Reichman and land owned by James A. Davidson and others, thence in an easterly direction and parallel with said division fence to the aforementioned county road; that said described way is the most reasonable and practical route that can be selected over and across the lands of said defendant; that there is, and for a long time has been, a road used by said defendant along the line of said route; that plaintiffs are the owners of and entitled to said right of way over the land of said defendant Reichman to the county road aforesaid, to pass and repass on foot and with

teams; and that said easement is appurtenant to the land heretofore described as having been conveyed to plaintiffs."

It is alleged that plaintiffs have requested defendants to "acquiesce in the definite locating of a right of way between said tract and the aforesaid county road, across the land of said defendant G. A. Reichman, * * * but the defendants refuse and neglect to do so"; that defendant Reichman "is still the owner of the land lying between said tract and said county road, and that said county road is the only public highway adjacent to said tract or to the lands of said defendant, Reichman; that the defendant Ft. Jones Creamery & Packing Company claims some interest therein by virtue of an option, but" said right is subject to the right of plaintiffs herein.

Defendants interposed a demurrer to the complaint for insufficiency of facts, and also on the ground of uncertainty, in that "it cannot be told whether plaintiff intends to allege that, at the time when it is claimed that defendant G. A. Reichman conveyed said property to plaintiff, said property was bounded as described in said complaint. Neither can it be told whether or not at the time of said conveyance there was a public highway running past the said land." For like reason the complaint is alleged to be ambiguous and unintelligible. The demurrer was overruled, and defendants answered: Admitted that defendant Reichman was, on June 16, 1909, the owner of the tract conveyed to plaintiff, "and was also owner of the land lying on the east and south sides of said tract and between said tract and the county road leading from Ft. Jones to Yreka," but for lack of knowledge and on information and belief denied that the Central Pacific Company was owner of the land on the north and west sides of said land; alleged that the said tract of land was conveyed to plaintiffs upon certain described conditions, but, as there was no evidence touching this matter, they need not be further noticed; so, also, no evidence was offered as to certain averments of the answer concerning a road now existing from Ft. Jones to the west side of the tract in question. Defendants made certain denials of the averments in said paragraph 6 of the complaint, which will be hereinafter noted.

The cause was tried by the court without a jury. The court made the following finding of fact:

> "That all the allegations of the amended complaint on file herein are true"

—and, as conclusion of law, the court found:

> "That plaintiffs are entitled to a decree of this court determining and adjudging that plaintiffs are the owners of, and entitled to, the right of way described in the complaint on file herein, said right of way of the minimum statutory width of 20 feet."

The decree adjudged plaintiffs "entitled to an easement for right of way over and across the lands of defendant G. A. Reichman, to pass and repass on foot and with teams (said easement not to exceed the minimum statutory width of 20 feet), extending from the (respondents say in their brief the word 'east' should be here inserted) boundary of their parcel of land, described in the amended complaint herein, in a southeasterly direction to the division fence between the land of defendant G. A. Reichman and lands owned by James A. Davidson and others, thence in an easterly direction and parallel with said division fence to the county road leading from Ft. Jones to Yreka and following throughout its length the road mentioned in said amended complaint and therein alleged to exist across the land of said defendant G. A. Reichman." Defendants appeal from the judgment and from the order denying their motion for a new trial.

In their specifications of error, defendants challenge the sufficiency of the evidence to support the finding that the facts set forth in paragraph 6 of the amended complaint are true. They challenge the sufficiency of the evidence to support the finding that plaintiffs have requested defendants to acquiesce in definitely locating a right of way across defendant Reichman's land from said tract to the public highway; also that said defendant Reichman is still the owner of the land lying between said tract and said county road, and that said county road is the only public highway adjacent to said tract or to the lands of said defendant Reichman; that the judgment is contrary to law in that there are no findings of fact to support it; that it is not definite or certain as to the location of the land claimed as a right of way and is uncertain as to the servitude to be imposed upon the lands of defendant Reichman, and the location of the easement cannot be determined from the judgment.

Plaintiffs introduced no witnesses; the evidence in support of the findings and judgment being entirely documentary, except as further supplied by the admissions of defendants in their answer.

Plaintiffs introduced a United States patent to the Central Pacific Railroad Company to the N. W. ¼ of the S. E. ¼, the S. W. ¼ and the N. ½ of section 35, township 44 north, range 9 west, M. D. M., which includes the tract conveyed to plaintiffs by the defendant Reichman. Plaintiffs here rested, as also did defendants. There was no evidence offered to show that any portion of this patented land was conveyed to Reichman, but it was alleged and was admitted that Reichman was the owner of the tract conveyed to plaintiffs and was the "owner of the land lying on the east and south sides of said tract (the tract conveyed to plaintiffs) and between said tract and the county road leading from Ft. Jones to Yreka."

Plaintiffs introduced no evidence to show that the road referred to in paragraph 6 of the amended complaint in fact existed, or that "there is or for a long time has been a road used by said defendant along the line of said route," but, as the averment was not denied, it may be taken as true. There was no evidence offered to show, as alleged, that this road "is the sole and only way from said tract to a public highway," or that "it is the most reasonable and practicable route that can be selected over and across the land of said defendant," or in support of the averment that the said road "is appurtenant to the land hereinbefore described as having been conveyed to plaintiffs." These averments were specifically denied. Respondents state in their brief that the theory upon which the action was brought is "that where one grants land surrounded by his own lands or partly by his lands and by the lands of strangers, such grantor impliedly grants a right of way to a public highway over and across his remaining lands" (citing Taylor v. Warnaky, 55 Cal. 350). It was held in that case that a "way of necessity" arises in favor of a parcel of land "where the same is wholly surrounded by the grantor's other land, or partly by this and partly by land of a stranger. This arises from the effect of the grant or reservation of the land itself, and is so far appurtenant to it as to pass with the land to another, provided he have no other way of access to the same. Washburn's Easem. & Serv., side p. 163, and cases there cited." Cited approvingly in Barnard v. Lloyd, 85 Cal. 131, 133, 24 Pac. 658; Blum v. Weston, 102 Cal. 362, 367, 36 Pac. 778, 41 Am. St. Rep. 188. Section 1104 of the Civil Code provides as follows:

> "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed."

Section 801 of the same Code declares what may be attached as servitude to other land "as incidents or appurtenances," and among these is "the right of way." Unless expressly excepted, "the transfer of a thing transfers its incidents." Id. § 1084. The action is clearly for a right of way as an easement arising impliedly out of a grant of land because of a necessity, and that necessity arises in the present case from the fact alleged that the grantee has no other way to and from the land than that referred to in the amended complaint, without trespassing upon land of strangers. Goddard's Law of Easements (Bennett's Ed.) p. 267.

In order that an easement may pass by implication it must be annexed to the estate granted, must be reasonably necessary for the beneficial enjoyment of the same, and must be in open, apparent, and continuous use at the time of the grant. 14 Cyc. 1168. "When the owner of land divides his property into two parts, granting away one of them, he is taken by implication to include in his grant all such easements in the remaining part as are necessary for the reasonable enjoyment of the part which he grants, in the form which it assumes at the time he transfers it" (Cave v. Crafts, 53 Cal. 135, 140); not that it shall be absolutely necessary for the enjoyment of the estate granted. 14 Cyc. 1171. Three things are necessary to create an easement by implied grant: (1) A separation of the title; (2) that before the separation takes place the use which gives rise to the easement shall have been so long continued and so obvious as to show that it was intended to be permanent; and (3) that the easement shall be necessary to the beneficial enjoyment of the land granted. 14 Cyc. 1168.

A way of necessity is derived from the law, and depends solely on the situation and boundaries of the land to which it is claimed to be appurtenant as they existed at the time of the conveyance. 14 Cyc. 1174. The right of way rests in necessity and not in convenience. Id. 1173.

The road alleged to have been used by defendant Reichman is not alleged or shown to have been openly used by him at the time he conveyed said tract to plaintiffs, nor is its initial point on the boundary of said tract definitely stated in the complaint or in the judgment. It is stated in the judgment that the right of way decreed "is not to exceed the minimum statutory width of 20 feet." It is not shown that the road referred to in the complaint or in the judgment is "the sole and only way from said tract to a public highway," nor is it shown, as alleged, that it is a "reasonable and practicable route." The point at the center of the road on the east boundary of said tract can readily be fixed and described with reference to a corner of the tract and the course of the road throughout its entire length should be stated to be coincident with the road as used by defendant Reichman, and its width as determined should be definitely stated. It should be alleged and proved that this road, claimed to be appurtenant to the land, was in use as such by defendant Reichman when he conveyed the land to plaintiffs, and was and is the only means by which plaintiffs can pass to and from said tract, and that it is necessary to the beneficial use of said tract by plaintiffs. These are but just requirements on plaintiffs' part before the servient tenement should be burdened with the easement. Civ. Code, § 1104.

The judgment and the order are reversed, with direction to the trial court to grant plaintiffs leave to amend their complaint if so advised.

We concur: BURNETT, J.; HART, J.

36 Cal. App. 212

PEOPLE v. ESCALERA. (Cr. 581.)

(District Court of Appeal, Second District, California. Feb. 8, 1918.)

1. FORGERY 🔑34(2)—VARIANCE.

Under Pen. Code, § 470, as to forgery, a charge that accused forged a check made payable to order of another than the person whose name was signed as maker would be established by proof of such making alone, without showing an actual passing of the check, such an instrument being capable of being used to defraud.

2. CRIMINAL LAW 🔑1032(7)—APPEAL—OBJECTIONS BELOW.

In prosecution for forgery of check, the objection of variance between the charge in the information and the proof, in that accused was not charged with making any indorsement on the back of the check, when in fact the indorsement did appear on the back of the check as exhibited, could not be raised on appeal, where the testimony showing that accused indorsed the name on the back of the check when he passed it came in without objection.

3. FORGERY 🔑44(1)—EVIDENCE.

In forgery prosecution, evidence *held* sufficient to show that another check passed by accused, offered to show accused's intent, had been forged.

4. CRIMINAL LAW 🔑824(8) — FAILURE TO INSTRUCT—REQUEST.

In a forgery prosecution, while it would have been better for the court to have distinctly pointed out in instructions the purpose for which evidence of a subsequent forgery was received, error could not be predicated on failure to do so, where accused offered no instruction covering the matter.

5. CRIMINAL LAW 🔑829(18)—INSTRUCTIONS—DEGREE OF PROOF.

Refusal to instruct that accused could not be convicted upon mere suspicion was proper, where the jury were fully instructed that they must find accused's commission of the acts charged beyond a reasonable doubt.

6. FORGERY 🔑14—INJURY FROM FORGERY.

To constitute the crime of forgery it is not necessary that any one be actually defrauded, but it is enough if an alleged forged check is of such a character that a person accepting it as true and genuine might suffer loss.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Juan Escalera was convicted of forgery, and appeals. Affirmed.

O. V. Willson and Willson & Stensland, all of El Centro, for appellant. U. S. Webb, Atty. Gen., Robert M. Clarke, Deputy Atty. Gen., and R. B. Camarillo, of Los Angeles, for the People.

JAMES, J. Appellant was convicted of the crime of forgery. He appeals from a judgment of imprisonment and from an order denying his motion for a new trial.

The charge made in the information was that the defendant, with intent to defraud certain persons, made and passed as true and genuine a check, which check was drawn upon a bank at Brawley, Cal., made in favor of one Carmel Relles and purporting to have been signed by H. G. Baughman. The evidence showed that this check was brought by the defendant Escalera to the store of Shore Bros. at Brawley; that the defendant presented the check and asked that it be cashed, representing himself to be the payee named in the check; that the proprietors of the store cashed the same after the defendant had indorsed the name of the payee upon the back thereof; that some days later, when the check was returned by the bank, the defendant, who was seen passing the store, was called in and was told of the fact that the check had not been paid; that he thereupon told the storekeepers that he would take up the same and at that time delivered to them a part of the amount mentioned in the check. The storekeepers retained the check, and a few days later the defendant brought in the remainder of the money, at which time he was placed under arrest by a constable. That the check was a forged instrument the evidence amply established, and the evidence also established beyond question that the defendant was not the payee named in the check. Defendant's name was as it appears herein, while Carmel Relles was a person who was known to the defendant. Not only was the proof sufficient to establish these things, but an express admission appears in the transcript of the testimony covering the same matter, as made by counsel for the defendant in the following words:

> "Mr. Willson: We can perhaps shorten matters in this trial. We will admit the signature on the check cashed by Mr. Shore and handed to Mr. Baughman is a forgery of Mr. Baughman's name, and we admit the defendant went there and cashed the check and all testimony bearing upon that point is unnecessary in view of the fact we admit it."

[1, 2] One of appellant's principal contentions for error is that there was a variance between the charge made in the information and the proof, in that the appellant was not charged with making any indorsement upon the back of the check, when in fact the indorsement did appear on the check as exhibited. He cites People v. Thornburgh, 4 Cal. App. 38, 87 Pac. 234, and People v. Cole, 130 Cal. 13, 62 Pac. 274. In the Thornburgh Case the check was one payable to the order of the maker and in the Cole Case the check was drawn by the defendant in his own name and made payable to himself. It was pointed out in these decisions that there could be no defrauding of any person by the making of checks so drawn, unless an indorsement on the back was added, and in the information there considered the forgery of an indorsement was not charged. This case presents entirely different facts. The check here was not made payable to the order of the maker, and it was an instrument capable of being used to defraud. The charge made by the information that the defendant made such a check would have been established by proof of such making alone, without showing an actual passing of the check. Section 470,

Pen. Code. The testimony introduced showing that the defendant indorsed the name of Carmel Relles upon the back of the check at the time he passed it came in without objection, and we think it is now too late for the defendant to complain of possible error committed in that regard.

[3] Specimens of the handwriting of the appellant were introduced in evidence for the purpose of enabling the jurors to make a comparison of the writings before them. Among the latter was a check purporting to have been drawn to the order of one Bonefessio Escalera, and the proof showed that this check had been negotiated and passed by this defendant at another time at a different store. This latter check bore on the back the name of the payee, and it was offered and received in evidence under the rule which permits like acts of a defendant to be shown where particular intent is involved. People v. King, 23 Cal. App. 259, 137 Pac. 1076. The latter decision sustains the right of the prosecution to make such proof, whether it refers to a transaction subsequent to that charged or one prior thereto. Appellant's counsel complain that there was not sufficient evidence showing that the last-mentioned check had been forged. It was shown without dispute that the defendant, who was not the payee named in the check, presented the same and received payment of the amount either in cash or merchandise. There was also before the jury samples of the handwriting of defendant, so that the evidence was available upon which the jury might properly conclude that the defendant had forged the latter check. There was also the testimony of Bonefessio Escalera that he had not delivered such a check to the defendant, and the testimony of Baughman that the signature attached thereto was not his signature.

[4] It would, no doubt, have been better for the court in its instructions to have distinctly pointed out to the jury the purpose for which the evidence of the subsequent forgery was received, but no instruction was offered by the defendant covering that matter; hence no error can be predicated upon the failure of the court so to do. It is contended that the court erred in refusing to instruct the jury that it was not to consider the indorsement made upon the back of the check described in the information, but to disregard "any testimony at this trial given, either against the defendant or in favor of him, concerning any indorsement or any writing upon the back of the check. * * *" We do not think the defendant was entitled to have this instruction given in the form proposed. As before noted, without any objection the prosecution proved the entire transaction concerning the passing of the check, and we think that all of the acts of the defendant concerning that transaction were proper to be proved and considered by the jury. Counsel expressly admitted that the check had been forged, and that the defendant went to the store and cashed it, adding that "all testimony bearing upon that point is unnecessary in view of the fact we admit it."

[5] The refusal of the court to give an instruction that the defendant could not be convicted upon mere suspicion, was proper, for the court had fully instructed the jury that they must find beyond a reasonable doubt that the acts charged against the defendant were committed by him.

[6] The instruction that to constitute the crime of forgery it is not necessary that any one should be actually defrauded, but that it is enough if the alleged forged check is of such a character that a person accepting it as true and genuine might suffer loss, was not objectionable. People v. Kuhn, 33 Cal. App. 319, 165 Pac. 26. As we have before indicated, we think that the charge given by the court might well have contained a more complete exposition of the law affecting the purposes for which the different classes of evidence might be considered; but it cannot be said from an examination of the entire record that a miscarriage of justice has resulted by the conviction of the appellant.

The judgment and order are therefore affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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36 Cal. App. 229

HOWARD v. CUNNINGHAM et al.

(Civ. 2325.)

(District Court of Appeal. First District, California. Feb. 9, 1918. Rehearing Denied by Supreme Court April 10, 1918.)

1. BOUNDARIES 🔑3(3)—MONUMENTS—COURSES AND DISTANCES.

That monuments upon the ground control courses and distances as recited in a deed is the unquestioned rule of construction of deeds under Code Civ. Proc. § 2077, subd. 2, providing that where ascertained monuments are inconsistent with measurements the monuments are paramount.

2. BOUNDARIES 🔑35(5) — MONUMENTS — PAROL EVIDENCE.

Where a monument has been obliterated or destroyed, its location may be proved by parol.

3. BOUNDARIES 🔑37(3) — SUFFICIENCY OF EVIDENCE.

Evidence *held* to warrant finding that a lost stake which would determine the boundary in dispute was at a place where calls of deeds located it.

4. APPEAL AND ERROR 🔑1011(1)—REVIEW—FINDINGS.

A finding of trial court that calls of deeds were correct will not be disturbed; oral testimony as to location of lost post which would determine boundary in dispute being somewhat contradictory and unsatisfactory.

Appeal from Superior Court, Mendocino County; George A. Sturtevant, Judge.

Action by James L. Howard against E. L. Cunningham and others. From the judgment rendered, plaintiff appeals. Affirmed.

Robert Duncan, of Ukiah, for appellant. Thomas & Thomas, of Ukiah, for respondents.

BEASLY, Judge pro tem. This action arises out of a dispute over a boundary line. The plaintiff, James L. Howard, is the owner of lot 15 and 8½ acres off the north end of lot 18 of the Yokayo rancho, near Ukiah, in Mendocino county, and the defendant Ruddick is the owner of the remainder of lot 18, which he acquired from his codefendant E. L. Cunningham. Plaintiff's father formerly owned the two lots, and some years ago he conveyed to the plaintiff the land now owned by him as above stated, and the part now owned by Ruddick he conveyed to another son, by name Mack Howard, who in turn conveyed it to Cunningham.

The sole point in this case is whether the evidence supports the finding against plaintiff of the location of one of the corner posts common to the two properties. The location of this post determines the boundary line between the properties of the plaintiff and of Ruddick. The stake has long since disappeared. The calls of the deed by which plaintiff's father acquired the land now owned by plaintiff, and of the deed conveying it to the latter, both locate this corner—which is described as "P 8"—at the point which is found to have been its location by the trial court.

Oral evidence was introduced to discredit the calls of these deeds as to the location of this corner. All the other monuments fixing the boundaries of these properties are in existence, and their location unquestioned. The point of location of stake "P 8" was, it is conceded, in a line at the northerly end of which is a stake marked "P 9" and at the southerly end of which is a stake marked "P 6." This line forms the entire westerly boundary of Ruddick's land and a part of the westerly boundary of the land of plaintiff. By the calls of the respective deeds of plaintiff and Ruddick this line from end to end should be 44.49 chains long. It is in fact by actual surveyor's measurement on the ground .44 chains longer than this, or 44.93 chains in length; and the plaintiff claims that instead of the stake "P 8" being located, as found by the court, 2.19 chains south from the corner "P 9," it should have been found to be 2.95 chains south therefrom, or 44.98 chains northerly from the corner "P 6."

Mack Howard, upon whose testimony plaintiff mainly relies, testifies that he saw this stake set by the engineer who made the original survey; that it was set at the westerly end of an old fence and in line with two trees, which he stated are still standing, and that he saw this post there for many years thereafter; that this old fence was straightened subsequent to the survey, and thereafter was moved 30 feet south of its original location. This fence still stands on the line to which it was removed. Other members of the Howard family also testified to the same facts except as to actually seeing the survey; Mack Howard being the only witness called who claimed to have been present at the placing of the stake "P 8."

[1-3] The plaintiff contends that the evidence of these witnesses, coupled with certain inaccuracies in the calls of the deeds as to other distances and in the statement of acreage contained within their descriptions, concluded the trial court from finding the location of the stake "P 8" at the point where the decision of the court places it. With plaintiff's assertion that monuments upon the ground control courses and distances as recited in a deed no fault can, of course, be found. This is the unquestioned rule of construction of deeds. Code Civ. Proc. § 2077, subd. 2. Nor can any exception be taken to plaintiff's statement that where the monument has been obliterated or destroyed its location may be proved by parol. But with his contention that under the evidence in this case the trial court could not find the location of the post "P 8" at the point where the finding places it we cannot agree.

The calls of these two deeds were some evidence of the location of the lost stake "P 8." Were there no other evidence whatever, no question could be made but that these calls would be controlling in this case; and were the other evidence conclusive against these calls we are not prepared nor called upon in this case to say that plaintiff might not be correct in his contention that the calls of the deeds must fall before it. But here there are certain inherent disagreements and defects in the testimony of plaintiff's witnesses which tend to weaken the value for accuracy of the evidence of Mack Howard in particular, and also of the other witnesses. For instance, without analyzing this evidence minutely as counsel have done, it may be said that Mack Howard was only 10 or 11 years old when the survey testified to was made, and yet he testifies to the exact location of practically all the stakes set by the engineer. He was 59 years old when he testified. The survey was made 50 odd years ago. There were certain inconsistencies in the testimony of the various witnesses the significance of which it was the province of the trial court to determine. The judge who tried the case saw Mr. Mack Howard on the witness stand, observed his manner of testifying and whether his memory was accurate as to these events of long ago. Upon that judge rested the duty of weighing this oral evidence as against the calls of these deeds and as against the testimony of a surveyor, called by the plaintiff himself, whose evidence in a measure tends to corroborate the deeds.

We find nothing out of harmony with these views in the cases cited and relied upon by the appellant. Thus, in Gordon v. Booker, 97 Cal. 586, 32 Pac. 593, a corner post, occupying about the same relative importance to the decision of that case as the post "P 8" does to this, was not undiscoverable. Its location was found by the charcoal placed under it by the government surveyor. This charcoal was actually found in place at the time of the trial, and three surveyors and two other witnesses testified that it was a "charcoal" or "government" corner, and that the charcoal determined the place where the stake had been set. It also appeared that no other corner or stake had ever been seen at a different place in that vicinity. The plaintiff there relied for the location of this corner upon a survey made by courses and distances from a distant corner which, if correct, would have located the corner in question at a different point from the place at which the charcoal was found. The court found against the plaintiff and held that there was no conflict in the evidence. In other words, it discarded the survey from the distant corner in favor of the present location of the charcoal, which indicated the place where the original post had been set by the government surveyor. Of course, this corner monument could not be brought into court, but the testimony of five witnesses uncontradicted that it was the point at which the court found to be its location was held to be conclusive in that case as against a survey made as above indicated. Some language in that case, considered without regard to its context, has misled counsel as to the rule which must be deduced from the decision read as a whole.

In Penry v. Richards, 52 Cal. 672, also relied upon by the plaintiff, it was held that, if the evidence shows the point where the monuments had been established by the surveyor, such point must control in determining the location of the property. This is not in conflict with the position of the defendants here, for in the instant case the trial court evidently held that the oral evidence did not correctly point out the place where the stake "P 8" had been set by the surveyor. In the case just cited the court premises the rule announced upon the statement that the evidence must establish the monuments. This is true of all the cases cited by appellant. In each of them it is assumed that the evidence established the location of the disputed monument. In the present case, as we have seen, the trial court evidently held that the oral evidence did not so establish the location of the disputed post "P 8." In other words, the trial court found as a fact that the calls of the deeds as to the length of the line between the posts "P 9" and "P 8" were correct, discrediting, as it had the power to do, the somewhat contradictory and unsatisfactory oral testimony of the plaintiff's witnesses as to the location of this post.

[4] The whole question is one of fact, and, the trial court having determined it, that ends the matter so far as an appellate court is concerned.

Judgment affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

36 Cal. App. 216

PEOPLE v. VOGEL. (Cr. 582.)

(District Court of Appeal, Second District, California. Feb. 8, 1918. Rehearing Denied by Supreme Court April 10, 1918.)

1. CRIMINAL LAW 🔑415(2)—EVIDENCE—ADMISSIBILITY.

In a trial for murder, testimony of witnesses that deceased, just prior to his death, accused defendant of having shot him, which defendant denied, *held* inadmissible.

2. CRIMINAL LAW 🔑419, 420(1), 1169(1)—EVIDENCE—HEARSAY—PREJUDICIAL ERROR.

Where in trial for murder a witness for the prosecution, after testifying that deceased accused defendant of having shot him, was asked if he had previously been informed defendant was under suspicion, and who had so informed him, his answer thereto was hearsay and prejudicial error.

3. WITNESSES 🔑259—EXAMINATION—TESTIMONY OF STENOGRAPHER FROM NOTES.

Where a witness for the prosecution in a murder case testified that from the odor of burnt powder about the weapon it had been fired within an hour preceding, and the defense sought to impeach this by showing he had testified in another case that such odor would remain much longer, the court reporter was a proper witness as to such testimony and could use her stenographic notes to refresh her recollection, under Code Civ. Proc. § 2047.

4. CRIMINAL LAW 🔑656(5)—EVIDENCE—INVADING PROVINCE OF JURY.

Where, in a murder trial, defendant attempted to impeach the expert testimony of a witness by showing he had testified differently in another case, the action of the trial judge in stating, after examination of reporter's transcript, that he found nothing in it to impeach the testimony of the witness was uncalled for, and encroached upon the province of the jury.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

John Vogel was convicted of murder, and appeals. Reversed and remanded.

Willson & Stensland, of El Centro, for appellant. U. S. Webb, Atty. Gen., Robert M. Clarke, Deputy Atty. Gen., and R. B. Camarillo, of Los Angeles, for the People.

WORKS, Judge pro tem. The appellant was convicted of murder in the first degree, and was sentenced to life imprisonment. The appeal is from the judgment and from an order denying a motion for a new trial.

The crime for which the appellant is sought to be punished was in the shooting of one

Joe Ming, the occurrence having taken place near El Centro. Ming operated a dairy, and Vogel was employed by him as a milker. Both the men were Swiss and had been acquainted at least as long as Vogel had been in the United States, a period of 6 years. Vogel had been employed by Ming for 18 months, and they had been friends the entire time. Several other persons, including Ming's wife, were regularly on the ranch and they all testified that, not only had there been no trouble between the men on the day of the shooting, but that there had never been trouble of any kind between them. Ming himself stated, within a short time after he was shot, death not resulting from his wound until more than 36 hours had passed, that he had never had any trouble with Vogel, and that they had always been friends. The record shows no motive whatever for the commission of the crime by Vogel.

The shooting occurred in the early evening. Ming had left the ranchhouse immediately after dinner for the purpose of irrigating a certain field on the ranch. His wife and several others remained in the house, listening to a phonograph. Vogel was not among them, he having left the house from half an hour to an hour before Ming was shot. He says he went to a certain bunkhouse which was on the ranch and retired to bed, not caring to hear the phonograph, of which he says he had become tired. Those in the ranchhouse heard a shot in the direction in which Ming had gone, and also heard some one cry out. Mrs. Ming, a boy of about 16 and a man, one Zeno Burch, ran in the direction of the sounds, the boy reaching Ming first, then Mrs. Ming and then Burch. Ming was walking or standing in the field at a point about 200 yards from the ranchhouse. The boy asked him what was the matter, and he responded that somebody had shot him. He was immediately helped toward the house by the three who had come to his relief, but said nothing to any of them, either on the way to the house or after he was gotten to bed, as to who had fired the shot. As soon as Ming was placed on the bed, the boy who had helped him to the house, accompanied by another boy, went to the bunkhouse, where they found Vogel in bed and entirely undressed. The boys told Vogel that Ming had been shot, and he said, "You are just kidding me." He was told that the statement was true, whereupon he dressed, except that he remained barefoot, and went to the house. He entered the room where Ming lay and had a conversation with him. They were seen talking together by at least two witnesses, but the conversation was so quiet that it was not overheard, except to the extent that Zeno Burch testified that he heard Vogel answer, "Yah," as the reporter writes it, to something said by Ming. In response to telephone call, three or four deputy sheriffs arrived at the ranch from half an hour to an hour after the shooting occurred. It was after their arrival that Ming made the statements referred to in the bedside conversation mentioned below. Up to that moment he had said nothing as to who had committed the crime upon him.

Aside from the bedside conversation and a dying declaration made by Ming in an automobile as he was starting from the house to a hospital, the evidence against Vogel was entirely circumstantial. Ming's wound, which was in the upper part of the abdomen, was inflicted by a 22-caliber bullet. He was the owner of a rifle of that caliber, which was used indiscriminately by those on the ranch, including Vogel. The latter was seen cleaning the weapon during the day, at about 10 or 11 o'clock. Kemp, one of the deputy sheriffs, says Vogel told him he had been shooting the gun all day. Kemp testifies, from an examination of the rifle after the shooting, that it was not discharged more than once or twice after it was last cleaned. It was kept sometimes in the ranchhouse and sometimes in the bunkhouse. On the day and evening of the shooting it was at the latter place. In addition to the circumstantial evidence already stated, Zeno Burch gave testimony that, as he proceeded after Mrs. Ming and the boy upon hearing the shot and the cry, he saw a man, whom he does not identify, move rapidly in a direction from the place where Ming was, and toward the bunkhouse. This man was near the bunkhouse at the time, and Burch says he saw him moving for a distance only of 15 or 20 feet, the place at which Ming was found after the shooting being several hundred feet from the bunkhouse. In a part of his testimony Burch says the man was walking rapidly. In another part he says he was running. On account of obstructions to his view, Burch could not see the door of the bunkhouse, but he says he did not see the man pass beyond that structure. It may be remarked here that the night was brightly lighted by the moon. The deputy sheriffs found some footprints in the neighborhood of and leading from near the scene of the crime and toward the bunkhouse, and they testified that a pair of Vogel's shoes fitted them. The shoes were of a medium size, one witness having testified that they were about No. 6½, another that they were about 8's. In making this statement of the circumstantial evidence in the record, we have placed it in the light most favorable to the case of the prosecution, and have refrained from stating evidence opposed to some of it and from stating hypotheses upon which the effect of some of it might be explained away.

The record contains testimony by the witnesses Zeno Burch, Cummings, Cleveland, and Kemp to the effect that Ming, while lying in bed after the shooting, accused Vogel of the crime. The appellant made motions to strike out the testimony of these witnesses upon this subject, but the trial court denied the motions and permitted the evidence to stand. The testimony of Burch, who was another Swiss and did not speak English well, was that Ming pointed at Vogel and said, "That is the man there," and that Vogel answered, "I don't shot." Cummings testifies that Ming, pointing toward Vogel, said that was the man that killed him, that was the man that shot him, and that Vogel responded only with a certain contemptuous and unprintable expression, which to our minds, however, was equivalent to a denial of the accusation. Cleveland has it that Ming said, indicating Vogel, "That is the man who shot me; that is the man that killed me;" and that Vogel answered with the contemptuous expression already mentioned. Kemp was the nearest to Ming when these occurrences took place. He testifies:

> "I asked him if he knew who shot him, and I was leaning over him, and he grabbed my arm and raised himself up in the bed and said, 'That is the man that shot me; that is the man that killed me.' Ming seemed to be suffering, and I laid him back in the bed and Mr. Cummings and Cass and Cleveland and myself and two or three others were in the room, and I walked around to where this defendant was, and asked him to come with me. Before I could get to him, he was protesting against Ming accusing him. He said he could not have done it, and what reason did he have to do it, and he was out in the bunkhouse asleep."

Kemp's request to Vogel to come with him is explained by the fact that the former was a deputy sheriff, as also were Cummings and Cleveland.

[1] The appellant's motion to strike the testimony of these witnesses was based on the rule stated in People v. Teshara, 134 Cal. 542, 544, 66 Pac. 798, 799. In that case the defendant was on trial for the murder of one Loucks. Before the latter died he accused the defendant of having inflicted his injuries upon him. The court said:

> "The court also erred in refusing to strike out the evidence of Patton and Mullen as to the accusation made by Loucks, when Amaya and defendant were brought to his bedside. The statement made by Loucks at that time was hearsay, and Teshara made no admission of its truth, either expressly or tacitly. He expressly denied it. The court and the district attorney seem to have lost sight of the fact that it is not the accusation, but the conduct of the accused, that is evidence in such cases, and that the only reason for admitting the accusation is to explain the conduct. The district attorney should not have offered this evidence, knowing, as he did, that Teshara had not remained silent under the accusation, but had repelled it at the time it was made."

The respondent insists that People v. Teshara has no application in this case, and that the motion to strike was properly denied under People v. Turner, 1 Cal. App. 420, 82 Pac. 397, and People v. Cole, 141 Cal. 88, 74 Pac. 547. In the first of these cases the court said (1 Cal. App. 422, 82 Pac. 398) in dealing with the question of the admissibility of such accusations:

> "Even where the defendant flatly denies the criminal act, yet if he goes on to make exculpatory statements, for instance, as to his whereabouts at the time, and these statements can be shown to be false, then the statements, together with their falsity, may be shown on the theory that falsehood in the matter is an indication of conscious guilt. In such a case, it is the falsehood only that tells against the defendant."

The point now before us is governed by People v. Teshara, unless it be for the testimony of the witness Kemp to the effect that Vogel said he was out in the bunkhouse asleep when the crime was committed. It will be noted, however, that Kemp does not ascribe to Vogel the making of this statement immediately upon the making of the accusation. After Ming made the charge Kemp saw that the injured man was suffering, and laid him back in the bed. As Ming was shot in the abdomen Kemp naturally let him down carefully, taking some appreciable time in performing the act. After that was done he started toward Vogel, and it was as he was on his way that he attributes to Vogel the making of the remark about his having been asleep in the bunkhouse. Moreover, Burch, Cummings, and Cleveland all testify to what was said by Vogel in direct response to Ming's accusation, and neither of them imputes to him any remark like the one mentioned by Kemp. They were all nearer to him than was Kemp when the accusation was made. It appears, then, that by what Vogel said in immediate response to the accusation he repelled it, and did not seek to exculpate himself or to explain. The cases of People v. Turner and People v. Cole of course mean that a person accused of crime must, immediately upon the accusation, make the "exculpatory statements" which the opinions in those cases determine will entitle the conversation to be received in evidence. The accused person cannot be expected to continue long to rely alone upon his denial. If innocent, he will follow the accusation with instant repudiation, and will be satisfied to so leave the matter for a brief interval; but, even if innocent, his mind will quickly go to matters which will justify and sustain the denial before the world. Denial is not proof, and he will almost immediately begin to think of proof; and it will not be strange if his statements reflect the condition of his mind. We are satisfied that the point is ruled by People v. Teshara and not by the other two cases. Not only the disposition of the motion to strike Kemp's testimony depends upon what we have just said, but also the motions to strike the testimony of Burch, Cummings, and Cleveland. They all testified before Kemp, and there was a motion to strike the testimony of each concerning the bedside accusation as that testimony was given by each, but counsel for defendant himself asked that a ruling on all the motions be reserved, and he did not finally insist upon them until Kemp had testified and the prosecution was about to rest its case.

[2] After Cummings had testified to the

occurrences at Ming's bedside the district attorney asked him if, up to that time, he had been informed that Vogel was under suspicion for having shot Ming. The question was objected to, but the objection was overruled. Cummings answered that he had. He was then asked who had made the statement to him and, over an objection to the question, he was permitted to answer that it was Zeno Burch. These rulings were both erroneous. The questions called for nothing but hearsay evidence, and should have been ruled out for that reason. This error was most damaging to the appellant's case, as there is nothing in the record, except the testimony of Cummings on this point, which fastens any suspicion whatever upon Vogel before the time of the conversation at the bedside of Ming.

[3] The witness Kemp had examined the bore of the rifle already mentioned, testified to its condition and also testified, from the odor of burnt powder about the weapon, that it had been fired, in his opinion, within a period of 30 minutes or an hour preceding the time of his examination of it. The period mentioned by him would cover the time of the shooting of Ming. The defense sought to impeach this opinion evidence of Kemp by showing expert testimony given by him in another action upon the question as to how long the odor of burnt powder would remain in a gun after its discharge. When he was on the stand Kemp was asked whether or not he had testified in the other action "that the odor of a discharged weapon would last as long or longer than 12 hours," and he answered that he had not. In the present action, the court reporter who had taken Kemp's testimony in the other case was examined, and was asked whether he had then testified that the smell of burnt powder could be detected in a discharged weapon 24 hours after the discharge. An objection to the question was sustained, and the ruling was correct, as the time fixed by the inquiry was different from that embraced in the impeaching question, which had been adressed to Kemp. The court, however, appears to have sustained the objection for a wrong reason, and, while that fact does not affect the propriety of the ruling, the circumstance is necessary to be stated in order to explain what followed. The district attorney had objected to the question on the general grounds, adding the specific objection that the record was the best evidence. When the objection was sustained the appellant's counsel asked the reporter to produce her record. She asked whether it was her notes or the transcribed testimony that was wanted. The district attorney responded that it made no difference to him, and counsel for appellant then asked the reporter to produce the transcript, whereupon the district attorney objected to "any testimony along this line, for the reason that there was no foundation laid; that the exact question and answer, which the defendant seeks to have read to the jury," had not been previously read to Kemp. After some argument, during which appellant's counsel stated, in effect, that he expected to show by the reporter, with the transcript to refresh her recollection, that Kemp had testified in the earlier case that the odor of a discharged gun would remain in it more than 12 hours, the court sustained the district attorney's very general objection, on the ground that what the transcript showed by way of question and answer had not been exhibited to Kemp. Not only that, but he examined the transcript himself and stated to the jury that "the evidence in the transcript which has been produced, I do not consider as impeachment." Counsel for appellant then offered to prove by the court reporter, she to use her stenographic notes or the written transcript to refresh her recollection, that Kemp had testified in the previous action that the odor would remain in a gun more than 12 hours after its discharge. There was no objection to the offer, but the court, evidently understanding that one had been made, said that he would sustain the objection, and the evidence was not received. These various rulings were erroneous. The court reporter was a proper witness to testify to statements made by Kemp at the trial at which she had acted as reporter, and she could have used her stenographic notes to refresh her recollection, as notes or memoranda made by her at the time to which her testimony related. Code Civ. Proc. § 2047; People v. Ammerman, 118 Cal. 23, 50 Pac. 15; People v. Sexton, 132 Cal. 37, 64 Pac. 107. Further, under the statement of the district attorney that it made no difference to him whether she produced her original notes or the transcript made from them, she could have refreshed her recollection from the transcript.

[4] We have pointed out the error into which the trial court fell in its rulings upon this question, but, in addition, we are impelled to direct attention to the action of the court in stating, after he had examined the reporter's transcript, that he found nothing in it to impeach the testimony of Kemp. His action in that regard was uncalled for. It was no more within his province to pass judgment upon the effect of the matter contained in the transcript than it would be for him to take the same attitude concerning any private memorandum which any witness was about to use for the purpose of refreshing his recollection under the terms of section 2047, Code of Civil Procedure. His statement was distinctly prejudicial to the rights of the appellant.

There are many other errors which the appellant contends were committed by the trial court, but we have not found it necessary to determine whether the contentions be well founded.

We have made a careful examination of the entire cause, including all the evidence, in order to determine, under the language of section 4½ of article 6 of the Constitution, if it can be said that the errors above pointed out have not resulted in a miscarriage of justice. We have above made an unusually full statement of the facts of the case in order to furnish a background for the consideration of this question. We are impelled to say, from our examination of the record, that a miscarriage of justice has resulted from the errors of the trial court.

The judgment and order are reversed, and the cause is remanded.

We concur: CONREY, P. J.; JAMES, J.

(36 Cal. App. 248)

THOMPSON v. NEWMAN. (Civ. 2271.)

(District Court of Appeal, First District, California. Feb. 11, 1918.)

1. Arbitration and Award ⚷1—Contract—Appraisement.

A contract between plaintiff and defendant calling for the appointment of "arbitrators" to determine the value of certain timber, providing that neither party shall offer any evidence before such arbitrators, is not a contract for arbitration under provisions of Code Civ. Proc. §§ 1284, 1285, but merely an agreement for appointment of appraisers to determine the value of the timber.

2. Logs and Logging ⚷10(3)—Appraisal—Evidence.

Evidence that so-called arbitrators went on the land together to make appraisement and separately examined and valued particular portions of timber, and met, compared notes, and finally concurred in its valuation, does not sustain contention that such valuation was not the result of the joint labor and judgment of such appraisers.

3. Arbitration and Award ⚷1—Appraisement Contract—Time of Report.

An objection to an appraisement of timber made under contract that such report was not made within the time provided, is without merit, in view of Civ. Code, § 1492, where time was not made the essence of the agreement, and the delay was caused by the refusal of some of the first appointed appraisers to act.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Mrs. Ada Thompson against Otto Newman. From a judgment for plaintiff decreeing specific performance of a contract, defendant appeals. Affirmed.

Preston & Preston, of Ukiah, for appellant.
Robert Duncan, of Ukiah, for respondent.

LENNON, P. J. On the 6th day of October, 1914, plaintiff and defendant entered into a written agreement by the terms of which they agreed to settle a controversy existing between them "with respect to their rights in the growing and down timber" standing and lying upon certain designated land.

The terms of the agreement were in substance these: Within 30 days after the report of "arbitrators" who were to be chosen by the parties according to the method provided by the contract, the plaintiff promised to pay to the defendant the sum estimated by the said "arbitrators" as the value "of all the down and standing redwood and pine timber * * * suitable for merchantable lumber and suitable for the making of ties." The defendant agreed that upon such payment he would make, execute, and deliver to the plaintiff, her heirs, and assigns a deed of all of the said timber. The contract in controversy, among other things, provided that:

> "Each of said parties * * * shall appoint and name one person as an arbitrator and the two arbitrators so appointed by the parties * * * shall agree upon and appoint a third person to act as arbitrator in said matters and * * * each and all of said arbitrators shall be men experienced in buying, selling or estimating of redwood or pine timber in the county of Mendocino, state of California. * * *"

The two parties first named in the contract as "arbitrators" failed to agree upon a third person, and one of them subsequently refused to act. In his place and stead, the judge of the superior court of Mendocino county, pursuant to a provision in the contract covering such a contingency, designated another person to act, and he with the person appointed in the first instance and who had consented to act met on the 19th day of April, 1915, surveyed the timber and appraised its value at the sum of $190. Thereafter on April 26, 1915, plaintiff tendered to defendant the sum of $190 and demanded a conveyance of the timber. Defendant declined the tender and refused to execute the conveyance.

Thereupon the plaintiff brought this action for specific performance, wherein the court below, in effect, found that, although designated in the contract as arbitrators, the parties who made the valuation were intended to be and were in fact but mere appraisers, and that they had made a fair, just, and reasonable estimate of the quantity and value of the timber which was the subject-matter of the contract here. From the judgment entered in favor of the plaintiff, decreeing specific performance, the defendant has appealed.

It is not claimed that the estimate of the appraisers was the result of collusion or fraud, but merely that their estimate was not in accord with the evidence adduced at the trial. While the record does show some evidence to the effect that the timber was worth more than the value placed upon it by the "arbitrators," nevertheless, the record shows other evidence which fixes the value of the timber at about the sum of $190. In short there is a substantial conflict in the evidence adduced upon this phase of the case, and, moreover, the contract in terms provided that the "arbitrators'" estimate, when made, was to be final and conclusive upon the parties to the contract.

[1] The contention that the "arbitrators" did not proceed legally to make the appraisement is grounded upon the fact that before proceeding to their duties, they were not sworn to faithfully perform the same and did not notify the parties to the contract of the time when the timber would be examined and valued. This contention involves the proposition that the contract in controversy was an agreement to submit to arbitration, and not intended for the purpose of merely making an appraisement. Consequently it is argued that the result of the appraisement was of no avail in the absence of a showing that they had complied with the provisions of sections 1284 and 1285 of the Code of Civil Procedure which provide that:

> "Arbitrators have power to appoint a time and place for hearing * * * to hear the allegations and evidence of the parties" and, "before acting, they must be sworn before an officer authorized to administer oaths faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy. * * *"

That the contract in controversy was not "a submission to arbitration," in the sense contemplated by the provisions of the Code sections last cited, is shown, we think, by the terms of the contract itself which expressly provide that:

> "Neither of the parties * * * shall offer any evidence before said arbitrators, but that said arbitrators shall go upon the ground and make their estimate from their own examination. * * *"

True, the contract in terms specifically uses the word "arbitrators," but that fact does not conclusively control the construction of the agreement. Foster v. Carr, 135 Cal. 86, 67 Pac. 43. The term "arbitrators" evidently was incorrectly employed to designate the character and capacity of the men who had been, or might be, agreed upon to carry out the terms of a contract which, when read in its entirety, purported to provide for nothing more nor less than a mere appraisement.

There is a clear distinction between an arbitration and an appraisement.

> "An arbitration presupposes a controversy or a difference to be tried and decided, and the arbitrators proceed in a judicial way, sometimes as an adjunct to a court of justice. Their investigation is in the nature of a judicial inquiry, and rules of procedure must be strictly observed or their award will be void. On the other hand, an appraisal or valuation is generally a mere auxiliary feature of a contract of sale, the purpose of which is not to adjudicate a controversy but to avoid one. Thus, if A. and B. contract, the former to sell, and the latter to buy, certain property at the value thereof as fixed by X., Y., and Z., the latter are appraisers, not arbitrators, and are not governed in their proceedings by the rules relating to arbitration." Omaha Water Co. v. City of Omaha, 162 Fed. 233, 89 C. C. A. 205, 15 Ann. Cas. 498.

In the case of M. E. Church v. Seitz, 74 Cal. 287, 15 Pac. 839, the court said:

> "There is scarcely a day in which in commercial transactions the valuation of property, or estimate of damages, is not intrusted to third parties, and no one has yet dreamed of looking upon them as arbitrations, and subjected to all the formalities imposed on them by the revised statutes, with the paraphernalia of oaths, witnesses, and notices of trials. It is most frequently confided to the personal skill, knowledge, or experience, or even acquired information of appraisers."

While the preamble of the contract in controversy discloses that there were two suits pending between the parties in the superior court of the county of Mendocino, involving their rights to the land in question and the timber thereon, and that they were desirous of settling between themselves such litigation and all claims involved therein, nevertheless we think that that very preamble, considered in conjunction with the specific terms of the contract, shows that its primary purpose was to avoid existing litigation rather than to adjudicate it, and that in pursuance of that purpose the parties had merged all of their differences into an executory contract of purchase and sale of the disputed timber, which sale was to be consummated when the value of the timber was ascertained in the manner contemplated by and provided for in the contract. In short, the only matter remaining at the time of the execution of the contract to be determined between the parties was the value of the timber in question, and this fact, considered in connection with the proviso in the contract that neither of the parties thereto should offer any evidence to the "arbitrators," who were required to go upon the land and make their own estimate of the quantity and value of the timber, compels the conclusion that the contract in controversy called for a mere appraisement rather than a submission to arbitration in the strict sense of the term.

[2] The evidence to the effect that although the so-called arbitrators went on the land together for the purpose of making the appraisement and, while so doing, separately examined and valued particular portions of the timber and then met and compared notes and finally concurred in the valuation of the whole, obviously does not sustain the contention that the valuation of the timber was not the result of the joint labor and judgment of the appraisers.

[3] There is no merit in the contention that the appraisers did not make their report within the time provided in the agreement and that therefore they were without power to report at all. Time was not made the essence of the agreement, and any delay therein could be compensated by the payment of interest on the amount fixed by the appraisers. Civ. Code, § 1492. Moreover, the delay appears to have been caused by the refusal to act of the "arbitrator" selected

by the defendant and was, as well, without prejudice to the defendant.

Judgment affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

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36 Cal. App. 240

CALLETT v. CENTRAL CALIFORNIA TRACTION CO. (Civ. 1558.)

(District Court of Appeal, Third District, California. Feb. 9, 1918.)

1. Street Railroads 🔑114(5) — Collision with Team—Negligence—Sufficiency of Evidence.

Evidence in action for the running down by an electric train operated on a street of a vehicle going in the same direction *held* to sustain finding of negligence.

2. Street Railroads 🔑117(24) — Collision with Team—Contributory Negligence.

The driver of a vehicle run down by an electric train, going in the same direction, operated on a street, was not necessarily negligent, because driving within 10 or 12 inches of the track, or because he did not look back.

3. Street Railroads 🔑114(15) — Collision with Team — Contributory Negligence — Sufficiency of Evidence.

Evidence in action for running down by an electric train, operated on a street, of a vehicle going in the same direction *held* to sustain finding of freedom from contributory negligence.

4. Street Railroads 🔑90(1) — Collision with Team—Interurban Trains.

The merits of the case of plaintiff, whose vehicle was run down by defendant's electric train going in the same direction on a street, is not affected by the fact that defendant ran interurban cars over the track; the train in question being a local, proceeding over a track in no respect differing from an ordinary street car track.

5. Appeal and Error 🔑1071(1)—Harmless Error—Finding of Fact.

Any error in finding defendant guilty of gross negligence was harmless; other findings of negligence and freedom from contributory negligence supporting the judgment.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Saul Callett against the Central California Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Butler & Swisler, of Sacramento, for appellant. Ralph W. Smith and J. M. Inman, both of Sacramento, for respondent.

BURNETT, J. The action was for damages occasioned by the negligence of the defendant. It was tried before the court without a jury and the plaintiff was awarded the sum of $800. From the judgment the appeal has been taken.

The nature of the action is shown by the following allegations of the complaint:

"That the defendant, on the 10th day of August, 1915, was operating an electric railroad running along the said X street in the city of Sacramento; that on said day at about the hour of 3:30 o'clock in the afternoon thereof, while plaintiff, with due care and caution was proceeding in a westerly direction upon said X street to the right of the car tracks of the defendant company thereon, seated in a wagon driving a horse thereto attached, at a point 15 feet more or less to the east of the east curb of the intersection of Twenty-Seventh street with X street in said city, and while the plaintiff was lawfully so proceeding on said street on said day and at said time and hour, the defendant willfully, negligently, carelessly, imprudently, and improperly propelled a freight car pushed by another car which was operated by means of an electric motor, in a westerly direction upon the northerly tracks of said defendant company upon said highway, at an excessive and unreasonable rate of speed, and without any regard for the safety of plaintiff or persons using said street and highway, and failed and neglected to give any signal or warning of the approach of said car and failed and neglected to watch or look ahead to avoid injuring plaintiff and others using said street and highway; that the said freight car, while being so propelled along said track, because of the acts of defendant as aforesaid, collided with the left back wheel of the wagon in which plaintiff was riding as aforesaid, throwing plaintiff from the seat thereof with great force and violence, resulting in his sustaining great and permanent injuries."

The plaintiff's version of the accident will appear from the following quotation from his testimony:

"I was working for Strickland; I was soliciting for him; I solicited and delivered suits of clothing. And on this particular day I was coming in from driving in the cleaning wagon, clothes wagon. I had a box wagon; put clothes on both sides; a door in the back, and a canopy over the front seat. I had been soliciting orders and delivering goods in Oak Park and I came back from Oak Park and came to about Z; came down Twenty-Eighth street towards X; my horse was on a trot, or a slow trot all the way; when I came to the crossing I slowed my horse down to a walk and I looked every direction; I could not see any cars coming either way and I turned to the left. I started down toward Twenty-Seventh street. I looked every way, to see any possible chance a car coming. I took the right-hand side of the street; I made a large turn all around. I just went all around the corner * * * until I came to the right-hand side of X street; then I started down to Twenty-Seventh street. I was driving at a rate of about 4 or 5 miles an hour at the time; the wagon was about 10 or 12 inches, probably, away from the track, on the right-hand side; the wheels of the wagon were not in the track at all. When I got down about two-thirds of the street, why, something hit the wagon with such force it throwed me out in front, and when I landed I just landed straight over the footboard, and how I managed to get out of the wagon, I do not know, sure. * * * There was no warning at all or whistle blown. I believe I followed a direct line from Twenty-Eighth street down to the point where the accident occurred. Probably I varied an inch or two either way, I cannot recall; I know this horse was a very gentle horse; there was no necessity of pulling the lines either way, this horse going straight. I did not pull on the line either way; just held the line firmly and let the horse go at a steady gait. It is a smooth macadamized street. The reason I turned down Twenty-Eighth, I have driven down there several times before. I found that road was all cut up and I went out Twenty-Seventh street, found the road down there was a whole lot better for driving, so that was my reason for driving off of Twenty-Eighth into X and going down to Twenty-Seventh where the road was a whole lot better."

It is admitted that the plaintiff was quite seriously injured, and there is no contention that the amount awarded him is disproportionate to the extent of the damage he suffered, nor is there any claim of any defect or imperfection in the pleadings in the case, nor is any ruling of the trial court during the trial challenged by appellant. There are two contentions, however, upon which appellant insists for a reversal of the judgment. One of these is that the evidence does not show that the defendant is chargeable with negligence, and the other is that it appears conclusively from the record that plaintiff himself was guilty of contributory negligence, and therefore under the well-established rule barred from recovery.

[1] As to the first of these contentions it may be said that the accident itself is some evidence of negligence on the part of appellant. The evidence shows that the plaintiff was driving along a public street; that the conductor of the train, who was sitting on top of the freight car, had a straight clear track ahead of him, with nothing to obstruct his view of the position of plaintiff or to prevent him from perceiving the danger of a collision, and, accepting the testimony of the plaintiff, as we must, it appears further that the train approached without any warning and ran down from behind the vehicle of the plaintiff. Under such circumstances, it must be apparent that a car or train would not ordinarily run down a vehicle proceeding in the same direction without there being negligence in its operation, and the mere fact that such an accident occurred in the operation of said street car or train furnishes at least some evidence of negligence. It may be further said that it follows from the testimony of the plaintiff and the witness Mrs. Mispley that there was no gong sounded or whistle blown immediately preceding the accident so as to give warning to the plaintiff of the approach of the car. It is also a fair inference from the testimony of the conductor of the train and of one Doane, who was a witness for the plaintiff, that no warning was given in sufficient time to avoid the injury. It must also be said that the inference is not unreasonable that the train was traveling at an unusual rate of speed. It is true that the conductor testified to the contrary, but the facts and circumstances of the collision justify the conclusion that the train was traveling much more rapidly than he stated on the witness stand.

We have this situation, therefore, which the trial court had a right to accept from the evidence in the case: With an unobstructed view, in broad daylight, on a public street of the city, the train was approaching the plaintiff, who was in a position of danger, no warning being given of its approach, and traveling at an unusual rate of speed. The foregoing statement is sufficient to show without controversy that the defendant is properly chargeable with negligence. It will not be gainsaid that it was the duty of the defendant to travel at a moderate rate of speed throughout the streets of the city. It is equally plain that it was also the duty of the conductor to be on a constant lookout for pedestrians and vehicles and travelers generally, and to use all precautionary measures to avoid injuring any one who might be in proximity to or upon the track and therefore in a position of danger. If the one in charge of the train omits any of these precautionary measures which we have suggested and thereby a collision is caused and damage suffered by another, the defendant is properly chargeable with actionable negligence. This must be true upon principle, and it is well supported by the authorities of this and other states. Of course, we are not concerned with the fact that there was testimony exculpating the defendant from all blame.

[2, 3] As to the question of contributory negligence of plaintiff, accepting the statements of plaintiff and viewing the situation as it is presented by him and other witnesses, it cannot be successfully controverted that the finding of the court is supported by the evidence. It is well settled and hardly needs the citation of authorities that the plaintiff had a right to use the street just as he was using it; that he had the right to drive his vehicle within 10 or 12 inches of the railroad track as he declared he did, or to drive it upon the track itself if he found it necessary or convenient. It was, of course, his duty to exercise ordinary care and prudence in proceeding along the street. He could not disregard the right of others to use the street. He must keep a careful lookout to avoid a collision with other vehicles. He must pay careful heed to any warning that might be given him of the approach of any car or train from behind. Necessarily he is not required to be constantly looking backward to see whether any train may be approaching, as has been said in some of the decisions. He cannot be looking both forward and backward at the same time. His primary duty is to keep looking forward so as to avoid collision with anyone who might approach from that direction, and also that he may suitably direct his course. He has a right to rely upon the exercise of care on the part of those conducting any train that might approach from behind. He has a right to believe that he will be given proper warning of the approach in order that he may place himself in a position of safety. It is well settled that a railroad company has no exclusive right to the use of the street itself. It has, it is true, a superior right to the use of the tracks for obvious reasons, but this is not inconsistent with the right of the pedestrian or one driving a vehicle to use said street also, providing he does so in a careful

way and is willing and ready to respond to any warning or signal of danger and to avoid the obstruction of the course of travel along the tracks. It makes no difference that it does not appear that the street was crowded or that there are any mudholes or obstructions between the curb and the track to prevent plaintiff from driving near said curb. We may repeat he had a right to drive near the track, and we may say, parenthetically, that the reason for his so doing is given by one of the witnesses for appellant, and, indeed, it is apparent to any one who is familiar with the use of graded and macadamized streets. The portion of the street near the center is nearly level and is easier for travel than the portion near the curb which is more inclined.

The horse itself, according to the testimony of this witness, would naturally seek and travel along that portion of the street near the car track. It cannot be said that the plaintiff unreasonably or arbitrarily selected the course upon which he proceeded, but we must hold that his action under the circumstances was natural and reasonable and according to the conduct of the average prudent man under the same circumstances, and there can be no doubt that it is a reasonable inference from the record that he was free from such conduct in this case as would prevent his recovery.

We are entirely satisfied that upon these two vital issues the finding of the court is amply justified, although a contrary inference might possibly have been drawn as to each, and it seems hardly necessary to call specific attention to the decisions of the courts in reference to these questions. We, however, cite three cases decided by our own Supreme Court upon which the decision herein may be safely based, as follows: Shea v. P. & B. V. R. R. Co., 44 Cal. 414; Swain v. Fourteenth St. R. R. Co., 93 Cal. 179, 28 Pac. 829; O'Connor v. U. R. R. Co., 168 Cal. 43, 141 Pac. 809.

In the first case it is held:

> "A person is entitled to walk on a street railroad track in a public street, using reasonable care and prudence to avoid injuries; but he is not required to abandon the track in order to avoid possible injuries which may result from the carelessness of the company, and if he is injured by the carelessness of the company while walking on the track, the fact that he might have walked by the side of the track is not contributory negligence on his part."

In the Swain Case it is held:

> "It is not negligence per se for the driver of a patrol wagon to drive along and upon a street car track, so long as he uses ordinary care to avoid a collision with the cars on the track, and it is a question for the jury whether he has used such ordinary care." Furthermore "it is the duty of a driver of a street car to observe what is in the road before him, so as to avoid inflicting injury upon others, if practicable; and he is guilty of negligence if he omits, without apparent excuse, to look ahead and observe whether or not the track is clear."

In the O'Connor Case it is held:

> "Other vehicles," besides the street car, "have a right to travel over the entire street, including the space between the tracks, even when other portions of the street may not be crowded or in bad condition," and that "the rule as to 'looking' applied to the drivers of vehicles about to cross the track of a steam railroad at highway crossings does not apply to those driving along street railroad tracks laid upon public highways," and that "the fact that the driver of such vehicle, after looking back and not seeing any approaching car, failed to again look back during an interval in which he drove a distance of about 500 feet, did not constitute negligence per se."

The foregoing authorities and others that might be cited are directly in point here. In judging of the conduct of the plaintiff, the court manifestly had a right to consider all of the circumstances in the case, including the testimony of the plaintiff, that before proceeding upon X street he had carefully looked to see if any car was approaching. To say that the only rational conclusion to be drawn from the record is that plaintiff was guilty of misconduct would be to disregard the unquestionable right of the citizen to use in a careful manner the whole of the public streets of the city.

[4] The fact that the appellant operates interurban cars over the track in question does not, in our opinion, affect the merits of the case. The train which collided with the vehicle driven by the plaintiff was a local train, and was proceeding over a track which in no respect differs from the ordinary street car track. We can see no circumstance in the case which differentiates it from the ordinary street cars. If there be any difference, it would rather be disadvantageous to appellant, since manifestly the operation of the train under the circumstances was attended with more danger to travelers on the street than would be the operation of the ordinary street car. The plaintiff had the same right to use the street and the track under the same limitations and the defendant was under the same obligation as to the speed of the train and the necessity of giving due warning of its approach. The situation is quite different, as must be manifest, from the operation of railroad trains run by steam power upon the ordinary tracks for such trains.

[5] There is some criticism of the action of the court in finding that the defendant was guilty of gross negligence. This conclusion was based upon the theory of the respondent that the case called for the application of "the last clear chance" doctrine. We need not, however, consider the question whether the evidence supports such theory because the finding to that effect may be ignored. The other findings as to the negligence of the defendant and the exercise of ordinary care on the part of the plaintiff are amply sufficient to support the judgment, and we may limit our consideration to the

sufficiency of the evidence to support these findings.

From a careful reading of the whole record and attention to the construction of the elementary principles involved and the decisions of the courts we are entirely satisfied that it must be said that there is no legal ground for disturbing the judgment of the lower court, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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36 Cal. App. 10

JOHN A. ROEBLING'S SONS CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 2454.)

(District Court of Appeal, Second District, California. Jan. 16, 1918. Rehearing Denied Feb. 15, 1918. On Rehearing in Supreme Court, March 14, 1918.)

1. Master and Servant ⇐381—Workmen's Compensation Act—Death as Probable Incident of Employment.

If a night watchman, when intoxicated, neglecting his duty, went into the washroom of the plant with intent to sleep, and lighted the gas heater, tightly closing the door and windows, and laid down upon a bench, where he was killed by gas, the death was not such an accidental death as was a reasonably probable incident of the employment, giving his widow right to compensation under the Workmen's Compensation Act (St. 1913, p. 279).

2. Master and Servant ⇐403—Workmen's Compensation Act — Injury in Employment—Burden of Proof.

The burden of proof that the injury for which compensation is asked under the Workmen's Compensation Act was suffered in the course of the employment and arose out of the employment is on the claimant.

3. Master and Servant ⇐405(4)—Workmen's Compensation Act — Burden of Proof—Theoretical Conclusions.

Where various theoretical conclusions may be drawn from the state of facts established, each being equally plausible, some indicating that the injury may have arisen out of the employment, and others that the misconduct of the person injured was the producing cause, it may not be said that the evidence is sufficient to sustain the cause of claimant under the Workmen's Compensation Act, upon whom the burden of proof rests.

4. Master and Servant ⇐405(4)—Workmen's Compensation Act—Death in Employment—Sufficiency of Evidence.

In a widow's proceeding under the Workmen's Compensation Act for compensation for death of her husband, a night watchman, from gas, evidence *held* insufficient to support the conclusion of the Industrial Accident Commission that decedent was killed in the course of his employment, tending, instead, to show that he willfully stepped aside from the performance of his duties and invited by direct action the causes which produced his death.

In Bank. Petition for writ of review by John A. Roebling's Sons Company and the Ætna Life Insurance Company against the Industrial Accident Commission and Ellen J. Bundshu to annul an award made by the Industrial Accident Commission under the Workmen's Compensation Act in favor of Bundshu as widow of Joseph G. Bundshu. Award annulled.

Redman & Alexander, of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

JAMES, J. Petitioners herein seek to have annulled an award made in favor of Ellen J. Bundshu by the Industrial Accident Commission. Said Bundshu is the alleged widow of Joseph G. Bundshu. The commission determined that Bundshu, who died on or about the 10th day of December, 1916, came to his death through accidental means while he was in the employ of petitioner Roebling's Sons Company. It is the contention of petitioners that the award cannot be sustained; that, first, it was not shown that the death of Bundshu was produced by causes arising out of his employment, and second, that it was not shown that Ellen J. Bundshu was the widow of the decedent.

At the time of his death Bundshu was employed as night watchman and janitor in the Roebling's Sons Company's plant in the city of Los Angeles. His duties were to keep watch over the plant during the nighttime, and to do necessary janitor work about the offices of the company. The local manager of the company testified that he had made up the compensation of Bundshu, which was $85 per month, by calculating about $60 as proper compensation for the watchman service and $25 for the janitor work. This witness testified:

> "I figured $20 to $25 a month extra to have the same man do the janitor work of the office, and make a better job for somebody. In addition to that they would have plenty of time to do the work and make it more economical for us than hiring two men, and would serve to give the fellow something to do and keep him awake and keep busy during the night."

The main business of the watchman, as is common in employment of that character, was to guard the plant against intruders. In order to insure the performance of such duties the watchman was required to "ring in" hourly upon instruments placed in the building which were connected with a concern known as the District Telegraph. It was the duty of the latter concern, whenever there was a failure of the watchman to so report, to send a roundsman to find out the reason for the neglect, if it so should happen to be. Bundshu was at work on the night of the 10th of December, 1916, in the Roebling plant. At about 9:30 o'clock a roundsman of the telegraph company, visiting the Roebling plant, saw Bundshu apparently asleep at a desk in the office. This roundsman rapped loudly upon the door, whereupon Bundshu aroused himself and started to come to the door. On the way he fell. When the door was opened the roundsman asked Bundshu whether he had been drinking, to which Bundshu first replied

"No." The roundsman, however, testified that "there was whisky on his breath," and that he said to Bundshu, "Do you mean to tell me you haven't had any whisky?" to which Bundshu replied, "Oh, I have had a little liquor." At 11 o'clock on the same night Bundshu failed to ring in to the telegraph company, and a roundsman was sent to the Roebling plant to ascertain the reason for the omission. This roundsman testified that he in turn saw the watchman sitting at a desk with his head lying on his arms, and that he had to pound on the door before being admitted. This roundsman testified that when Bundshu came toward the door to admit him he staggered a little, and that he asked Bundshu what kind of "water" he had been drinking, and Bundshu replied, "Damned good." In the opinion of this witness, Bundshu was at the time "somewhat intoxicated." At 1:30 a. m. on the same night Bundshu again failed to ring in, and the same roundsman who visited him at about 9:30 was sent again to the Roebling plant. This witness testified that he reached there about 1:45 and pounded upon the door without being able to secure any response; that he then went to a neighboring plant and aroused the watchman there. The two men took a ladder, and by that means gained an entrance to the Roebling plant through a balcony window. On the main floor of the building was a little room used as a washroom. The door of this room was found to be closed. Upon its being opened the watchman noticed that the air which came from the room was "bad"; it "hurt the eyes." This room had been tightly closed, and they found a gas stove burning therein. Lying on a bench, with his hat on the floor, was Bundshu. He was dead at the time. An examination of the stove showed that the gas was turned on very "high," but there appeared to be no indication that unconsumed gas was escaping in any other way. The windows of the room were tightly closed. This stove had been placed in the washroom and had regularly been made use of by the men employed at the plant while changing their clothes in the mornings before going to work. The manager of the plant testified that on the morning following the death of Bundshu he made an examination of the pipe supplying gas to the stove and failed to find any leak. He testified that the stove had been used since that time as it was used before. He was asked the question as to whether a night watchman employed on those premises had any occasion to be in that room or use the stove, to which he replied, "Absolutely none that I can conceive of, unless he wanted to use the toilet." There was other testimony that the office of the plant was heated during the daytime by steam which proceeded from the heating apparatus in the basement; that this heating plant, after having been used during the day, would ordinarily keep the office warm until about 1 o'clock in the morning. No instructions had been given forbidding any watchman employed on the premises to make use of the steam-heating plant, if he so desired; neither had instructions been given as to the use of the gas heater, except as has been noted in the testimony of the manager, who said that a watchman would have no business in the toilet room except for the purpose of using the particular facilities therein provided. The use of such facilities, of course, would only consume a brief period of time.

[1-4] In order to sustain the finding of the commission we must conclude it to be a reasonable proposition fairly indicated by the proof that Bundshu, not being affected by any condition arising from his own misconduct, lighted the heater, and that the fumes of the gas overcame him before he was able to protect himself and avoid being suffocated. The expert testimony given before the commission showed that death was due to poisoning produced by carbon monoxide, that being a constituent of illuminating gas in its unburned state. If we are to assume another state of facts, to wit, that Bundshu on the night in question was intoxicated, that neglectful of his duty he went into the washroom with intent to sleep, that he there lighted the heater and tightly closed the door and windows and lay down upon the bench, and that under such conditions was killed, it must at once be said, we think, that the death was not such an accidental death as was a reasonably probable incident of the employment; and the last conclusion we feel is the one which the evidence, with little uncertainty points to. But it is not essential to the case of petitioners that the conclusion last suggested be one which the evidence clearly established. The burden of proving, as has often been said in the decisions both of our own Supreme Court and courts of last resort in other states where similar conditions of statute exist, that the injury for which compensation is asked was suffered in the course of the employment and arose out of the employment, is upon the claimant. Where various theoretical conclusions may be drawn from the state of facts established, each being equally plausible, some indicating that the injury may have arisen out of the employment, and others that the misconduct of the person injured was the producing cause, then it may not be said that the evidence is sufficient to sustain the case of him upon whom the burden of proof rests. A finding in such a case in favor of the claimant is said to be speculative. In Massachusetts the Compensation Act is, in those portions of it relating to the matter here being considered, practically identical with the provisions of the California law. Our Supreme Court has quoted with approval in Kimbol v. Industrial Accident Commission, 173 Cal. 351, 160 Pac. 150, L. R. A. 1917B, 595, Ann. Cas. 1917E,

312, the language of the Supreme Court of Massachusetts defining the term "arising out of the employment." Sanderson's Case, 224 Mass. 558, found in 113 N. E. 355, was a case where the Industrial Commission of that state awarded compensation to a widow where death had apparently been caused by accidental means. The court, in the course of its opinion, declared that many conjectures could be made as to the cause of the fall of the deceased, some of which would sustain the application and others negative any right in the claimant. It concluded that the finding of the commission was based "upon surmise, speculation, and conjecture, and does not rest upon a foundation of proof by a preponderance of the evidence"; the court adding:

> "It may be the dependent is correct in her contention that the death of the employé was due to a fall from the wagon, but other theories and conjectures are quite as probable."

And we may remark that the uncontradicted evidence in this case indicates, if we are to choose between conflicting speculative deductions, that on the night in question the deceased willfully stepped aside from the performance of the duties which his employment laid upon him and invited by direct action on his part the occurrence of the detrimental causes which produced his death. In our opinion, the conclusion of the commission is not supported by sufficient evidence.

As the conclusion just announced necessarily determines the whole matter of the validity of the claimant's application, it seems unnecessary to give special consideration to the second point urged upon the application for this writ. The second contention is based upon the fact, as shown in evidence, that the claimant here, long prior to her marriage to Bundshu, had been married to two other persons from whom she had not been divorced. The history of her marital experiences were, in brief, as follows: In 864, when 14 years of age, she married one Butler, from whom she was soon divorced. In 1868 she married one Morrell, living with him for about a year and a half, when she returned to her parents, but was never divorced from the husband. This man, she testified, she had not since heard from. In 1872 she went through a form of the ceremony of marriage with one Maisey, with whom she lived for about 18 years, and by whom she had two children. She testified that Maisey went away with another woman, and that upon consulting the district attorney in Chicago with the design to compel Maisey to support herself and children, she was advised that her marriage with Maisey was not legal. In 1891 she was married to one Brennan, and after living with him 2 years, secured a divorce. She then married Bundshu, with whom she was living at the time of the latter's death. The testimony showed that Maisey was still living. There was no testimony as to Morrell being alive or not. The latter was of about the age of 25 when he married the claimant. We have presented this statement of facts regarding the second contention, but, for the reasons expressed, do not consider it necessary to announce a conclusion as to the legal proposition involved.

The award is annulled.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

Opinion of Supreme Court Denying Rehearing.

PER CURIAM. In denying the application for a hearing in this court, we deem it proper to say that we do not understand the rule to be that if different conclusions may rationally and fairly be drawn from the evidence, one sustaining the right to compensation and the other being opposed thereto, the Industrial Accident Commission is not at liberty to adopt the conclusion favorable to the claim. Of course it is well settled that the commission can do this very thing, and that its conclusion in that regard is beyond the scope of our review. No member of this court disputes this proposition. The justices opposed to granting the application for a hearing in this court are of the opinion that the opinion of the District Court of Appeal means that in this case there was no substantial evidence reasonably warranting an inference favorable to the claim for compensation, and that any finding to the contrary is necessarily based on mere surmise, speculation, or conjecture, and that when that court speaks of a case "where various theoretical conclusions may be drawn," it is in fact speaking of conclusions based on speculation and conjecture, rather than of inferences reasonably and fairly made from testimony.

The application for a hearing in this court is denied.

178 Cal. 10

IRWIN v. GOLDEN STATE AUTO TOUR CO. (L. A. 4156.)

(Supreme Court of California. March 23, 1918.)

1. Negligence 🔑93(1) — Imputed Negligence—Person Invited to Ride in Auto Truck.

Where the driver of an auto truck invited plaintiff to ride home with him, and plaintiff had no control over the driver's conduct, or any participation in his management of the truck, and had not become a passenger upon the truck, but was about to board it, any negligence of the driver with respect to the position of the truck by the curb was not imputable to plaintiff, so as to defeat his action for personal injury from being struck by defendant's automobile.

2. Negligence 🔑93(1) — Imputed Negligence—Passenger in Automobile.

A passenger, about to board an automobile truck on driver's invitation to ride, if conceded a passenger, is not to have imputed to him the negligence of the driver as to matters over which the passenger has no direction or control.

3. Municipal Corporations 🔑705(10)—Injury from Automobile — Contributory Negligence.

Plaintiff, in an action for injury when struck by defendant's automobile as he was about to board a standing truck on the driver's invitation, was responsible only for the exercise of ordinary care on his part.

4. Municipal Corporations 🔑706(7)—Injury from Automobile—Contributory Negligence—Question for Jury.

In an action for personal injury when struck by defendant's automobile while about to become an invited passenger on a truck standing by the curb, *held*, on the evidence, that plaintiff's contributory negligence was for the jury.

5. Municipal Corporations 🔑706(4)—Personal Injury from Automobile — Evidence—Ordinance.

In an action for personal injury when struck by defendant's automobile before plaintiff had become an invited passenger on another's truck, which was standing by the curb, so that the driver's negligence, if any, was not imputable to him, the exclusion of an ordinance tending to show the driver's negligence in allowing his truck to stand in a forbidden position was properly excluded.

6. Municipal Corporations 🔑706(6) — Injury from Automobile — Negligence — Question for Jury.

In an action for injury to plaintiff, when struck by defendant's automobile while about to board a standing truck, *held*, on the evidence, that defendant's negligence was for the jury.

Department 1. Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by W. H. Irwin against the Golden State Auto Tour Company. Judgment for plaintiff, and from the judgment, and from an order denying a motion for a new trial, defendant appeals. Judgment and order affirmed.

Riddle & Cheroske, of Los Angeles, for appellant. Tyrrell, Abrahams & Brown, of Los Angeles, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment and order denying a motion for a new trial in an action for damages for personal injuries. Concerning the facts of the case there is, with one exception, no material dispute. The accident in which the plaintiff suffered his injuries occurred on the evening of February 18, 1914, on North Broadway street, near Pritchard street, in the city of Los Angeles. Plaintiff's version of it is substantially adopted for the purpose of this appeal. He testified that about 5 o'clock on the evening of the above date he had taken a car on North Broadway and Eighteenth avenue, and ridden out North Broadway to Pritchard street, where he got off the car and went across the street to a butcher shop to get some meat. As he went into the butcher shop he met Mr. Kelley, whose truck was standing in front of the shop, and who asked him if he wanted a ride home. (Mr. Kelley lived in his neighborhood.) The plaintiff answered, "Yes," and went on into the shop to get his meat; Mr. Kelley in the meantime going elsewhere on an errand. Coming out of the shop, the plaintiff walked to the curb at the rear end of Kelley's truck, which it is stipulated was 14 feet long and 5 feet wide. It was backed up; the right-hand rear wheel being against the curb and the right-hand front wheel a distance from the curb stated by the plaintiff to have been not over 3 feet, but variously estimated by the different witnesses. It is upon this point in fact that the main dispute between the parties arose; the witnesses for the defendant asserting that the front end of Kelley's truck was at such a distance from the curb out in the street as to constitute a violation of the ordinance of the city in respect to the positions of vehicles with relation to the curb. However that may be, the plaintiff states that he walked to the curb and looked down the street, when he saw a touring car approaching, and being at the time about 150 feet away, and out in the street next to the car track. The street was fairly lighted, though it was raining at the time, and the plaintiff had his umbrella up. The front and rear lights on Kelley's truck were lighted. The plaintiff stepped off the curb, walked around the rear end of Kelley's truck toward the front, put his right foot on the footboard, laid his meat on the seat, lowered his umbrella and was about to step up into the truck; his face being toward it and his back in the direction of the approaching touring car. While in this position he was struck by the touring car, which passed over his leg, causing the injuries for which he sues. The touring car, prior to its impact upon the plaintiff, had been climbing a somewhat steep grade from the lower street, going slowly and making sufficient noise to be heard by the plaintiff as he went around the truck to board it. Plaintiff, in this respect, states that he heard the noise of the approaching car, but that no other warning was sounded prior to the collision. It was between 25 and 30 feet from the nearest track to the curb on that side of the street, and as the plaintiff first observed the touring car it was approaching out in the street near the track, and following a line of approach which would have taken it safely by the head of Kelley's truck, and safely past the point where the plaintiff was about to board it, with space to spare. Upon a showing of these facts the plaintiff recovered a verdict and judgment for the sum of $2,500, which the court refused to set aside on motion for a new trial, wherefore the defendant prosecutes this appeal.

[1] The first contention urged by the appellant is that the court erred in giving the following instruction:

> "You are instructed that, if you find from the evidence that plaintiff was about to board the automobile truck as the guest of its driver, neither exercising nor assuming any control over it, then, even though you may also find that the auto truck was not properly equipped or lighted, or that its driver was negligent in any other respect, such negligence must not be imputed to plaintiff. The plaintiff is responsible only for the exercise of ordinary care on his own part."

In this connection the appellant also alleges that the court erred in refusing to give, in lieu of the foregoing instruction, the following instruction requested by the defendant:

> "You are hereby further instructed that the plaintiff, when he was in the act of getting onto the auto truck which was standing in the street, accepted the conditions there existing, including the position in which said auto truck was standing."

The rule which the appellant seeks to invoke in support of its contention that the trial court was in error in giving and refusing respectively the foregoing instructions is that the negligence of the driver of a vehicle is to be imputed to the passenger, or, as in the case at bar, to one about to become such passenger; the appellant claiming that there was sufficient evidence that Kelley was negligent, with respect to the position in which his truck was standing at the time of his invitation to the plaintiff to ride with him, and in the position in which it still stood at the time when the plaintiff was attempting to board it, to permit the application of the above rule, and hence that the appellant was entitled to an instruction to the jury to that effect. We are of the opinion that the rule for which the appellant contends, however correct in a proper case, cannot be given application to the facts of the case at bar. It is true that the plaintiff had been invited by Kelley to ride home with him in his truck, but the plaintiff had in no way participated in any act of negligence which Kelley may theretofore have committed in the placing of his truck; nor had the plaintiff any control over the conduct of Kelley in regard thereto, or in his management of his vehicle. The plaintiff had not yet become, in point of fact, a passenger upon Kelley's truck. The cases, therefore, cited by counsel for the appellant, of persons occupying a vehicle and engaging in a mutual adventure with its driver have no application to the instant case.

[2-4] But, even if it were to be assumed that the relation of driver and passenger had arisen upon the acceptance of the former's invitation to ride, we still think the sounder rule to be that the passenger is not to have imputed to him the negligence of the driver in respect to matters over which the passenger or persons about to become such, had no direction or control. The following authorities sustain this view: Bresee v. L. A. Traction Co., 149 Cal. 131, 85 Pac. 152, 5 L. R. A. (N. S.) 1059; Robinson v. N. Y. Central R. R. Co., 66 N. Y. 11, 23 Am. Rep. 1; Dyer v. Erie Ry. Co., 71 N. Y. 228. It follows that the court did not err in refusing to give the defendant's suggested instruction, nor in its refusal to give any other of the defendant's offered instructions in which the doctrine of imputed negligence was sought to be invoked; nor was the court in error in giving the foregoing instruction at the plaintiff's request, since, aside from its correct statement as to the rule of imputed negligence, it also embodied in its concluding sentence the proper rule governing the plaintiff's situation in the instant case:

> "The plaintiff is responsible only for the exercise of ordinary care on his own part."

Whether or not he exercised such care under the circumstances of the instant case was a question of fact for the jury.

[5] The appellant's next contention is that the court erred in the exclusion of the ordinance of the city of Los Angeles in effect at the time of the accident, making it unlawful to stop any vehicle on any street unless the side next the curb is not more than 2 feet from the curb. The only bearing which this ordinance could have upon this case would be upon the question of the imputed negligence of Kelley in allowing his vehicle to remain standing in a position violative of

the requirements of the ordinance. But when the doctrine of imputed negligence is eliminated from the case, the terms of this ordinance become entirely immaterial to it, and hence it was properly excluded by the trial court. This reasoning and conclusion also applies to another ordinance to practically the same effect, which the defendant omitted to introduce upon the main trial, but which it sought to have presented as newly discovered evidence upon its motion for a new trial. It was neither newly discovered evidence nor was it material to the issues in the case.

[6] The remaining points urged by the appellant relate to its contention that upon a consideration of the whole evidence in the case the record shows that the plaintiff was guilty of contributory negligence, which, as a matter of law, should prevent his recovery, and also shows that the accident was unavoidable and in no sense due to any fault on defendant's part. The facts of this case do not warrant either of these contentions. The question of the plaintiff's contributory negligence was, under proper instructions by the trial court, a question of fact for the jury. The evidence does not show that the accident was unavoidable, but, on the contrary, discloses that the plaintiff, while in plain sight of the driver of the defendant's touring car for a distance of 150 feet, and while upon the public street, where he had a right to be, was run into from behind by the defendant's car, while the driver of said car had practically three-fourths of the width of an otherwise unoccupied street, in which to have so altered his course as to avoid striking the plaintiff. Under such circumstances we cannot say, as a matter of law, that the accident was unavoidable.

Judgment and order affirmed.

We concur: SLOSS, J.; SHAW, J.

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178 Cal. 17

FERGUSON v. EDGAR et al. (L. A. 4221.)

(Supreme Court of California. March 23, 1918. Rehearing Denied April 22, 1918.)

1. CONTRACTS 🔑266(1), 270(1)—RESCISSION—DUTIES OF PARTIES.

Under Civ. Code, § 1691, parties to a contract must rescind promptly upon discovering facts entitling them to rescind, and restore to the other parties all they received under the contract.

2. LANDLORD AND TENANT 🔑34(4) — CONTRACT—RESCISSION—DUTIES OF PARTIES.

Where defendants entered on land under lease with option to buy, having presumptive knowledge of existence of road across land, such road being obvious, and they retained possession until expiration of the lease and the option, they could not then rescind and relieve themselves from the unperformed obligation of the lease to make certain improvements on the land.

3. VENDOR AND PURCHASER 🔑135(1)—CONTRACT—CONSTRUCTION—"CLEAR TITLE."

A covenant in a contract to give a clear title refers to title free from incumbrance, including taxes, assessments, and liens, as defined by Civ. Code, § 1114, but does not mean title free of obvious burdens, such as state highway, whose use was open and notorious.

[Ed. Note.—For other definitions, see Words and Phrases, Clear Title.]

Department 2. Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Don G. Ferguson against Ray Edgar and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Childers & Bruce, of El Centro, for appellants. Conkling & Brown and B. D. Noel, all of El Centro, for respondent.

VICTOR E. SHAW, Judge pro tem. The facts upon which this action is based are as follows: On January 22, 1913, plaintiff and defendants entered into a written agreement whereby the former gave the latter an option to be exercised at any time prior to January 22, 1914, to purchase 160 acres of land for the sum of $16,000, payable "$12,000 cash on delivery of clear title," subject to mortgage of $4,000, and also gave to defendants the right to the use and occupation of the land for the period covered by the option. In consideration therefor defendants on their part agreed to do certain improvement work upon the land and seed the same to alfalfa. Defendants entered thereon and continued in the use and occupation thereof until January 22, 1914, at which time, the option by its terms having expired without defendants exercising the right given thereby to purchase the property, they surrendered possession of the same to plaintiff, who, in May following, brought this action to recover damages for defendants' breach of contract to do the work agreed to be done by them upon the property.

In their answer defendants alleged that at no time during the period covered by the option could plaintiff have given them a clear title to the land for the reason that by virtue of an easement therefor granted by plaintiff a public highway existed along one side of said tract of land which constituted an incumbrance upon the title. It was further alleged that upon discovery of the fact that such incumbrance existed defendants rescinded the contract. The issues joined were tried by a jury, which returned a verdict in favor of the plaintiff. Judgment followed, from which defendants appeal.

"The only question involved," says counsel for appellants, "is whether or not the admitted public road and the other easements * * * are incumbrances" which entitled defendants to rescind the contract. "If the facts did not warrant a rescission of the contract, then," says appellants' counsel, "the judgment is correct, and should be affirmed."

Section 1689 of the Civil Code provides that:

"A party to a contract may rescind: * * * 2. If, through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part; * * * 4. If such consideration, before it is rendered to him, fails in a material respect, from any cause."

The consideration moving to defendants and upon which their promise to do the work was based was the use and occupation of the land for one year, together with the right at their option during said time to buy the same at a specified price. In effect, the contract was a lease for a term of one year for a stipulated rental with an option given to purchase.

[1, 2] In order to accomplish rescission of the contract, it devolved upon defendants, as provided in section 1691, Civil Code, to rescind promptly upon discovering facts which entitled them to rescind and restore to plaintiff everything of value which they had received from him. Presumably, since the contrary is not shown, they knew of the existence of the highway and its physical effect upon the land when they entered. Notwithstanding this fact, they entered upon and took possession thereof and retained possession of the same, and all rights under the option, until the expiration of the lease with which the option also expired. Then, and not till then, when all rights under the contract had terminated, they surrendered possession of the property. The effect of such action was to defeat any right of the defendants to rescind the contract. Evans v. Duke, 140 Cal. 22, 73 Pac. 732. Not only was there an entire absence of the exercise of diligence in their purported act of rescission, but a total failure on the part of defendants to restore to plaintiff that which under the contract they had received, and all of which they retained. Under these circumstances to hold the facts sufficient to constitute a rescission and release defendants from their promise would be most inequitable. Cross v. Mayo, 167 Cal. 595, 603, 140 Pac. 283; Bailey v. Fox, 78 Cal. 396, 20 Pac. 868. The attempted rescission after the contract had terminated was a futile act.

[3] Moreover, while there is some apparent conflict of authority upon the subject, the covenant in the contract to give a "clear title" must, upon the facts disclosed by this record, be deemed to have been understood and intended by the parties as a title free of incumbrance as defined by section 1114 of the Civil Code. It was not considered as having reference to obvious and physical burdens, permanent in character, such as a state highway, the use of which was open and notorious. As to such obvious burden the party proposing to buy, having full knowledge of the servitude and the necessity therefor as a means of egress and ingress to the premises, contracts subject to the physical and visible burden imposed upon the land. Sisk v. Caswell, 14 Cal. App. 377, 112 Pac. 185. In the case of Patterson v. Arthurs, 9 Watts (Pa.) 152, the owner, as here, had covenanted to convey the property free from all incumbrances, and it was there held that a public road which occupied a portion of the property was not an incumbrance within the meaning of the covenant. In Brewster on Conveyancing, § 203, it is said:

> "In cases where there is a physical burden of this sort, which is visible, there is a fair and reasonable presumption, in the absence of an express agreement, that both parties act with reference to this plain, existing burden, and that the vendor on the one hand demands, and the vendee on the other pays, only the fair value of the land as visibly incumbered. Therefore, it is said, such burdens, by way of open and notorious easements, are not really incumbrances within the meaning of this covenant, because the real subject-matter of the dealings between the grantor and the grantee is the land, subject to visible easements."

What is said applies with like force to the canal or water ditch, the purpose of which was to convey water for irrigation and use upon the land in question in common with other lands in the vicinity, and without which, as known by defendants, the land would be valueless.

The judgment is affirmed.

We concur: MELVIN, J.; WILBUR, J.

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178 Cal. 54

In re BEER'S ESTATE. (Sac. 2679.)

(Supreme Court of California. March 28, 1918.)

EXECUTORS AND ADMINISTRATORS ⚷17(2)—RIGHT TO ADMINISTRATION.

Since, under Code Civ. Proc. § 1474 (Civ. Code, § 1265), the wife's selected homestead vests absolutely in the husband on her death, the brother of a wife, who selected a homestead from her separate property, and predeceased her husband, was not entitled to administration in preference to the public administrator, on the husband's estate, under Civ. Code, § 1386, subd. 8, as to descent of property to kin of spouse who first died, in view of Code Civ. Proc. § 1365, stating order of administration, since no interest in the homestead came to him by descent directly from his sister, within Civ. Code, § 1386, subd. 8.

In Bank. Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Proceedings in the matter of the estate of Christian Beer, deceased. Contest for letters of administration between the Public Administrator and William Seliner. The superior court granted Seliner's petition, and the Public Administrator appealed, and the court in Division No. 2 reversed the order. On rehearing in bank order of the superior court reversed.

Von Detten & Henry, of Stockton, for appellant. Lawrence Edwards and Ben Berry, both of Stockton, for respondent.

ANGELLOTTI, C. J. Christian Beer died intestate, leaving no wife, issue, father, or mother. There was a contest for letters of administration between the public administrator and William Seliner, a brother of Christian Beer's predeceased wife, Elizabeth

S. Beer, who also died intestate. The superior court granted Seliner's petition, and the public administrator appeals.

The right of Seliner to letters of administration is dependent upon his right under subdivision 8 of section 1386, Civil Code, to succeed to property of the decedent as the surviving brother of the predeceased wife of the decedent; he himself not being related by blood to the decedent. Section 1365, Code Civ. Proc. The estate of decedent consists in part of a lot of land with the house thereon in the city of Stockton. This was the separate property of the predeceased wife, who died in the year 1911. In the year 1910, while said property was her separate property, she had duly selected it as a homestead, and therefore upon her death, by express provision of the homestead statute, it vested in the surviving husband, the decedent. Civ. Code, § 1265; Code Civ. Proc. § 1474. Seliner's claim of right to succeed to this property is based on a provision of subdivision 8 of section 1386 of the Civil Code, which provides that, if any portion of the estate "was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise or bequest," such portion shall go to specified relatives of the deceased spouse. Section 1265, Civil Code, and section 1474, Code of Civil Procedure, as they now are, and as they were at the time of the selection of this homestead, both substantially provide that, if the selection of a homestead was made by a married person from the community property, or from the separate property of the spouse making the selection or joining therein, the land selected, on the death of either of the spouses, vests in the survivor. The precise question here is whether homestead property so vesting in the survivor of the marriage comes to him "by descent" within the meaning of this provision of subdivision 8 of section 1386, Civil Code.

We are of the opinion that this question must be answered in the negative. It seems clear to us that this provision contemplates only such property as comes by will or under the law of succession to the surviving spouse, directly from and through the deceased spouse. In view of our decisions as to homesteads selected from the community property or from the separate property of the spouse making the selection or joining therein, the property selected as a homestead does not so come. The character of such a homestead under our law is perhaps nowhere better described than in the opinion of Mr. Justice Lorigan in Wall v. Brown, 162 Cal. 307, 122 Pac. 478, where, subsequent to the selection of a homestead from the community property, the husband conveyed the property to the wife, and there was a question as to the effect of such conveyance on the homestead. It was said:

> "But it does not follow because a conveyance is made by the husband to the wife of an interest in the community property impressed with a homestead that the homestead is impaired or the right of survivorship created thereby is to the extent of the property conveyed destroyed. The homestead is something distinct from the legal title. It qualifies and limits the right of the owner of the title for the benefit and protection of both spouses while living, and to insure future protection to the survivor. A conveyance of the community property to the wife does not affect any of the characteristics incident to the homestead itself. It affects only the title to the property which has been so impressed; what was community property when the declaration was filed becomes by the conveyance her separate property, but though the character of the title is changed, this does not affect the homestead, but the title is taken subject to it."

This means that to the extent provided in the homestead law for the benefit and protection of both spouses while living, and for the benefit and protection of the survivor, the title to the property is at all times subject to the homestead, with the result that upon the death of one of the spouses whatever title he or she had in the property selected as a homestead is absolutely extinguished by operation of law, the homestead absorbing all of such title. The owner of separate property selected by him or her as a homestead, by the selection impresses the property with the homestead character, dedicates it to this paramount purpose, and the vesting of the title on the death of one of the spouses under the law relative to homesteads is simply in satisfaction of the homestead claim of the survivor. The title to the property does not come to such survivor directly from or through the deceased spouse. It has been substantially said many times by this court that upon the death of the husband or wife it vests absolutely, by operation of law, in the survivor; that the property is never in fact a part of the estate of the deceased spouse; that the court in probate is without power to affect the absolute title vested in the surviving spouse at the moment of the other's death; and that any order setting such property apart as a homestead is not essential to the title of the surviving spouse, and has no other effect than to withdraw it from further consideration by the court and relieve the executor or administrator from further obligation in regard thereto. See Estate of Klumpke, 167 Cal. 420, 139 Pac. 1062; Saddlemire v. Stockton Savings, etc., Soc., 144 Cal. 653, 79 Pac. 381; Hart v. Taber, 161 Cal. 20, 118 Pac. 252; Wall v. Brown, supra; Estate of Shirey, 167 Cal. 195, 138 Pac. 994; Williams v. Williams, 170 Cal. 625, 151 Pac. 10. In such a case the deceased spouse at the moment of his or her death has no interest in the property which is capable of being effectually devised (Williams v. Williams, supra), or, it would appear to follow, passing by succession, as the term is defined by section 1383, Civil Code.

It seems clear that the provision of subdivision 8, § 1386, Civil Code, has no application to such a case as is here presented, and that therefore Seliner is not entitled to succeed to any portion of the estate of deceased. It follows that he could not legally be appointed administrator in preference to the public administrator.

The order is reversed.

We concur: WILBUR, J.; RICHARDS, Judge pro tem.; MELVIN, J.; VICTOR E. SHAW, Judge pro tem.; SLOSS, J.

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178 Cal. 40

BULLIS v. STANIFORD et al. (S. F. 7447.)

(Supreme Court of California. March 25, 1918.)

1. HOMESTEAD ⚷57(3) — RESIDENCE — EVIDENCE.

In an action to set aside a homestead, evidence *held* not to sustain a finding that defendant actually resided on such homestead at the time of declaration.

2. HOMESTEAD ⚷181(3)—EVIDENCE—CHANGE OF RESIDENCE—HEAD OF FAMILY.

In an action to set aside a homestead claimed as exempt from execution, evidence *held* to require a finding that the husband of defendant was the head of the family and had established his residence elsewhere than on the homestead claimed by his wife.

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by W. S. Bullis against Virginia Lee Staniford and husband. Judgment for defendants, and plaintiff appeals. Reversed.

Edward C. Harrison and Maurice E. Harrison, both of San Francisco, and Edgar K. Brown and Trask & Brown, all of Los Angeles, for appellant. Frank Kauke, of Fresno, for respondents.

MELVIN, J. Plaintiff, who is a judgment creditor of defendants, sued to annul and set aside a homestead which was alleged to have been declared fraudulently by defendant Virginia Lee Staniford, wife of defendant George F. Staniford, upon certain premises in the city of Fresno. Judgment was given in favor of defendants. From said judgment plaintiff appeals.

The most important question in the case was whether or not, at the time of filing the declaration of homestead, Virginia Lee Staniford was actually residing with her husband and family on the premises in the contemplation of the homestead law. The declaration of homestead was filed in February, 1914. It is undisputed that the property in question had been originally purchased by the Stanifords as their place of residence and had been occupied by them. At that time Mr. Staniford was employed in the business of special agent of insurance companies. His occupation compelled him to travel over certain territory embracing Fresno. At times he was able to be at home with his family as his territory included the San Joaquin Valley. In 1912 he was given duties which required his services elsewhere and was relieved of the task of attending to business for his employers in the San Joaquin Valley. He was then, as he testified, "transferred absolutely to Southern California." At that time he went to Los Angeles, and had been there all of the time from 1912 until the trial took place in 1915. It was shown without contradiction that George F. Staniford had registered as a voter in the city of Los Angeles in April, 1912, again in September of that year, and yet again in April, 1915, and that he had voted at all regular elections in that city between 1912 and 1915. Of course, his registrations were supported by affidavits solemnly alleging, in each instance, that his residence was in Los Angeles. It was shown, further, that in August, 1914, George F. Staniford had testified in the superior court of Los Angeles county that his residence was in the city of Los Angeles. It will thus be seen that, between 1912 and the time of the declaration of the homestead, Mr. Staniford, not only by his solemn declarations under oath, but by every overt act, indicated his intent, as running with his physical presence, to make Los Angeles the place of his residence.

Appellant's counsel contend that as Mr. Staniford was the head of the family, furnishing support to his wife and the younger son, who was a student at Stanford University, his residence was the residence of his family, and that, irrespective of the intention of Mrs. Staniford with regard to her place of residence, his residence in Los Angeles at the time of the declaration of homestead is established without contradiction and is determinative of the whole matter. We will have occasion to consider this theory further in a subsequent part of this opinion. It appears without contradiction that, when the Stanifords moved into the home in Fresno, the family consisted of Mr. and Mrs. Staniford and two sons. In 1912 the elder son established himself as a physician in San Francisco and the younger was a student at Leland Stanford, Jr., University. In that year the defendants leased the property in Fresno, and Mrs. Staniford went to San Francisco to keep house for her elder son and to be near the younger one. Mr. Staniford had gone to Los Angeles. During the first year of their absence the tenants were a family named Johnson. Judge George B. Graham, a warm friend of the defendants and a relative of the Johnsons, went to lodge and board with his kinsfolk, and at the expiration of the written lease to the Johnsons, in July, 1913, a lease for the following year was taken in his name. In February, 1914, a foreclosure suit by plaintiff upon other property of the defendants being in progress, but not yet carried to a judgment, Mrs. Staniford consulted an attorney in San Francisco upon the subject of filing a homestead on the Fresno property. He wrote a letter to Judge Graham and Mrs. Staniford, without previous notification to the judge, went with her younger son to Fresno and to the property here in question. Judge Graham was about to start on a business trip to San Francisco. This was February 20, 1914. On presentation of the letter from her attorney in San Francisco, Mr. Coldwell, to Judge Graham, a "rider" canceling the lease was pasted on the written contract. Judge Graham then departed for San Francisco, taking with him only the articles necessary for a short sojourn, and he returned from San Francisco on the 26th or 27th of February. Meanwhile Mrs. Staniford remained at the house, and her younger son was there part of the time. Graham's subtenants stayed on the premises just as they had been in occupancy of the place. There is no evidence that they ever attorned to Mrs. Staniford or paid her any rent. On February 24th Mrs. Staniford filed the declaration of homestead wherein she certified and declared that she was actually residing on the premises with her husband and family. On Judge Graham's return a new lease was executed whereby he became the tenant of the property for one year from March 1, 1914, upon exactly the same terms upon which he had previously rented it and Mrs. Staniford returned to her son's home in San Francisco where she continued to remain.

From these facts, appellant insists that the cancellation was a mere "paper transaction," carried through so that Mrs. Staniford could file a homestead. The validity of this contention is virtually conceded by counsel for respondents. He declared at the oral argument that he did not depend upon the brief sojourn of Mrs. Staniford and her younger son in February to establish residence, but he contended in his briefs and in his argument that defendants had never surrendered their residence in Fresno. In support of this contention he calls attention to the fact that Mr. Staniford was almost constantly on the move from place to place in his territory; that the family furniture was left in the Fresno house; that a small room or closet was reserved, by the lease, for the storage of some of the goods of the Stanifords; and that Mrs. Staniford retained membership in a lodge in Fresno.

[1] It is argued that undoubtedly the family resided on the premises originally; that the burden of proof was on plaintiff to show a change of residence in effect at the time of the declaration; and that this burden had not been met. With this contention we cannot agree because it appears not only that Mrs. Staniford was physically present in San Francisco substantially all of the time between her arrival there in 1912 and the time of the trial, but that she solemnly swore that she resided in San Francisco. Her first registration was on October 4, 1912. Regarding this matter she said that she was induced to register in a moment of enthusiasm over the newly acquired right of women to exercise the electoral franchise and without any intention of abandoning her home and residence in Fresno. We cannot help lauding her enthusiasm in a cause so great and praising its continuance, for not only did she vote in San Francisco at all elections following her registration, but on the 15th of July, 1914, after filing the declaration of homestead, she again registered and voted in San Francisco. In her affidavits of registration she deposed that she was a resident of the city and county of San Francisco.

At the oral argument counsel for respondents said in substance that there was no question that both Mr. and Mrs. Staniford violated the law by voting, but that "that did not have the effect of changing their residence. It was only a circumstance." Undoubtedly our laws are most liberal to homestead claimants and the courts in the interpretation of such laws go to great lengths to protect the actual home of the family from creditors; but to permit such an alleged homestead as this to withstand appellant's attack would make a mockery of laws passed for the beneficent purpose of preserving an abiding place for the actual, bona fide residence of the family. True, our own courts have held that in certain instances residence on the property, though only for a day, may be sufficient. Skinner v. Hall, 69 Cal. 195, 10 Pac. 406; Hohn v. Pauly, 11 Cal. App. 724, 106 Pac. 266. But in both of those cases there were special circumstances vastly different from those presented in the case at bar to sustain the judgments. In Skinner v. Hall the declarant had abandoned one homestead, which had undoubtedly been created in good faith, and had immediately filed a new declaration. In the opinion in the other case it was said "that the plaintiff actually resided in the building and that it was her only home is not questioned."

It has also been held that, although the wife may not declare a valid homestead on one piece of property and the husband upon another parcel of land, she may establish a valid homestead. Gambette v. Brock, 41 Cal. 78; Harlan v. Schulze, 7 Cal. App. 287, 94 Pac. 379. But in both of those cases the right of the wife was carefully qualified by the statement that the wife's selection of a homestead is valid only in the absence of any proof that the husband had a home or fixed residence elsewhere. In the case at bar not only did the husband declare by registration, by voting and by his sworn testimony in court that Los Angeles, where his business permanently kept him, was his place of residence, but, when asked if he, as the head of the family, was supporting his wife and his sons during their absence from Fresno, he said:

> "I was turning over my earnings to them. I don't know about being the head of the family. I supplied the money to them."

The only justification for the conclusion of the lower court that Mr. Staniford had not changed his residence to Los Angeles appears in his own declarations, which were contradicted by his repeated acts and his solemn sworn asseverations, when not confronted with any question involving the homestead. That he was not actually residing on the property personally or by legal intendment when the homestead was declared is obvious, and any pretense to the contrary is sham. The law on this subject is declared in Tromans v. Mahlman, 92 Cal. 1, 27 Pac. 1094, 28 Pac. 579, wherein it is said:

> "It is settled law in this state that to constitute a valid homestead the claimant must actually reside on the premises when the declaration is filed. Prescott v. Prescott, 45 Cal. 58; Babcock v. Gibbs, 52 Cal. 629; Aucker v. McCoy, 56 Cal. 524; Pfister v. Dascey, 68 Cal. 572 [10 Pac. 117]; Lubbock v. McMann, 82 Cal. 228 [22 Pac. 1145] 16 Am. St. Rep. 108. * * * The obvious purpose of the statute in providing for the selection of a homestead was to thereby make a home for the family, which neither of the spouses could incumber or dispose of without the consent of the other, and which should at all times be protected against creditors. To effect its purpose, the statute has been liberally construed in some respects, but the requirement as to residence at the time the declaration is filed has been strictly construed. Thus this court has many times used and emphasized the word 'actually,' to show that the residence must be real, and not sham or pretended."

Again, speaking of the purpose of our homestead law, this court has said:

> "The benign object of the statute was to protect the home of the owner from forced sale, and not to withdraw from the reach of creditors property of the debtor as a source of revenue for the support of himself or family." Maloney v. Hefer, 75 Cal. 422–424, 17 Pac. 539, 540 (7 Am. St. Rep. 180).

[2] Under the undisputed facts in this case the husband was the head of the family. His place of residence was the residence of his wife. Section 52, subd. 5, Pol. Code; Luck v. Luck, 92 Cal. 653, 28 Pac. 787. The record in the case discloses no single act of the husband from 1912 to the time of the trial, such as would alter the effect of his removal to Los Angeles as a change of residence. The only contradiction of all of his acts and sworn statements while he was actually occupying an office and lodgings in Los Angeles occurred in the trial of this case. At one place in the record we find that he said, while a witness:

> "Traveling the way I was, my home was under my hat all the time."

Again, he was asked if he had any intention of having any other place of abode, as a residence or home, than Fresno, and he said:

> "Not in Los Angeles, or directly in Los Angeles, but if we could have ever sold our property, disposed of it properly, and taken up a home somewhere else, where we had purchased a ranch, which we had purchased, and over which this controversy is, we might have done it."

Yet during his absence from Fresno the property claimed as a homestead was occupied by a tenant, except for a few days, when the pretended surrender of the lease took place, and during that time the lessee's subtenant was undisturbed. Added to this were his admitted permanent business activities outside of the San Joaquin valley, his repeated statements under oath that Los Angeles was his place of residence, and his participation in all regular elections held in that city. At most his testimony amounts to proof of a floating intention some day to return to Fresno to live, and this, as against the solemn, undisputed evidence of facts establishing his residence in Los Angeles, is negligible. Estate of Weed, 120 Cal. 634, 53 Pac. 30.

Appellant sustained the burden of proving the establishment of another residence than Fresno by Mr. Staniford, thus fixing the family home in Los Angeles, and this showing was not overbalanced by the mere declaration that Mr. Staniford had always intended to keep the property in Fresno as his home.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

178 Cal. 6

GILMOUR v. NORTH PASADENA LAND & WATER CO. et al. (L. A. 4159.)

(Supreme Court of California. March 23, 1918.)

1. Husband and Wife 🔑131(1)—Separate Property—Presumptions.

A conveyance of property to a husband and his wife presumptively vests an undivided half interest in the wife as her separate property under the direct provisions of Civ. Code, § 164, as amended by St. 1889, p. 328.

2. Husband and Wife 🔑131(1)—Separate Property—Presumptions.

The presumption under Civ. Code, § 164, as amended by St. 1889, p. 328, that the conveyance to a husband and wife vests an undivided half-interest in the wife as her separate property is not conclusive as to one not a bona fide purchaser, but may be overcome by evidence that the property belongs to the community.

3. Husband and Wife 🔑262(2)—Community Property—Burden of Proof.

Where a conveyance of real property is made to a husband and his wife, the burden of proving the community character of the property rests on the husband.

4. Husband and Wife 🔑254—Community Property—Gifts.

Where property deeded to a husband and wife is bought with community funds, the property acquired becomes community property in the absence of an intent on the husband's part to make a gift to the wife of the interest transferred in her name.

5. Husband and Wife 🔑49½(8)—Gifts—Evidence.

The form of a conveyance of real estate to a husband and his wife is itself some evidence of an intent by the husband to make a gift to the wife of the interest transferred in her name.

6. Husband and Wife 🔑270(9) — Wife's Separate Property—Question of Fact.

The presumption declared by Civ. Code, § 164, as amended by St. 1889, p. 328, that conveyance to a married woman and her husband by an instrument in writing gives her an undivided separate interest, in itself constitutes evidence, so that it is for the trial court to say whether evidence offered to overthrow presumption is sufficient for that purpose.

7. HUSBAND AND WIFE ⟹49½(8)—GIFT TO WIFE—EVIDENCE.

Where community property is transferred to a husband and wife, the intent of the husband to make his wife a gift is to be inferred from all the circumstances; the husband's own testimony not being conclusive, although competent.

8. COSTS ⟹96—PARTIES — REPRESENTATIVE CAPACITY.

The fact that a suit is brought by individuals describing them as "a water committee for residents of block A," etc., does not absolve such parties from personal liability for costs.

Department 1. Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Howard J. Gilmour against the North Pasadena Land & Water Company and others. Plaintiff appeals from judgment for defendants and from order denying new trial. Affirmed.

Wm. Lewis, of Los Angeles, for appellant. Porter & Sutton, of Los Angeles, for respondents.

SLOSS, J. In 1910 Mrs. H. J. Gilmour (the wife of the plaintiff and appellant in the present action), together with Arizona Garrison and Mary F. Taylor, commenced an action against North Pasadena Land & Water Company, a corporation. That action resulted in a judgment in favor of the defendant and against the plaintiffs for $378.05, costs of suit. The judgment was affirmed on appeal. Garrison v. North Pasadena L. & W. Co., 163 Cal. 235, 124 Pac. 1009. In March, 1913, the judgment creditor caused execution to be issued and placed in the hands of the sheriff of Los Angeles county. The sheriff levied on all the right, title, and interest of Mrs. H. J. Gilmour in and to two lots in the city of Pasadena, and was about to sell them when the plaintiff commenced the present action to enjoin such sale. The complaint alleged, in effect, that the lots were community property of the plaintiff, Howard J. Gilmour, and his said wife, and that the threatened sale would cast a cloud upon plaintiff's title. An application for a temporary injunction was denied, and the property was sold by the sheriff to J. E. Garrison, who had become the assignee of the judgment obtained by North Pasadena Land & Water Company. The sum bid by Garrison was $185, which was credited on the judgment. The assignment to Garrison and the execution sale to him were set up by a supplemental complaint, in which the plaintiff asked that Garrison be made a party, and that the execution sale and the sheriff's certificate issued thereunder be "decreed to be clouds upon the plaintiff's title." The answer denied, among other things, that the lots were community property of the plaintiff and his wife, and the court found against the averments of the complaint in this behalf. Judgment was entered in favor of the defendants. Plaintiff's motion for a new trial having been denied, he appeals from the order of denial, and from the judgment.

[1-5] The plaintiff attacks as unsupported the finding relative to the ownership of the lots sold. The instrument under which plaintiff claimed title was a deed made in 1908, granting the property "to Howard J. Gilmour and Sarah J. Gilmour, his wife." Under section 164 of the Civil Code, as amended in 1889 (St. 1889, p. 328), such conveyance presumptively vested an undivided one-half interest in the wife, as her separate property. Except as against a bona fide purchaser for value—and it is not claimed that the defendants come within this category—the presumption is, however, not conclusive. It may be overcome by evidence showing that, notwithstanding the form of the conveyance, the property conveyed belongs to the community. Fanning v. Green, 156 Cal. 279, 104 Pac. 308. The burden of proving the community character of the property rests on the husband. Alferitz v. Arrivillaga, 143 Cal. 646, 77 Pac. 657. If, as appears to have been the case here, the purchase price consisted of community funds, the property acquired would become community property, unless there was an intent on the part of the husband to make a gift to the wife of the interest transferred to her name. Fanning v. Green, supra. But the form of the conveyance is itself some evidence of an intent to make such gift. Shaw v. Bernal, 163 Cal. 262, 124 Pac. 1012.

[6, 7] The appellant contends that the undisputed evidence shows conclusively that the husband had no intent to make a gift of any part of the property to his wife. We cannot assent to this claim. The presumption declared by section 164, "although disputable, is itself evidence, and it is for the trial court to say whether the evidence offered to overthrow the presumption has sufficient weight to effect that purpose." Pabst v. Shearer, 172 Cal. 239, 156 Pac. 466. The testimony relied on by the appellant in this behalf was by no means clear. While both spouses were careful to say that the land was conveyed to them "as community property," their further and more specific statements indicated that the deed was made to both because of the wife's demand, agreed to by the husband, that she should have a separate interest in the property. The intent accompanying the act is to be inferred by the court or jury from all the circumstances, and the party's own testimony that he did not intend to make a gift, while competent, is not conclusive. It certainly cannot be said, in view of the character of the evidence in this case, that the court was not authorized to find that the presumption had not been overcome. In Fanning v. Green, supra,

as in Fulkerson v. Stiles, 156 Cal. 703, 105 Pac. 966, 26 L. R. A. (N. S.) 181, cited by appellant, the trial court had found that, notwithstanding the form of the conveyance, the property was, in fact, community property, and in each case the finding was held to be sustained by the evidence. If the trial court had found the other way on the evidence, its finding might equally have been upheld on appeal. In the present case, the evidence offered to overcome the statutory presumption is decidedly less direct and convincing than it was in the cases referred to.

If the wife was the owner of an undivided one-half interest in the lots, the plaintiff was, of course, not entitled to prevent a sale of her interest, or to have such sale, once made, set aside.

[8] The contention that Mrs. Gilmour was not personally liable on the judgment for costs is without merit. The former action was brought by her and her two coplaintiffs, and the judgment for costs ran against them as individuals. The fact that they described themselves in their complaint as a "water committee for residents of block A," etc., does not alter their status as parties to the action.

It is further claimed that the judgment in the former suit had been paid and satisfied by Garrison. But the finding is to the contrary, and it is fully supported by evidence indicating that Garrison did not pay the judgment, but merely took an assignment thereof from the North Pasadena Land & Water Company.

The views herein expressed render immaterial any other points urged in the briefs.

The judgment and the order denying a new trial are affirmed.

We concur: RICHARDS, Judge pro tem.; SHAW, J.

178 Cal. 15

RAHMEL v. ROST et al. (L. A. 4138.)

(Supreme Court of California. March 23, 1918.)

1. Appeal and Error 🔑856(5)—Review—New Trial.

Where motion for new trial is made upon all the statutory grounds, the order granting such motion, general in its terms, will be upheld on appeal, if sustainable upon any of the grounds stated.

2. Appeal and Error 🔑1015(2)—Review—New Trial.

An order granting a new trial will not be reviewed, where the testimony is conflicting as to the issues.

3. Appeal and Error 🔑933(4)—Review—Presumptions.

Where the order granting a new trial does not indicate that it is based on misconceptions of the trial court as to matters occurring at the trial, it must be presumed to have been made on the ground of insufficiency of the evidence to justify the decision.

Department 1. Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Action by Gottlieb Rahmel against Jules Rost and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Trask & Brown and Edgar K. Brown, all of Los Angeles (Everett L. Ball, of Los Angeles, of counsel), for appellants. James R. Jaffray and B. P. Welch, both of Los Angeles, for respondent.

RICHARDS, Judge pro tem. [1-3] This is an appeal from an order granting the plaintiff a new trial. The action was one to recover damages for deceit alleged by the plaintiff to have been practiced upon him by the defendants in an exchange of properties. The findings and judgment of the court upon the trial were in favor of the defendants. The motion for a new trial appears to have been duly made upon all the statutory grounds. The order of the trial court granting said motion was a general order, and hence if sustainable upon any of the grounds stated will be upheld upon appeal. The appellants devote a large amount of space in their opening brief to a review of the evidence in the case, but it is conceded that as to the alleged misrepresentations upon which the plaintiff principally relied, there was direct conflict of testimony, the plaintiff asserting and the defendants denying that such misrepresentations had been made. Upon such a state of the record the order granting the motion for a new trial will not be reviewed upon appeal. Counsel for the appellants, however, undertook to argue that the order granting the motion for a new trial was based upon some misconceptions of the trial court as to certain matters occurring at the trial; but the order of the court does not so indicate, and hence must be presumed to have been made upon the ground of the insufficiency of the evidence to justify its former decision. Newman v. Overland Pac. Ry. Co., 132 Cal. 73, 64 Pac. 110; Pollitz v. Wickersham, 150 Cal. 238, 88 Pac. 911.

The order is affirmed.

We concur: SLOSS, J.; SHAW, J.

178 Cal. 46

DAWES v. TUCKER et al. (S. F. 7261.)

(Supreme Court of California. March 27, 1918.)

1. Mortgages 🔑369(2)—Foreclosure—Setting Aside—Sale—Grounds.

In suit to set aside sale under trust deed for error of the recorder in entering dates of publication of notice, plaintiff could not prevail, in the absence of showing that he saw the copy erroneously stating such dates or relied upon such record.

2. Mortgages 🔑94—Recordation—Sufficiency.

Recorder's error in copying trust deed, requiring notice of sale to be published once a week, so as to require notice twice a week, was not such as to render the recordation void, where all other matters were correctly copied, so that a subsequent purchaser could not disregard such record as of no validity.

3. MORTGAGES ⟹369(7) — SETTING ASIDE SALE—RECORDATION—PRESUMPTIONS.

In suit to set aside sale under trust deed for recorder's error in copying provision for notice of sale on default, plaintiff, who never saw the record, was not entitled to the presumption arising from constructive notice that he inspected it and was misled by the error.

In Bank. Appeal from Superior Court, Alameda County; N. D. Arnot, Judge.

Action by George M. Dawes against Helena M. Tucker, Sr., and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Keyes & Martin, of Oakland, and Leon Martin, of San Francisco, for appellant. A. F. St. Sure, J. Leonard Rose, McKee & Tasheira, and H. L. Breed, all of Oakland, for respondents.

RICHARDS, Judge pro tem. This is an appeal from a judgment in favor of the defendants in an action brought by the plaintiff to have set aside a sale of certain premises under a trust deed executed by the plaintiff's grantor, and to compel a conveyance of the premises to plaintiff free from the operation and effect of the trustees' deed issued pursuant to such sale and all subsequent deeds and mortgages executed by the purchaser at said sale and his successors to the title acquired thereby. The cause was submitted to the trial court for decision upon an agreed statement of facts, which may be briefly summarized as follows:

On May 1, 1906, Mary Polk Du Bose was the owner of the premises affected by this action. On that day she executed a deed of trust thereon in favor of Helena M. Tucker, Sr., with Emily F. Tucker, and Helena M. Tucker, Jr., as the trustees named therein, for the purpose of securing an indebtedness of the grantor to said Helena M. Tucker, Sr., in the sum of $2,500, evidenced by a promissory note for said sum. The trust deed contained the provision that, in case of default on the part of the maker of said note, the trustees were empowered to sell the property described in said trust deed, provided that before such sale they should first publish a notice of the time and place thereof, with a description of the property to be sold, "at least once a week for three successive weeks, in some newspaper published in the town of Berkeley." This deed of trust was filed for record with the county recorder of Alameda county, and was recorded on May 7, 1906. The recorder, however, in attempting to copy said trust deed in his proper book of records, made a mistake in transcribing the above-quoted sentence in said deed, so as to make it read that the notice of trustees' sale should be published "at least twice a week," etc. It was this error which gave rise to this action. On April 25, 1907, Mary Polk Du Bose, for a sufficient consideration, sold and conveyed the premises covered by said trust deed to George M. Dawes, the plaintiff and appellant herein. By the terms of said conveyance the said property was sold subject to said trust deed, with express reference therein to the date and place of its record, and to the amount of the promissory note which it had been given to secure. Default was made in the payment of the principal and interest due on said note, and thereafter, and shortly before June 5, 1908, a demand was made upon said Dawes for the payment thereof, and he was notified that if such payment was not made the premises would be sold by said trustees to satisfy said indebtedness. Such payment not having been made, the trustees, on June 5, 1908, began the publication of a notice of the sale of said premises under said trust deed in a Berkeley newspaper, and thereafter published the same once a week for three consecutive weeks prior to the 29th day of June, 1908, the date fixed for said sale; and on said last-named day sold the said property to M. S. McQuarrie, one of the defendants herein, for the sum of $2,700, and on the 7th day of July, 1908, executed to said McQuarrie their trustees' deed for the same, which was duly recorded on the following day; whereupon the said M. S. McQuarrie took possession of the premises so conveyed to him. On July 27, 1908, defendants M. S. McQuarrie and Margaret McQuarrie made, executed, and delivered to Isabel De Lancey a grant deed to said premises, which was also duly recorded. On August 12, 1908, the said Isabel De Lancey and her husband, John S. De Lancey, also made defendants herein, made, executed, and delivered a deed of trust covering said premises to secure the payment of the sum of $2,500 to the Bankers' Trust Company of Oakland, said deed being duly recorded, and on August 18, 1908, the said defendants Isabel De Lancey and John S. De Lancey conveyed the premises by a deed of grant to Jennie P. Stover, also one of the defendants herein. On October 8, 1908, the plaintiff herein tendered to Helena M. Tucker, Sr., and to her said trustees under said first-named deed of trust the entire amount due to said date upon the promissory note secured thereby, and thereupon demanded a reconveyance to him of the premises in question, which tender and demand were refused by the said Helena M. Tucker, Sr., and also by her said trustees. Shortly thereafter the plaintiff commenced this action.

In his second and supplemental complaint filed herein the plaintiff sets forth in the main the facts above summarized, and in addition thereto alleges that prior to the commencement of the action he never saw the original of the said trust deed to the trustees of Helena M. Tucker, Sr., and had no knowledge or information, either actual or constructive, as to the contents and provisions thereof except as the same appeared and were set forth in the record thereof; and that the said plaintiff in the purchase of said premises and at all times thereafter, in all matters relating thereto, "did rely implicitly and absolutely upon said record of said deed of trust, and did at all times until long after said sale of said premises to M. S. McQuarrie fully believe that said record of said trust deed in all things and particulars correctly set forth the exact terms and provisions of said original trust deed." The plaintiff also alleged, in substance that the said M. S. McQuarrie and all other purchasers and incumbrancers subsequent to said trustees' deed were not purchasers or incumbrancers in good faith, for value and without notice, of the plaintiff's equities as set forth in his complaint. His prayer was that the trustees under said original trust deed be ordered and directed to convey the premises to him, and that the conveyance by them to M. S. McQuarrie, and all subsequent transfers and incumbrances made by said McQuarrie or his grantees or successors in interest, be declared void, and that all such persons be declared to have no right, title, or interest in said premises, and that the said plaintiff do have and recover damages in the sum of $3,000 from all of said defendants for the detention of said property, and for such other and further relief as may be proper in the premises, and for costs of suit.

The defendants, while admitting in their answers the facts averred by the plaintiff, which are matters of record, deny that the plaintiff ever or at all relied upon the record of said trust deed in his purchase of said premises, or believed that said record thereof correctly set forth the terms and provisions of the original trust deed; and they further deny that said M. S. McQuarrie and his subsequent purchasers and incumbrancers were not innocent purchasers without notice of the plaintiff's asserted equities.

Upon the trial of the cause the parties stipulated as to the facts of the case upon which the findings of the court should be made, expressly reserving therein respective objections to the introduction and relevancy in evidence of the several instruments upon which the respective parties relied. The court admitted all such instruments in evidence, subject to said objections, and made its findings of fact accordingly, disposing of said objections by the form and scope of its judgment, which it rendered in the defendants' favor.

It is to be noted that neither in the stipulation of the parties as to the facts of the case, nor in the findings of the court made thereon, is there to be found any statement or finding in support of the averment of the plaintiff's complaint to the effect that he relied upon the terms and provisions of the record of the said trust deed from Mary Polk Du Bose to the trustees of Helena M. Tucker, Sr., in making his purchase of the premises, or at any later time; nor is there any statement in either the stipulation of the parties or the findings of the court that the plaintiff ever actually saw said record, or ever had any knowledge of the contents thereof, other than that given by the reference thereto in his own conveyance, or other than that imparted by the naked constructive notice thereof arising from the fact of such record. Such being the state of the agreed facts and findings herein, it is plain that the plaintiff depended at the trial of the cause for his right of recovery therein, and must here depend, for his right to a reversal of the judgment, solely upon his constructive notice of the terms and provisions of the record of said original trust deed, without any proof or showing on his part of any actual knowledge of the contents of said record, or of any actual reliance thereon at the time of his purchase of the premises, or at all. This presents the sole question necessary to be determined upon this appeal.

[1] There can be no quarrel with the cases cited by the appellant herein, dealing historically with the subject of constructive notice imparted by the recordation of instruments conveying title to real property and declaring the full right of purchasers or incumbrancers of such property to rely thereon. We are in full accord with the principles enunciated in these cases. But the difficulty herein consists in their application to the facts of the case at bar as these are set forth in the stipulation of the parties and in the findings of the court. The plaintiff herein comes into a court of equity seeking relief from the effect of a trustees' sale of the premises to which he claims title, under the precise terms of an original trust deed covering the same, and executed prior to the time when he acquired whatever title or equity in the said premises remained in the maker of said trust deed. In order to obtain such equitable relief the plaintiff must have been able to show some actual injury sustained by him through the said action of such trustees in the proper exercise of their trust, and this injury could only have arisen out of the fact, if it be the fact, that the plaintiff had relied upon said record in making his purchase of the premises and in respect to the trustees' sale thereof, and had been misled as to the terms and conditions contained in said original trust deed by the mistake of the recorder in erroneously inserting in his record of the same the single word upon which the plaintiff rests his case. In order for the plaintiff to recover in such a case by proof that he had been thus misled, he must have been actually and not merely constructively misled; for no person can be misled to his injury in a transaction by any fact or circumstance upon which he placed no reliance in entering into such transaction. In the stipulation of the parties hereto as to the facts upon which the findings and judgment of the trial court are predicated there is no showing or even suggestion that the plaintiff ever saw the recorded copy of the trust deed in question or any abstract thereof, or ever

knew or inquired as to the contents thereof in making his purchase of the property, and there is no statement or suggestion that the said plaintiff did in fact actually rely either upon said record or upon the legal fiction of his constructive notice of its contents in making said purchase, or at any time thereafter, or at all. In the absence of such a showing he has not made out his case.

[2] The plaintiff, however, insists that the record of the original deed is void and of no effect because it is not a true copy thereof, but only a purported copy of an instrument which had no existence in fact, and that he therefore stands in the position of one who has purchased property upon which there was an unrecorded incumbrance of which he had no notice. We do not think, however, that the error of the recorder in the instant case was of such consequence as to render the recordation of the instrument in respect to which it happened entirely and utterly void. In all such essential particulars as the names of the parties, the designation of the debt secured, the description of the property, the general definition of the rights of the parties and duties of the trustees, the record truly transcribes the original trust deed, and it was therefore sufficient in these respects to give notice to intending purchasers or later incumbrancers of the existence and terms of said trust deed. It cannot therefore be held to be void as a record of a nonexistent original which the plaintiff was entitled wholly to disregard. In some respects, at least, the trust deed, as originally written and as recorded, required the plaintiff, as a subsequent grantee of the premises, to look behind the record and to the original documents to ascertain certain vital facts affecting his purchase of the premises; as, for instance, the trust deed does not set forth the terms of the promissory note which it secures, either as to the amount of interest it bears or the time of payment thereof. It would have been the duty, therefore, of the plaintiff, for his own protection, to have inquired as to the contents of the original documents in respect to these matters; and it may be plausibly argued that his duty to thus ascertain the time when the indebtedness would fall due would also require him to inform himself, by reference to the original documents, as to the penalties which would follow upon the default of either his grantor or himself in the payment of the obligation thus secured. It is not necessary, however, to press the inquiry thus far, for the reason that the stipulated facts of the case fail to disclose that the plaintiff went either to the record or to the original documents to inform himself as to any of these matters, but rests his entire case upon the naked fiction of his constructive notice of the terms of the instrument as recorded, without proof or finding that he ever in fact relied thereon.

[3] The appellant urges, however, that notwithstanding the absence of any showing in the stipulated facts of the case that plaintiff knew anything of the record or that he relied thereon in his purchase of the property in question, or thereafter, he is entitled to the presumption, arising from his constructive notice thereof, that he did in fact investigate the record and did in fact rely upon it; for since, as he argues, the law holds that as against a party he is presumed to have known such facts as, being put upon inquiry, he would reasonably have discovered, the like presumption operates in his favor. The argument is plausible, but it is sophistry. The reason for the creation of such a presumption against a party put upon inquiry as to any fact is that due diligence is required of all persons concerned in a transaction; but to invert the presumption would be to destroy the reason for it by rewarding a party for not doing that which due diligence would have required him to do. As in the instant case, so far as the record herein discloses, the plaintiff purchased the property in question without any examination or inquiry as to the state of the record title, and without any actual reliance upon the fact which it would have disclosed had such examination been made. To indulge in a presumption that he did these things would be to substitute the presumption for proofs, which it was his duty and fully within his power to produce if they existed, and, if they did not exist, to permit the presumption to furnish the foundation for a wrong. We find no merit, therefore, in this contention on appellant's behalf. The foregoing views render unnecessary a consideration of the question argued elaborately in the briefs of respective counsel as to whether the subsequent purchasers and incumbrancers under the trustees' deed from McQuarrie were bona fide purchasers and incumbrancers so as not to be affected by the equity asserted by the plaintiff in this action.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

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178 Cal. 20

SOUTHERN PAC. CO. v. INDUSTRIAL ACC. COMMISSION. (S. F. 8583.)

(Supreme Court of California. March 25, 1918. Rehearing Denied April 24, 1918.)

1. COURTS ⚷97(5) — DECISIONS OF UNITED STATES COURTS—FEDERAL EMPLOYERS' LIABILITY ACT.

On question whether employment falls within scope of Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1916, §§ 8657–8665), the court must give controlling force to the decisions of the United States courts.

2. COMMERCE ⚷27(5)—FEDERAL EMPLOYERS' LIABILITY ACT — CHARACTER OF EMPLOYMENT—"INTERSTATE COMMERCE."

A servant injured while working on main power line carrying alternating current to substations, which converted it to direct current for operating cars in interstate commerce, was not injured in interstate commerce; his employment being too remote.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Wilbur and Melvin, JJ., dissenting.

In Bank. Application by the dependents of William T. Butler for workmen's compensation. Opposed by the Southern Pacific Company, employer. On petition of the employer for a writ of review, to review award of the Industrial Accident Commission in favor of the dependents. Award affirmed.

A. L. Clark and Henley C. Booth, both of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondent.

SLOSS, J. The Industrial Accident Commission made an award in favor of the dependents of William T. Butler, who was killed while working as an electric lineman in the employ of petitioner, Southern Pacific Company. Said company operates a system of electric railway lines in Alameda county; its cars being used in both intrastate and interstate commerce. For the generation of electric power the company maintains at Fruitvale a main power house, whence an alternating current of high voltage is transmitted through a main power line to substations. At the substations the current passes through converters and transformers which convert it to a direct current and reduce its voltage. The direct current, thus reduced, passes to the trolley wires, and from them to the motors on the cars. When Butler sustained the fatal injury, which was caused by an electric shock, he was engaged in wiping insulators on the main power line between the Fruitvale power house and the substations.

This writ of review was issued to test the validity of the employer's claim that the commission was without jurisdiction to make an award, for the reason that Butler was engaged in interstate commerce, within the purview of the act of Congress of April 22, 1908. In its findings the commission, after setting forth in some detail the circumstances surrounding the employé's injury, declares:

> "That while said employé was working as aforesaid between said power house and said substation, the electricity which caused said electric shock had not reached its point of distribution to said electric cars, and he was employed in work preliminary to the running of said electric cars, and that therefore he was not employed in interstate commerce."

[1] Upon the question whether a given employment falls within the scope of the federal act, we must look to the decisions of the courts of the United States as of controlling force. In Shanks v. Del., L. & W. R. R. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797, the court said:

> "The true test of employment in such commerce in the sense intended is: Was the employé at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?"

The commission was, no doubt, seeking to apply this test, and we take it that the word "preliminary," though perhaps not an altogether appropriate term, was used by it in its finding to express the idea that the work in which Butler was engaged was not so closely related to interstate transportation as to be a part of it.

The opinion in the Shanks Case refers to a number of earlier cases in which, upon varying facts, the federal statute had been held to be applicable or inapplicable. Upon examination of these decisions it will be found that each case turned upon the peculiar facts of the employment in question. It may be said, however, that the decisive consideration is always the closeness or remoteness of the particular work, as related to interstate transportation. In this court it has been held that a mechanic engaged in repairing a switch engine which was used in the transportation of commerce, interstate and intrastate, was engaged in interstate commerce within the meaning of the act (Southern Pac. Co. v. Pillsbury, 170 Cal. 782, 151 Pac. 277, L. R. A. 1916E, 916); that a watchman on a main steam line was engaged in interstate commerce (Southern Pac. Co. v. Industrial Acc. Com., 174 Cal. 8, 161 Pac. 1139, L. R. A. 1917E, 262); as was a lineman who was removing a telephone wire which had fallen on the trolley wire of the same lines involved in this proceeding (Southern Pac. Co. v. Industrial Acc. Com., 174 Cal. 19, 161 Pac. 1143).

In C., B. & Q. R. R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941, the Supreme Court of the United States had occasion to consider a state of facts more closely analogous to the situation here presented. The injured employé was a member of a switching crew which was engaged in switching cars of coal belonging to the railroad company. The coal was being switched to a shed, where it was to be placed in bins and chutes, and supplied as needed to locomotives engaged in interstate as well as intrastate transportation. It was held that the federal Employers' Liability Act was not applicable. Applying the test laid down in the Shanks Case, the court said that:

> "Manifestly there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use."

[2] The reasoning is apt here. The coal was essential to the production of motive power for the locomotives, just as, in this case,

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the electric current was necessary to move petitioner's cars. But in moving the coal to the shed Harrington was engaged in a work which was at least one step removed from the actual furnishing of the coal to the engines, and this precluded that close relation of his work to interstate commerce which would bring him within the scope of the federal act. So in this case Butler was working on the part of the line between the main power house and a substation. The current was still to pass through the transformers and converters, and be so converted and reduced as to be suitable for use in propelling the cars. The test of remoteness seems as applicable in the one case as in the other. It is true, as petitioner claims, that the electric current, once it is generated at the main power house, passes along the main power line, to and through the converters and transformers in the substations, and to the trolley wires, without interruption, and without storage. No doubt, too, a break in that current at any point, however remote from the lines of track, would immediately stop the progress of all cars then moving. But we think the decisive factor in the case is not to be sought in these characteristics of electric energy. As the Supreme Court of the United States says:

> "The federal act speaks of interstate commerce in a practical sense suited to the occasion." Shanks v. Del., Lack. & West. R. R., supra; C., B. & Q. R. R. v. Harrington, supra.

Viewing the question before us in this light, we think the answer to it should be the same as that given in the Harrington Case. The main power line is not part and parcel of the railroad or its equipment, in the same sense as the roadbed or the trolley line. It is an instrumentality by means of which something necessary for the operation of the cars is brought to a point where it can be usefully applied. Its purpose is simply to get to the road the necessary power to operate cars thereon—the same purpose served by wagons or cars laden with coal to be carried to the road for the operation of its locomotives. Even though the power flows without interruption from the power house to the trolley lines, it still remains that all that the main line does, and all that those engaged in keeping it in order do, is to assist in putting on to the trolley line the necessary power to be used by the operatives of the road as desired, or, to paraphrase the language already quoted from the Harrington Case, "putting the electric power [coal supply] in a convenient place from which it could be taken as required for use."

We think, therefore, that the commission was justified in exercising jurisdiction.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; VICTOR E. SHAW, Judge pro tem; RICHARDS, Judge pro tem.

WILBUR, J. I dissent. The test is stated by the Supreme Court of the United States to be:

> "Was the employé at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"

The deceased was engaged in working upon an insulator that supported a wire that was actually in use in moving trains engaged in interstate commerce, and was killed by a fall resulting from a shock caused by an escape of some of the electric current so used. His connection with the actual movements of trains was so direct that had all the current short-circuited through his body its effect on the trains in motion would have been instantaneous.

The electricity in question was generated at a steam-generating plant at Fruitvale. That steam plant was just as truly operating the moving cars as though the steam had been generated in a locomotive attached to the train. The electric transmission line was merely a means of conducting that power to the train, and in no sense differs in legal contemplation from the system of transmission of power by cable to the cars of a cable railroad. It is merely a means to an end; an instrumentality for moving interstate commerce; a method of applying the potential energy of coal and fuel oil to the movement of a train. The instant the potential energy was converted into kinetic energy it became the proximate cause of train movement, and the instrumentalities used in applying it to the interstate commerce is as much a part of the system of transportation as the car in which the passenger or freight rides. The intimate connection with the actual movement of trains is shown by the fact that the instant the power plant ceases to operate, or the transmission wire breaks, the car upon the railroad track, whether it be 10 miles or 500 miles away, immediately stops. The fact that in transmitting this power it passes through what is known as transforming stations has no significance whatever. It must be conceded that distance is not a factor in the determination of the question whether or not a person is engaged in interstate commerce. For instance, no one would doubt that if a train despatcher on Eiffel Tower, Paris, operated trains on an interstate railroad in California from there, he would be engaged in interstate commerce. The question of the method of the transmission of his orders would likewise be immaterial. He might use wireless across the Atlantic Ocean, a telegraph wire from New York to San Francisco, and a telephone from San Francisco to the station agent, who writes the message and hands it to the conductor. It would make no difference if the message was originally written and transmitted in French and was afterwards translated into English. It is obvious that the true question is: "Were the messages that were sent by the train despatcher obeyed by the train crews in operating their trains?" So the question here is: "Was the power passing along the power line the proximate cause of the motion of the trains?" If so, those engaged in operating or maintaining the devices by which the power is transmitted would, upon the principle above stated, be engaged in interstate commerce. That this power so transmitted was the proximate cause of the movement of the trains would seem to be conclusively answered in the affirmative by the fact that any break in the power line instantaneously affects the moving trains. The transforming stations referred to in the majority opinion are merely a means to an end, viz. the transmission of the power from the steam plant to the train. The fireman in the generating plant is as truly engaged in moving interstate commerce as is the fireman of a locomotive hauling such commerce. In each case the fireman is putting into the firebox potential energy in the form of coal or oil. That energy before it is applied to the cars must first be converted into heat, a form of kinetic energy, and then from heat into train motion. The fact is that both are actually engaged in moving the train by the process of converting the potential energy stored in coal or oil into the movement of a train. If there were some process involved in the scheme of electrical transmission of power similar to the storage of coal, in other words, if the electricity was stored in one place, as oil or coal may be stored, and thus reconverted into potential energy, and then used out of the storage batteries, as in the case of an electric automobile, the situation might be analogous to that referred to in C., B. & Q. R. R. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941, but under the agreed facts there is no storage whatever. This case cannot be distinguished in principle from the case of Southern Pacific Co. v. Industrial Accident Com., 174 Cal. 8, 161 Pac. 1139, L. R. A. 1917E, 262, where a lineman was killed while engaged in removing a telephone wire which had fallen on a "trolley wire of the same line involved in this proceeding." The power transmission line was but an extension of the trolley wire, as much a part of the system as feed wires along the track, or the span wires supporting the trolley wires.

I concur: MELVIN, J.

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36 Cal. App. 319

Ex parte JOHNSON. (Cr. 592.)

(District Court of Appeal, Second District, California. Feb. 19, 1918.)

1. INFANTS 🔑16—JUVENILE DELINQUENCY—JUVENILE COURT LAW—PROBATIONARY COMMITMENT.

The juvenile court law, in case of an ordinary criminal information, permits the superior court to make a probationary commitment of a minor to the custody of a parent, guardian, probation officer, or a state school, leaving in the court the right to change or modify its judgment at any time during the probationary term.

2. INFANTS 🔑16—JUVENILE DELINQUENCY—JUVENILE COURT LAW—PRESTON SCHOOL OF INDUSTRY.

The juvenile court law does not take away from the board of trustees of the Preston School of Industry the right to allow paroles or make discharges of inmates.

3. INFANTS 🔑16—JUVENILE DELINQUENCY—COMMITMENT TO SCHOOL OF INDUSTRY—DISCHARGE—STATUTES.

Under the juvenile court law (Stats. 1915, p. 1225) § 9, providing that any order made by the court in case of any person subject to its jurisdiction under the act may be changed, modified, or set aside, provided that nothing in the act shall be deemed to interfere with the system of parole and discharge provided by law or by rule of the board of trustees of the Preston School of Industry, in view of section 17 of the act providing for the establishment of the Preston School of Industry (St. 1889, p. 100, as amended by St. 1893, p. 39, St. 1909, p. 964, and St. 1915, p. 849), providing it shall be lawful for the board of trustees to give an honorable dismissal to any inmate, who shall thereafter be released from all penalties and disabilities resulting from the offenses and crimes for which he was committed, and that the magistrate or court shall thereupon dismiss the accusation pending against the discharged inmate, where a minor charged with grand larceny was convicted and committed to the Preston School of Industry "until he reaches the age of 21 years, unless sooner discharged by law," with an order that he should not be released except by order of court, but should be returned to court on attaining his majority, and such minor was honorably discharged by the trustees of the school of industry, and given a certificate thereof, he was released from all penalties and disabilities resulting from the offenses for which he was committed, and entitled to discharge from the custody of the sheriff who had rearrested him, the court assuming jurisdiction on the ground that it had been retained under the commitment issued to the school of industry.

In the matter of the application of Leslie Johnson for writ of habeas corpus. Petitioner ordered discharged from custody.

Arthur E. T. Chapman, of Los Angeles, for petitioner. Thomas Lee Woolwine, Dist. Atty., and Wm. J. Clark, Deputy Dist. Atty., both of Los Angeles, for respondent.

JAMES, J. Habeas corpus. Petitioner seeks to secure his discharge from the custody of the sheriff of Los Angeles county. In July, 1916, petitioner was convicted before a jury of the crime of grand larceny. The court determined his age at that time to be 19 years, and that he was a fit subject for commitment to the Preston School of Industry. The following judgment was then entered:

> "It is ordered that the said Leslie Johnson be and he is hereby committed to the said Preston School of Industry, at Ione, Cal., until he reaches the age of 21 years, unless sooner discharged by law, provided, however, the said minor is not to be released or discharged except by order of this court, first had and obtained, but to be returned to court upon attaining majority."

On January 6, 1918, the authorities at the school of industry to which petitioner was committed gave him an honorable discharge, certificate of which has been here exhibited. Thereafter, upon petitioner's return to Los Angeles county, he was rearrested, the court assuming jurisdiction on the ground that such jurisdiction had been retained under the commitment theretofore issued to the Preston school. Thereafter the court made its order determining that petitioner had violated conditions of his probation, and thereupon sentence was imposed that petitioner be imprisoned in the state prison for not less than one nor more than 10 years.

[1-3] It is first contended in behalf of petitioner that, as petitioner was regularly tried and convicted under an ordinary criminal information, when the court determined that he should be committed to the school of industry it exhausted its right of control of the minor. Under the express terms of the act (Stats. 1889, p. 100, as amended Stats. 1893, p. 39, as amended Stats. 1909, p. 964, as amended Stats. 1915, p. 849), this conclusion would seem to follow. However, counsel for respondent sheriff contends that the juvenile court law permits the superior court in such a case to make probationary commitment, leaving in the court the right to change or modify its judgment at any time during the probationary term. Such undoubtedly is the condition, of the law respecting ordinary proceedings under the juvenile act. Acting under the authority of that law, the superior court in proper cases has the right to repose the custody of a minor during the probationary period in the parent or guardian or probation officer or to commit such minor to a state school. Stats. 1915, p. 1225. Section 25 of the act provides that its provisions shall supersede the provisions of the act relating to the Preston School of Industry as to the "mode of commitments" to that institution. However, there is another provision important to be considered, and that is found in section 9 of the same law. It is as follows:

> "Any order made by the court in case of any person subject to the jurisdiction of the court under the provisions of any of subdivisions one to thirteen inclusive of section one of this act may at any time be changed, modified or set aside as to the judge may seem meet and proper; provided, however, that nothing in this act contained shall be deemed to interfere with the system of parole and discharge that is now or may hereafter be provided by law, or by rule of the board of trustees of the Whittier State School, the Preston School of Industry or the California School for Girls, or any similar state institution or institutions, respectively, for the parole and discharge of wards of the juvenile court committed to the said schools or to any similar state institutions hereafter created, or with the management of the said schools, save that the court committing a ward to any of said schools may thereafter change, modify or set aside said order of commitment upon ten days' notice of the hearing of the application therefor being served by United States mail upon the superintendent of the said school to which said person has previously been committed, and providing that the court shall not then change, modify or set aside said order without due consideration of the effect thereof upon the discipline and parole system of said school or institution."

An express condition of this subdivision is that nothing in the act shall be deemed to interfere with the system of parole and discharge that may be provided by law or rule of the board of trustees of the school of industry. There is the proviso that the court may change and modify its order of commitment upon ten day's notice to be given to the superintendent of the school. The latter condition of course presupposes that at the time such modification is sought to be made the person affected has not been theretofore discharged from the institution. Conceding, as we must, then, that the juvenile court law does not take away from the board of trustees of the school of industry the right to allow paroles or make discharges of inmates, we have to examine the law creating the school and providing for the authority given respecting paroles and discharges therefrom. Section 17 of the act providing for the establishment of the Preston School of Industry (hereinbefore referred to) provides as follows:

> "It shall be lawful for the board, whenever it may deem any inmate of said institution to have been so far reformed as to justify his discharge, to give him an honorable dismissal, and to cause an entry of the reasons for such dismissal to be made in the book of records prepared for that purpose. All persons thus honorably dismissed, and all those who shall have served the full term of their respective sentences, shall thereafter be released from all penalties and disabilities resulting from the offenses or crimes for which they were committed. Upon the final discharge of any inmate, as in this section provided, the superintendent shall immediately certify such discharge in writing, and shall transmit the certificate to the magistrate or court by which such inmate or boy was committed. Said magistrate or court shall thereupon dismiss the accusation and the action pending against said person."

At the time this petitioner received his discharge from the school no change had been made pursuant to the provisions of the juvenile court law in the order of commitment. That order of commitment was that the minor be there committed "until he reaches the age of 21 years, unless sooner discharged by law." Under the terms of the juvenile court law there was reserved to the board of trustees of the institution mentioned the right to parole petitioner or give him a discharge from the institution. This right we think could not be affected by the conditional order made in the judgment to the further effect that the minor should not be released except by order of court, but should be returned to court upon attaining majority. If the board of trustees had the right to make the discharge as they did, then the discharge must be given the full effect provided to be given to it by the act, to wit, it released the petitioner from all penalties and disabilities resulting from the offense for which he was commited. This being true, it follows that petitioner is entitled to the relief sought under the writ.

It is ordered that petitioner be and he is discharged from the custody of the sheriff of Los Angeles county.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

36 Cal. App. 275

STINNETT v. SUPERIOR COURT IN AND FOR MERCED COUNTY et al.

(Civ. 1824.)

(District Court of Appeal, Third District, California. Feb. 15, 1918.)

1. NEW TRIAL 🔑163(2), 170, 171—EFFECT—AMENDMENT.

Where defendant's motion for new trial was granted, the judgment was in effect set aside, and the court could then allow an amendment to the cross-complaint, hear the case, make findings, and enter judgment thereon.

2. CERTIORARI 🔑5(1) — RIGHT TO REMEDY — EXISTENCE OF OTHER REMEDIES.

Where plaintiff had decree for divorce and defendant's motion for new trial was granted and thereafter he was granted a divorce, plaintiff had the right to appeal from the second judgment and to review of the proceedings subsequent to the judgment in her favor, which was a plain, speedy, and adequate remedy, which, under Code Civ. Proc. § 1068, precluded a right to writ of review.

Writ of Review to Superior Court, Merced County; E. N. Rector, Judge.

Petition by Florence Elliot Stinnett against the Superior Court of Merced County and the judge thereof to review a judgment of such court in an action by petitioner against George Stinnett. Writ denied.

Terry W. Ward, of San Francisco, for petitioner.

PER CURIAM. This is a proceeding for a writ of review. It appears by the petition that petitioner brought an action against George Stinnett, her husband, for a divorce. On October 9, 1917, defendant in that action filed answer and cross-complaint. On October 22, 1917, plaintiff in the action filed her answer to said cross-complaint, and on November 2, 1917, the cause was tried and submitted to the court for decision. On November 15, 1917, the court signed findings and conclusions of law and on the same day entered judgment, awarding a divorce to defendant in the action and on the same day plaintiff in the action served and filed her notice of intention to move for a new trial. On November 24, 1917, defendant served and filed notice of intention to move for a new trial on certain stated special issues, to wit, whether or not at the commencement of the action plaintiff was a resident of Merced county and had been such resident for one year continuously preceding the commencement of the action, and whether or not plaintiff is the wife of said defendant, and that said motion will be made on the ground that the court made no findings on said issues. On November 26, 1917, the court made an order granting defendant's motion for a new trial on said special issues and denied plaintiff's motion for a new trial.

On December 7, 1917, plaintiff in the action filed notice of appeal "from said judgment and interlocutory decree of divorce made and entered" November 15, 1917, "and from the whole thereof." On December 12, 1917, defendant filed motion for leave to file amendment to his said cross-complaint, that said plaintiff was at the commencement of the action and for one year preceding thereto had been and was such resident continuously, and that on said day he by leave of court filed said amendment, that on said 17th day of December, 1917, the court "tried the special or particular issues," hereinbefore specified, and received evidence in proof of the allegations contained in the amended cross-complaint and on said day "and before the trial of said particular issues, your petitioner, acting through her attorney, Terry W. Ward, objected to said court proceeding with said trial, or proceeding or performing any further judicial act, function, or action, upon that ground that petitioner had on the 7th day of December, 1917, filed her notice of appeal from the judgment rendered in said action on the 15th day of November, 1917, and that said court therefore was without jurisdiction to proceed further in said action; that said court proceeded to try said particular issues, and thereafter on the 16th day of January, 1918, signed and filed its findings of fact and conclusions of law," and on said day made and entered its interlocutory decree awarding said George Stinnett his decree of divorce from said plaintiff. It is alleged that the court was without jurisdiction to render said judgment and decree on the ground that the court had no jurisdiction "to perform any judicial act in said cause from and after the date of the filing of petitioner's notice of appeal from said judgment and decree made and entered by said court on the 15th day of November, 1917."

The situation, briefly, is this: Judgment was entered; both parties moved for a new trial; the motion was denied as to plaintiff and was granted as to defendant; after these orders were made, plaintiff gave notice of appeal from the judgment; shortly thereafter defendant, by leave of court, filed an amendment to his cross-complaint alleging residence of the plaintiff, and the court, over plaintiff's objection, proceeded to take evidence upon the special issue referred to in defendant's motion, made and filed findings of fact and conclusions of law, and entered judgment awarding defendant a divorce. The question is: Had the court jurisdiction to proceed in the case after notice of appeal from the judgment?

[1] The proceedings for a new trial are independent and collateral to the judgment for,

"under our system, from the entry of the verdict or filing of the findings of the court, the motion for new trial is a kind of episode, or in a certain sense, a collateral proceeding—a proceeding not in the direct line of the judgment; for the judgment may be at once entered and even executed, while a motion for a new trial is pending in an independent line of proceeding, which ends in an order reviewable on an independent appeal." Spanagel v. Dellinger, 38 Cal. 278, 284; 1 Hayne on New Trial and Appeal (Revised Ed.) p. 15.

The granting of defendant's motion for a new trial had the effect to set aside the judgment and the court had the power thereafter to allow defendant's proposed amendment to his cross-complaint and to hear and determine the case, make findings, and enter judgment thereon.

[2] Furthermore, plaintiff had her right to appeal from this second judgment and to move for a new trial and thus bring up for review these later proceedings. This right furnished a plain, speedy, and adequate remedy which, under the statute, precludes her right to a writ of review. Code Civ. Proc. § 1068.

For the foregoing reasons, the writ is denied.

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36 Cal. App. 316

DOWNEY v. CAVASSO. (Civ. 2322.)

(District Court of Appeal, First District, California. Feb. 19, 1918.)

PLEADING ⚷192(2)—DEMURRER — INDEFINITENESS OF COMPLAINT.

Where complaint did not reveal whether the cause of action was on the theory that the contract involved was made by plaintiff and defendant as members of an existing corporation, or was made after dissolution of the copartnership and when defendant was retiring as a stockholder of the corporation, which was created to take over the copartnership, demurrer was properly sustained.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by J. C. Downey against I. L. Cavasso. From a judgment for defendant, plaintiff appeals. Affirmed.

Edward R. Eliassen, of Oakland, for appellant. M. J. Rutherford, of Oakland, for respondent.

LENNON, P. J. This is an appeal from a judgment entered in favor of the defendant after an order sustaining a demurrer to the plaintiff's second amended complaint without leave to further amend. The demurrer was grounded upon the sufficiency of the facts stated to constitute a cause of action and the uncertainty and unintelligibility of the averments of the complaint.

The plaintiff's complaint, when disentangled, discloses that the gist of the plaintiff's grievance arises out of a set of facts which, concretely stated and in the order in which they are rightly related, are these: On and for some time prior to the 2d day of January, 1913, the plaintiff and defendant were copartners, doing business in the city of Oakland under the firm name of the "Downey-Cavasso Glass & Paint Company." On that date the plaintiff and defendant caused to be created, out of the assets of, and for the purpose of enhancing the conduct of, the business of the copartnership, a corporation under the former firm name. All of the issued corporate capital stock, save one share reserved for the purpose of qualifying the necessary third member of the corporation, was owned and held in equal shares by the plaintiff and defendant until October 31, 1914, when the defendant sold all of his stock in the corporation to the plaintiff for a consideration which, in part, was the promise and agreement of the defendant, expressed in writing, that he would not, for a period of five years thereafter, engage in business in the city of Oakland in competition with either the plaintiff or the corporation. This agreement was violated by the defendant to the plaintiff's alleged damage in the sum of $1,000. The prayer of the complaint was for judgment in that amount, and for injunctive relief.

The complaint is, beyond doubt, unintelligible in its purported statement of a cause of action, because it cannot be ascertained therefrom, with any degree of certainty, whether the plaintiff's cause of action proceeded upon the theory that the contract in controversy was made by and between the plaintiff and the defendant as members of an existing corporation which was about to be dissolved, or whether it was made some ten months subsequent to the dissolution of the copartnership and at a time when the defendant was retiring as a stockholder of the corporation which was created for the purpose of absorbing and conducting the business of the copartnership. Upon this ground alone the demurrer was well taken and rightly sustained, even though the complaint somewhere within its averments hazily hints at a cause of action upon the theory contended for by counsel for the plaintiff, viz.: That the plaintiff and defendant by agreement between themselves, at the time of and subsequent to the creation of the corporation, continued and sustained toward one another the relation of copartners, and that, as a consequence, the contract in suit, even though made at the time of or after the corporate absorption of the copartnership assets, is not controlled by the statutory inhibition of section 1673 of the Civil Code against contracts in restraint of trade, but falls within the exception thereto provided by section 1675 of the same Code, which declares that:

"Partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof."

Perhaps if it had unequivocally appeared from the allegations of the complaint that the plaintiff and defendant had, by agreement, express or implied, continued their relations as copartners in conjunction with their relation as stockholders of the corporation, the law would take cognizance of such dual relationship and deal with "the parties in the light of their agreement, independently of their corporation" (Shorb v. Beaudry, 56 Cal. 446), and if, in fact, such had been the relationship of the parties, to plead it with perspicuity would, it seems to us, have been a very simple matter.

The judgment is affirmed.

We concur: BEASLY, Judge pro tem.; KERRIGAN, J.

36 Cal. App. 289

CALIFORNIA TROJAN POWDER CO. v. GARNSEY et al. (Civ. 1972.)

(District Court of Appeal, Second District, California. Feb. 18, 1918.)

STATUTES ⚷117(8) — TITLE — INDEMNITY AGAINST MECHANICS' LIENS.

The title of St. 1897, p. 202, as amended by St. 1911, p. 1422, "an act to secure the payment of claims of materialmen, mechanics and laborers employed by contractors upon state, municipal or other public work," is, under Const. art. 4, § 24, sufficiently broad to include a claim for material furnished a subcontractor.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by the California Trojan Powder Company against Leigh G. Garnsey and others, doing business as Kautz & Gabler, and another. Judgment for defendants, and plaintiff appeals. Reversed.

Ervin S. Best, of San Francisco, and Isidore B. Dockweiler, of Los Angeles (Thomas A. J. Dockweiler, of Los Angeles, of counsel), for appellant. Scarborough & Bowen, of Los Angeles, for respondents.

CONREY, P. J. This is an appeal by the plaintiff from a judgment dismissing the plaintiff's action as to the defendants Leigh G. Garnsey and Globe Indemnity Company upon plaintiff's refusal to amend its complaint after an order sustaining the demurrer thereto of those defendants. The plaintiff furnished materials to a subcontractor, whose contract was with the defendant Garnsey. Garnsey was the contractor in the principal contract, which was made between him and the state of California for the construction and completion of a portion of the state highway in Ventura county. The materials furnished by the plaintiff were used by the subcontractor upon a part of the work included in the principal contract. On obtaining his contract with the state, Garnsey, together with defendant Globe Indemnity Company, executed a bond for the purpose and in the terms required by an act of the Legislature of the state of California, entitled "An act to secure the payment of claims of materialmen, mechanics, or laborers, employed by contractors upon state, municipal, or other public work," and an act amendatory thereof. Stats. of 1897, p. 202, and Stats. of 1911, p. 1422. If under the statute as in force during the year 1914, when the contract and undertaking were made, such an undertaking covered the matter of payment for materials furnished to a subcontractor to be used and which were used in the performance of the work described in the principal contract, then the complaint stated a cause of action against the defendants who executed that undertaking. In the case of Associated Oil Co. v. Commary-Peterson Co., 32 Cal. App. 582, 163 Pac. 702, the facts were similar to the case at bar and the same question was presented. It was there held that the statute in question is not confined to the engagements of the contractor. "It was manifestly intended to cover all labor and all material contributing to the improvement, whether furnished directly to the contractor or indirectly through a subcontractor." In the absence of any controlling decision in this state, the court discussed a number of decisions rendered in other jurisdictions. A petition for a rehearing of that cause in the Supreme Court was denied.

Notwithstanding the authority of the decision mentioned above, counsel for respondents insist that a different ruling should be made; their argument being based upon a point not suggested in the former case. They admit that the language of the statute, exclusive of its title, is broad enough to include the claim of the plaintiff; but they say that the title thereof (which we have quoted supra) is so limited that the statute does not cover the claims of any persons except those employed by the principal contractor. In support of this contention they rely upon article 4, § 24, of the Constitution of this state.

"Recognizing the mandatory effect of the provision regarding the substance of the titles given legislative acts, the decisions have construed that provision in various cases. It has been said that the purpose of requiring the title to express the subject of the act was that legislators themselves, as well as the public, might not be deceived by false, misleading, or deceitful titles, and so permit mischievous legislation to be unwittingly enacted. A liberal rule of construction has been adopted, however, in the interest of protecting meritorious legislation from being declared void through inartificially constructed titles. 'The main object of this provision is to prevent legislators and the public from being entrapped by misleading titles to bills whereby legislation relating to one subject might be obtained under the title of another. * * * It seems to be well settled that it is not necessary that the title of an act should embrace an abstract or catalogue of its contents.' Abeel v. Clark, 84 Cal. 226 [24 Pac. 383]. Where the body of an act embraces provisions which are germane to the general subject stated in its title, the title will be held sufficient to comprehend all of the provisions of the act itself; and, where the title suggests to the mind the field of legislation which the text of the act includes, the title will not be held misleading or insufficient, or the act restricted in its operation." People v. Jordan, 172 Cal. 391, 394, 156 Pac. 451, 453.

Applying the principles above stated, it appears clear to us that the provisions contained in the text of the statute here under consideration do not extend beyond the field of legislation naturally suggested to the mind by the words "materialmen * * * employed by contractors upon state, municipal, or other public work." It is our opinion that the complaint stated a cause of action.

The judgment is reversed.

We concur: JAMES, J.; WORKS, Judge pro tem.

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36 Cal. App. 288

GENTRY v. CITRON et al. (Civ. 2304.)

(District Court of Appeal, Second District, California. Feb. 18, 1918.)

LANDLORD AND TENANT 🔑291(2)—UNLAWFUL DETAINER—SERVICE OF NOTICE.

Service on one of two tenants who as lessees had bound themselves together as coparties to the lease is sufficient within Code Civ. Proc. § 1161, subd. 2, declaring a tenant guilty of unlawful detainer, where he continues in possession after default in rent, pursuant to the lease, and three days' notice, in writing, requiring its payment, shall have been served on him.

Appeal from Superior Court, Los Angeles County; W. H. Thomas, Judge.

Action by F. V. Gentry against U. Citron and another. From an adverse judgment, defendants appeal. Affirmed.

Paul W. Schenck and Jos. Citron, both of Los Angeles, for appellants. Alfred W. Allen and Fred W. Heatherly, both of Los Angeles, for respondent.

WORKS, Judge pro tem. This is an action for unlawful detainer, in which the defendants appeal from a judgment against them.

The defendants together occupied the premises which are the subject of the action, under a written lease executed by the plaintiff. Before the commencement of the action the plaintiff served upon one of the lessees the three days' notice to quit which is provided for in subdivision 2, § 1161, Code of Civil Procedure; the notice having been addressed to both lessees. The statute mentioned requires service of the notice upon "the tenant," and the appellants contend that a service upon one of two tenants situated as they are is insufficient. The point is untenable. As the lessees had bound themselves together as coparties to the lease, standing thus in opposition to the respondent, the lessor, they occupied as between themselves and as to him a relationship kindred to that of copartners, if, in fact, they might not actually have been regarded by him as copartners (Spencer v. Barnes, 25 Cal. App. 139, 142 Pac. 1088), which latter point we do not, however, decide. A notice to one of copartners binds the partnership (Burritt v. Dickson, 8 Cal. 113), and we can see no reason why the spirit and justice of the rule do not require its application to such a case as is here presented. In fact, it has been determined in other jurisdictions that, where two or more tenants hold either jointly or in common a service of notice to quit upon one of them is sufficient to terminate the tenancy of all. 16 R. C. L. p. 1176; 24 Cyc. p. 1332.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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36 Cal. App. 251

CUNEO v. DAVIS et al. (Civ. 2199.)

(District Court of Appeal, First District, California. Feb. 21, 1918.)

ATTORNEY AND CLIENT 🔑162 — COMPENSATION — ACTION BY ASSIGNEE — TIME FOR BRINGING SUIT.

Action by the assignee of an attorney's claim for services in defending an action, under a contract for payment if the attorney should defeat the action and prevent recovery, or if as a result of the action a lesser amount should be recovered than that claimed, was prematurely brought pending appeal in the action from a judgment for defendant; for until a final judgment on appeal has been obtained in favor of defendant, or until the case is otherwise finally determined in his favor, or a judgment shall have become final for a lessor amount than that prayed for in the action, the attorney has not defeated the action or prevented a recovery.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by E. Z. Cuneo against Thomas E. Davis, Jr., and another. From a judgment for plaintiff, defendants appeal. Reversed.

S. W. Molkenbuhr and Thos. W. Firby, both of San Francisco, for appellants. James H. Boyer and Frank J. Golden, both of San Francisco, for respondent.

BEASLY, Judge pro tem. The facts of this case are very simple. For some time previous to the 8th day of September, 1916, James H. Boyer, an attorney at law and the assignor of plaintiff, had represented the appellants in certain litigation for which, it is claimed by plaintiff, Boyer had not been fully paid. At the last-mentioned date an action was pending between the Pacific Coast Casualty Company and Thomas E. Davis in the superior court of the city and county of San Francisco, and Boyer entered into an agreement with the Davises, defendants herein, by which he undertook to defend that action and to pay the costs of defending the same. The provision of that contract which is under consideration here is that, in case Boyer should defeat that action and prevent any recovery against the Davises therein, then the Davises would pay to him the entire amount prayed for by the Pacific Coast Casualty Company in that action; or if, as the result of said action, a lesser amount should be recovered than that claimed the difference should be paid to Boyer by the Davises, such payment, as the case might be, to be in settlement, of what Boyer claimed was coming to him for his services previously rendered in other matters as well as for his services in the pending action.

Boyer defended the action of Pacific Coast Casualty Co. v. Davis, and it resulted in favor of Davis; a judgment therein being entered in the superior court for his costs. Thereupon Boyer demanded that he be paid in accordance with the terms of the contract above recited. The Davises refused to pay him, and he brought this action against them, without waiting for the determination of an appeal taken by the Casualty Company in the action in question. There are other facts appearing in the transcript, but these are the only facts essential to the decision of the case at bar.

The obvious claim that this action was prematurely brought must be sustained; for it is apparent that Boyer has not defeated the action he undertook to defend nor prevented a recovery therein until a final judgment on appeal has been obtained in favor of Davis, or until the case is otherwise finally determined in his favor, or by a judgment which shall have become final for a lesser amount than that prayed for in that action.

The judgment is reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

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36 Cal. App. 338

LEFURGEY et al. v. PRENTICE et al. (Civ. 1772.)

(District Court of Appeal, Third District, California. Feb. 20, 1918. Rehearing Denied by Supreme Court April 17, 1918.)

1. ESTOPPEL ⟹77—TRANSFER OF STOCK.

Defendant in possession of the property of a mining corporation under a stock transfer agreement with plaintiff, the principal stockholder, upon termination of the agreement, because of default in payment of price, cannot deny plaintiffs' right to recover possession on ground that title to the property is in the corporation.

2. VENUE ⟹5(3)—CHANGE OF.

Where the main stockholder of a mining corporation sold his stock, and gave buyer possession of the corporate property, and upon default in the payment of price sued to recover the property, and to have a mortgage placed thereon in violation of the contract declared invalid, such action was local under Code Civ. Proc. § 392, providing that actions for the recovery of real estates, etc., shall be tried in the county where the land lies.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by O. B. Lefurgey and another against J. O. Prentice and others. Defendants' motion for a change in the place of trial denied, and they appeal. Affirmed.

Bradley V. Sargent and Vincent Surr, all of San Francisco, for appellants. J. P. O'Brien and H. M. Anthony, both of San Francisco, for respondents.

CHIPMAN, P. J. This is an appeal from an order denying defendants' motion for a change in the place of trial from Tuolumne county to the city and county of San Francisco. It is not disputed that at the commencement of the action defendants Prentice and Duke had their residence in said city and county, where also was the principal place of business of the defendant corporation; the defendant Craig resided in Alameda county and the defendant Kinsey resided in San Mateo county, the two latter consenting that the cause might be transferred to the city and county of San Francisco. The question presented is whether the action was personal or local in its nature as involving real property. The complaint was filed in July, 1914; the motion to change the place of trial was denied on September 28, 1914, and the transcript on appeal was filed October 1, 1914. No briefs were filed in the case until after its transfer to this court in November, appellants' brief having been filed November 20, 1917, and respondents' January 14, 1918.

The following facts alleged in the complaint will perhaps be sufficient to indicate the character of the action: The defendant corporation was, at the commencement of the action, the owner of certain mining property in Tuolumne county, and plaintiff Lefurgey was then the owner of a large majority of its capital stock, and at the time of the execution of the agreement hereinafter referred to controlled its board of directors, and by virtue of such ownership and control had the management and control of the business and property of the corporation; on February 1, 1913, Lefurgey entered into an agreement with defendant Prentice, by which the former agreed to sell to the latter 240,000 shares of his stock, and to deliver possession of the mining properties of defendant company to defendant Prentice, and to cause four out of the five directors of the corporation controlled by Lefurgey to resign and to elect in their place four other directors to be nominated by Prentice, thereby Lefurgey surrendering control of the property to Prentice. It was also agreed that Prentice should have the right to work, operate, and develop the properties, and to extract and remove the minerals therefrom, provided all work was done in a good and minerlike manner, and was to be done at Prentice's sole cost and expense, and he also agreed to keep the premises and property free and clear of all liens and incumbrances. The agreement also fixed the purchase price to be paid by Prentice, and the times and manner of payment, and that Prentice would arrange with other stockholders to pay them their proportion of minerals extracted from the mining property. The agreement also provided that on Prentice's failure to pay the purchase price or any part thereof when it became due and payable, and he should fail to keep or perform any of the conditions of the agreement, the agreement should thereupon terminate and end, and that Prentice should immediately deliver to Lefurgey the possession of the property which he obtained under said agreement from Lefurgey, and also would procure the resignation of the directors nominated and controlled by Prentice who had theretofore been elected in place of those controlled by Lefurgey. It was also alleged in the complaint that Lefurgey delivered possession of the property to Prentice, and caused four directors to resign, and to be elected in their place four directors nominated by Prentice, in accordance with the terms of the agreement, and that Prentice accepted possession of the property and control of the corporation from Lefurgey, and operated the property under such possession and control, and did certain work upon the property, and then failed to comply with the conditions of the agreement, which by its terms thereupon terminated and ended; that thereafter Lefurgey demanded possession of the property free of all liens and incumbrances and the resignations of the directors theretofore nominated by Prentice, all of which defendant Prentice refused to do in violation of the conditions in said agreement. The complaint also alleged that while in possession of the property under said agreement and while Prentice was in control of the corporation through the directors nominated and controlled by him, he caused a mortgage to be executed by the corporation to him for moneys expended in working and operating the property, while he was in possession thereof under the agreement, and which, by the terms of the agreement, he agreed to pay as a part of the consideration for delivering possession of the property and control of the corporation to him, and it was alleged that this mortgage is fictitious and invalid, and constitutes a cloud upon the title of the property. It also appears that before the commencement of the action, plaintiff Lefurgey conveyed an interest in the cause of action to his coplaintiff Shepard.

The complaint goes into great detail in setting forth the matters of which the foregoing is a brief epitome. It was stated in the complaint that Prentice defaulted in all the progressive payments which he was to make for the purchase of the said stock; that he had involved the corporation in a large indebtedness in the course of operating the mines and had caused a note and mortgage for $20,000 to be executed by the corporation to him as covering a part of the expenditures made by Prentice in operating the mine, and contrary to the express terms of the agreement by which he was to operate the mine entirely at his own cost and expense and keep the mining property entirely free from all liens and incumbrances.

The prayer of the complaint is that the defendant J. A. Prentice be required to deliver immediate possession of said premises and property to the plaintiffs; that said alleged promissory note and mortgage be adjudged void and that they be surrendered by the defendant Prentice and canceled; that it be adjudged that the defendant Prentice has no claim against the said Stanislaus Gravel Mining Company for moneys expended by him upon the properties while in possession thereof under the terms of the agreement set forth in the complaint, and that all alleged proceedings of the directors of said mining company acknowledging or admitting any indebtedness of said company to defendant Prentice be adjudged invalid and void; that defendants Craig, Kinsey, and Duke be required to resign as directors of said mining company; also for judgment against the defendant Prentice for the amount of any indebtedness incurred by him while operating said properties and which indebtedness was not paid by him, and for attorney's fees and costs and such other and further relief as may seem meet and proper.

[1] Plaintiffs do not seek a money judgment against the defendants. The main objects of the action are first: To compel Prentice to return the possession of the real property to Lefurgey from whom he received the possession and this in strict accordance with the agreement under which Prentice went into possession; second, to have the incumbrance on the real property removed which was placed on the property under Prentice's direction, for his own benefit and in violation of the agreement under which he had possession and control of the property of the corporation. It is true that the title to the property is in the corporation, and that the business of the corporation is transacted through its directors. But it is alleged that Lefurgey, by reason of his owning a large majority of the shares of the corporation, did himself in fact control its acts; that in compliance with the agreement he caused his directors to resign and directors of Prentice's selection to be substituted, thus for the time passing control over to Prentice, subject, however, to the agreement that should Prentice fail to keep its covenants on his part to be performed he would cause his directors to resign and would surrender possession to Lefurgey. Having entered into possession under Lefurgey, Prentice is in no position to deny Lefurgey's right to posses-

sion. Garvey v. Lashells, 151 Cal. 526, 532, 91 Pac. 498.

[2] The nature of the action is to be determined by the averments of the complaint and the nature of the relief that can be granted in the action, and not by the probable result in a trial upon the merits. Questions raised on the demurrer such as the legal sufficiency of the complaint, whether there is an improper joinder of actions or of defendants, are matters which do not properly arise in determining the motion. Section 392 of the Code of Civil Procedure declares that the following causes must be tried in the county in which the subject of the action or some part thereof is situated:

> "1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property."

The gist of the action here is to recover possession of the land, and to have a mortgage lien fraudulently placed thereon canceled. These objects, we think, clearly characterize the action as local under section 392. The principle governing these cases is quite fully discussed in an opinion by Justice Burnett in Robinson v. Williams, 12 Cal. App. 515, 107 Pac. 705. See, also, Donohoe v. Rogers, 168 Cal. 700, 144 Pac. 958.

The order is affirmed.

We concur: BURNETT, J.; HART, J.

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36 Cal. App. 312

MUNN v. ANTHONY et al. (Civ. 2102.)

(District Court of Appeal, Second District, California. Feb. 19, 1918.)

1. FRAUD 🔑20—RELIANCE ON REPRESENTATIONS.

A buyer of an automobile may recover damages for false statement of seller's agent as to date of manufacture, though she had the car examined before buying, where such examination was as to the condition of the machine and batteries, and not as to its date.

2. FRAUD 🔑35—WAIVER — CONTRACTS IN WRITING.

Where written contract for sale of automobile waived all promises or agreements not specified therein, the buyer could not recover for false representation as to the year of manufacture, particularly in view of Civ. Code, § 1625, providing that written contracts supersede all the negotiations or stipulations preceding their execution.

3. FRAUD 🔑58(1)—DAMAGES—EVIDENCE.

In an action by a buyer, based upon misrepresentation of year of manufacture of an automobile, evidence *held* sufficient to sustain finding of trial court as to the difference between the value of the machine as it was and what it would have been if made in year represented.

Appeal from Superior Court, Los Angeles County; Stanley A. Smith, Judge.

Action by Charlotte P. Munn against Earle C. Anthony, Earle C. Anthony, Incorporated, and another. From a judgment for plaintiff, and from an order denying a new trial, defendant Earle C. Anthony, Incorporated, appeals. Judgment reversed.

E. W. Freeman and Paul Nourse, both of Los Angeles, for appellant. Olin Wellborn, Jr., and Stephen Monteleone, both of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment entered in favor of the plaintiff, and from an order denying to the defendant Earle C. Anthony, Incorporated (a corporation), a new trial. The action was based upon alleged misrepresentations made by an agent of appellant regarding the year of manufacture of a certain electric automobile.

Plaintiff negotiated with English, the agent of appellant, for the purchase of a second-hand electric automobile. She alleged, and the court found, that English represented that the automobile had been manufactured in the year 1913, when in fact it was a 1912 model. The car was offered to the plaintiff, with electric rectifier, for the sum of $1,800. Plaintiff informed appellant's agent that she would not purchase it without the privilege of having an examination made by persons of her own selection. Agreeable to this suggestion, the machine was left with the mechanics designated by the plaintiff, where it remained for a day or so. These mechanics, being experienced in the handling of electric machines, examined the car and its batteries, and reported to the plaintiff that everything was in good condition, and that the car "looked to be a good buy." Plaintiff thereupon offered appellant the sum of $1,700 for the car and rectifier, that being $100 less than the proposed price. This offer was accepted, and thereupon a written contract was entered into and signed by both parties. The contract appears to have been made upon the blank form used for the purchase of new cars, except that the descriptive matter was written in before it was signed. The contract in its main parts was in the following form:

"November 24, 1913.

"In consideration of the placing at once of an order with the manufacturer, I hereby agree to purchase of the California Motor Company of Los Angeles.

One R & L Electric Model No. 28475..	Price ....
Sold for the account of Mrs. K. A. Kelley (*as is*)	Price $1700.00
Including one second-hand Westinghouse rectifier	Price ....
....	Price ....
....	Price ....
....	Price ....
....	Price State License 2.00
....	Total 1700.00

and to pay for the same the sum of $1,700.00, said payment to be made at the garage of the California Motor Company, of Los Angeles, as soon as shipment from factory is received. All cars are sold under the standard warranty of the National Association of Automobile Manufacturers. All promises, verbal understandings, or agreements of any kind pertaining to this purchase not specified herein, are hereby expressly waived.

"Subject to conditions on back.

"[Signed] Charlotte P. Munn.

"Received of Charlotte P. Munn, Hotel Maryland, Pasadena, Cal., the sum of $200, as deposit upon and to apply upon the purchase price of the above contract. All agreements contingent upon fires, strikes, delays in shipment, accidents, or other reasons beyond our control.

"California Motor Company,
"By E. Anthony."

[1, 2] There was a conflict in the evidence upon the question as to whether the false representations had been made, and this conflict having been resolved by the trial judge in favor of the plaintiff, appellant admits that the determination of that fact is beyond the reach of its appeal. However, two points are insisted upon: First, that the plaintiff was not entitled to rely upon any representations made regarding the automobile when she resorted to independent means before buying to ascertain its value and condition; second, that having finally entered into a written contract of sale, which contained terms excluding all previous negotiations and statements, the claim that false representations had been made by way of inducement could furnish no ground for a cause of action. As to the first proposition, we do not agree with appellant's contention, for the reason that the evidence does not show that the independent examination made at the instance of the plaintiff, went to the question at all as to the year of manufacture of the car. This examination looked only into the general condition of the machine and its batteries. As to the second point, we think the contention of appellant should be sustained. The written contract as entered into contained a description of the car, with its model number, and contained the limiting clause that:

> "All promises, verbal understandings, or agreements of any kind pertaining to this purchase not specified herein, are hereby expressly waived."

It appears that the model number as used in the contract was descriptive to show the year during which the car was manufactured, for the witness Holbert testified that:

> "The Rauch & Lang Company never designates the year of their models; they always just use the model number or model letter."

It seems quite plain that the limiting term incorporated in the contract was intended to save disputes and eliminate all question of representations as to kind and condition of machines sold. Our Civil Code (section 1625) provides that:

> "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

See, also, Tockstein v. Pacific Kissel Kar Branch, 33 Cal. App. 262, 164 Pac. 906.

The writing here considered appears to be intended to express the whole contract between the parties. Kreuzberger v. Wingfield, 96 Cal. 251, 31 Pac. 109.

[3] While appellant advances the further argument that the evidence was insufficient to sustain the finding that there was any difference in the value between a 1912 model electric and a 1913 model, both being in the same condition of repair, we are not prepared to agree with that contention. The evidence was not strong, but it was of such a nature as might well have been satisfactory to the trial judge. The value of the car as purchased by the plaintiff appears to have been established at a price not less than the amount she paid for it. She used the machine for about a year before discovering, as was found by the court, that the automobile was a 1912 instead of a 1913 model. The damage to her—that is, the difference between what the machine would have been worth had it been of the later model and the value of a machine of 1912 model—the court found to be $150. We are satisfied that this judgment cannot be sustained, because of the condition of the contract by which plaintiff waived the representations made previous to the execution thereof. The law did not permit an appeal to be taken from an order denying a new trial at the time the appeal herein was perfected; hence as to the order attempted to be appealed from no judgment is required. Watt v. Bekins Van Storage Co., 171 Pac. 832.

The judgment is reversed.

We concur: **CONREY, P. J.**; **WORKS**, Judge pro tem.

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35 Cal. App. 775

HUCKABY v. NORTHAM et al. (Civ. 2318.)

(District Court of Appeal, First District, California. Jan. 7, 1918.)

QUIETING TITLE ⚷53 — APPEAL—REVERSAL.

Judgment for defendants in suit to quiet title must be reversed on appeal, where it is conceded that the evidence is insufficient as a matter of law to support a finding of title in defendants, and it is also conceded that plaintiff was in possession when suit was begun, and that such possession, as against a person who had no better title, or no title at all, should have compelled a finding in favor of plaintiff.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Vernon Huckaby against Elizabeth A. Northam and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded for new trial.

Theodore A. Bell, of San Francisco, for appellant. C. K. Bonestell and W. D. Crichton, both of Fresno, for respondents.

PER CURIAM. This was an action to quiet title, in which judgment was rendered in favor of the defendants, and the plaintiff appeals.

It is conceded by the respondents in open court that the evidence is insufficient as a matter of law to support the finding of title in the defendants as made by the trial court; and it is also conceded that the plaintiff was in possession of the property in suit at the time the action was commenced, and that such possession, as against a person who had no better title, or no title at all, should have compelled a finding in favor of the plaintiff. That being so, there remains nothing for this court to do but to reverse the case upon that point alone.

The point decided being determinative of the entire case, there is no necessity to discuss the other points presented.

It is ordered that the judgment be and the same is hereby reversed, and the cause remanded for a new trial.

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36 Cal. App. 284

BLOCHMAN COMMERCIAL & SAVINGS BANK v. KETCHAM. (Civ. 2072.)

(District Court of Appeal, Second District, California. Feb. 18, 1918.)

1. APPEAL AND ERROR 🔑757(1)—BRIEFS—TYPEWRITTEN TRANSCRIPT—ASSUMPTION AS TO RECORD.

Under Code Civ. Proc. § 953c, requiring that parties who present a cause on appeal by the alternative method print in the briefs such portion of the record as they desire to call to the attention of the court, where only a typewritten transcript on appeal has been filed, the appellate court will assume that the parties have printed in their briefs such portions of the record as they desire to call to the attention of the court, and that its statement of facts should be confined to matters thus brought to its attention.

2. ALTERATION OF INSTRUMENTS 🔑7, 12—NOTES—INSERTING PLACE OF PAYMENT—"MATERIAL ALTERATION."

Where a promissory note reads, "I promise to pay to the order of myself at ......," there is an implied authority given the holder to fill the blank by designating a place of payment at his election, and such act by him is not a material alteration of the instrument within Civ. Code, § 1700, providing that such an alteration of a written contract extinguishes all executory obligations.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Material Alteration.]

3. CONTRACTS 🔑147(1)—CONSTRUCTION—INTENTION.

In the interpretation of contracts, the intention of the parties, so far as ascertainable and lawful, controls under Civ. Code, §§ 1636, 3268.

4. EVIDENCE 🔑81—PRESUMPTIONS—LAW OF FOREIGN COUNTRY.

In the absence of contrary showing, presumably the law of Mexico, where the note in suit was drawn, is the same as that of California, where the suit was brought.

5. ALTERATION OF INSTRUMENTS 🔑20—NOTE—PLACE OF PAYMENT—FILLING IN BLANK—EFFECT—WHAT LAW GOVERNS.

Under Civ. Code, § 1646, providing that a contract is to be interpreted according to the law of the place where it is to be performed, or, if it does not indicate a place of performance, according to the law of the place where it is made, where a promissory note was made in Mexico, with the place of payment left blank, and the payee, pursuant to its implied authority, filled in a place of payment in California, the note was enforceable as a commercial instrument in California, being such under the laws of the state, though not in the form and substance required by the laws of Mexico.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the Blochman Commercial & Savings Bank against L. Y. Ketcham. From the judgment, defendant appeals. Affirmed.

Shreve & Shreve and Harry W. Horton, all of San Diego, for appellant. Sam Ferry Smith, of San Diego, and Laurence H. Smith, of San Francisco, for respondent.

CONREY, P. J. [1] The defendant appeals from the judgment. The action is based upon an alleged promissory note dated at Ensenada, Mexico. The case is presented upon printed briefs and without oral argument. Appellant contends that as to certain matters the evidence does not sustain the findings, and as to other matters that the court erred in its ruling at the trial. On both sides the briefs discuss portions of the evidence without furnishing us any quotations therefrom. Only a typewritten transcript on appeal has been filed. In such cases the rule is that we will assume that the parties have printed in their briefs such portions of the record as they desire to call to the attention of the court, and that our statement of facts should be confined to matters thus brought to our attention. Code Civ. Proc. § 953c; Jones v. American Potash Co., 169 Pac. 397; Stewart v. Andrews, 169 Pac. 397. Therefore we shall discuss on the merits only those points which are illustrated by quotations from the transcript and those assertions of fact made by one party and definitely admitted on the other side, as being shown by the record.

The note as dated and delivered at Ensenada, Mexico, read, in part, as follows:

> "Six months after date, without grace, I promise to pay to the order of myself at ...... one thousand dollars, in gold coin of the United States of America, of the present standard value."

After the note had been delivered and after it came into the possession of the plaintiff, the plaintiff inserted in the blank line left therein, after the word "at," the words "Blochman Commercial & Savings Bank of San Diego, San Diego, California." The defendant claims that this was a material alteration in the instrument, and that for that reason no recovery can be had thereon. He further claims that had no place of payment been inserted in the note, questions concerning its execution and meaning would be determined according to the law of Mexico, under which, he asserts, he would be entitled to the equitable defenses set up in the answer. For the reason above suggested, he has not properly brought before us those equitable defenses or the rulings of the court. We find, however, in the respondent's brief a quotation from the record which shows that at the trial the attorney for defendant stated, "I do not expect to go into that fraud proposition." We presume that this referred to those equitable defenses, whatever they were.

Section 1700 of the Civil Code provides that:

> "The intentional destruction, cancellation, or material alteration of a written contract, by a party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor, against parties who do not consent to the act."

Appellant relies upon certain decisions made in other states and upon Pelton v. San Jacinto Lumber Co., 113 Cal. 21, 45 Pac. 12. In the Pelton Case it does not appear that any blank was left in the note with words indicating an undesignated place of payment. After its execution it was altered by adding thereto a stated place of payment in the state of New York, although the note was made in California. It was held that this alteration of the note was material. As it read before its alteration it was payable only in this state, but thereafter it was made payable at a designated bank in the state of New York.

[2] We are of the opinion, however, that where, as in the case at bar, there is a blank in the note preceded by the word "at," there is an implied authority given to the holder to fill that blank by designating a place of payment at his election. The act done by him under that authorization does not constitute a material alteration in the instrument.

[3, 4] In the interpretation of contracts the intention of the parties, so far as ascertainable and lawful, will control. Civ. Code, §§ 1636, 3268. The modern trend of authority seems to be that where the place of payment is inserted in a blank of the kind above described, left in the note at the time it was signed or indorsed by the prior party sought to be charged, the holder will be permitted to recover. Some cases base this rule upon the doctrine of estoppel, but the doctrine of implied authority is also fully admitted; it being recognized, however, that an express understanding that no place of payment is to be inserted will in any event negative the implied authority. Diamond Distilleries Co. v. Gott, 137 Ky. 585, 126 S. W. 131, 31 L. R. A. (N. S.) 643. That case is also reported in 31 L. R. A. (N. S.) 643, where the authorities are collected in an extensive note. See, also, note in Ann. Cas. 1912B, 1010. Defendant in this case testified that at the time of the execution of the note nothing was said between himself and the persons to whom he delivered it as to whether or not the place of payment should be filled in. It is not claimed that there is anything in the record to show that the Mexican law did not permit blanks in notes to be filled in by the owner.

Therefore, presumably the law of Mexico is the same as that of California, according to which, as we have stated, a blank space of the kind above described may be filled in by the holder of the note.

[5] Appellant further claims that under the laws of Mexico the note could not be enforced as a commercial instrument, and was void because it was not in the form and substance required by those laws. "A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." Civ. Code, § 1646. Our decision that the plaintiff was authorized to make the note payable at a place in California carries with it the conclusion, above stated, that such act of the plaintiff did not constitute an alteration which changed the legal import or effect of the instrument. Therefore the executory obligations of the note were not extinguished by that act, and the provisions of Civil Code, § 1700, are not applicable to this case.

The note is a valid obligation of the defendant. No contention is made that it is unpaid, or that the plaintiff was not shown to be the owner thereof.

The record as presented to us raises no other questions which we are called upon to consider.

The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

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36 Cal. App. 311

BARKER BROS. v. JOOS et al. (BOWRING, Intervener). (Civ. 2054.)

(District Court of Appeal, Second District, California. Feb. 19, 1918.)

APPEAL AND ERROR 🔑757(1)—ALTERNATIVE METHOD — REVIEW — TYPEWRITTEN TRANSCRIPT.

Appellate courts will not look to the typewritten transcripts filed under the alternative method of appeal to determine whether ground exists for the reversal of the judgment appealed from, where no part of record is printed in brief, as expressly required by Code Civ. Proc. § 953c.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Barker Bros., a corporation, against J. Joe Joos and R. E. Joos, wherein Lynden Bowring intervened. From a judgment for the return of property to the intervener, or for the value, plaintiff appeals. Affirmed.

A. P. Michael Narlian and N. B. Nelson, both of Los Angeles, for appellant. Geo. S.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Hupp and Lynden Bowring, both of Los Angeles, for respondents.

PER CURIAM. It is stated in the brief of plaintiff in this case that the appeal is from a judgment for the return of certain personal property to the intervener-respondent, or for the value thereof. The appeal is taken under the alternative method. No portions of the record are printed in appellant's brief. References are made to the pages of the typewritten transcripts only. Section 953c, Code of Civil Procedure, requires that the parties who present a cause on appeal by the alternative method print in their briefs such portions of the record as they desire to call to the attention of the court. It has been repeatedly held that appellate courts will not look to the typewritten transcripts filed under the alternative method of appeal for the purpose of determining whether ground exists for the reversal of the judgment appealed from. Jones v. American Potash Co., 169 Pac. 397; Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430; Wills v. Woolner, 21 Cal. App. 528, 132 Pac. 283; Miller v. Oliver et al. (Sup.) 163 Pac. 357; Pasadena Realty Co. v. Clune, 166 Pac. 1025; McKinnell v. Hansen et al. (Sup.) 167 Pac. 887; California Sav. & Commercial Bank v. Canne (Sup.) 169 Pac. 395; Stewart v. Andrews, 169 Pac. 397; Huffaker v. McVey, 169 Pac. 704; Hepler et al. v. Wright et al. 170 Pac. 667; Anderson v. Recorder's Court, 171 Pac. 812; Blochman Commercial & Sav. Bank v. Ketcham, Civil No. 2072, decided February 18, 1918, 171 Pac. 1084.

The judgment appealed from is affirmed.

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36 Cal. App. 308

MacPHEE v. BOARD OF POLICE COM'RS OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 2122.)

(District Court of Appeal, First District, California. Feb. 18, 1918.)

1. Municipal Corporations ⟹185(4)—Dismissal of Police Officer.

Under provision of city charter that office becomes vacant on conviction of incumbent of an offense in violation of duty and provision that police officer cannot be dismissed except upon trial before police commission after notice, where plaintiff police officer was convicted under Pen. Code, § 182, of a misdemeanor involving violation of official duty, the office became vacant ipso facto, and he would not be entitled to mandamus to compel commissioners to vacate dismissal made without notice to or hearing of plaintiff, although conviction had been reversed on appeal, and new trial ordered, and proceedings in lower court thereupon dismissed.

2. Municipal Corporations ⟹176(3)—Provisions of Charter—Construction.

As a charter provision that a member of a police force shall not be subject to dismissal for any cause except after notice and trial is not irreconcilable with a provision that an office shall become vacant on incumbent being convicted of an offense in violation of duty, application of the rule that particular provisions prevail over more general ones is unnecessary.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Application for writ of mandate by Arthur F. MacPhee against the Board of Police Commissioners of the City and County of San Francisco and others. Application denied, and plaintiff appeals. Affirmed.

See, also, 26 Cal. App. 218, 146 Pac. 522.

Nathan C. Coghlan, E. V. McKenzie, and A. L. O'Grady, all of San Francisco, for appellant. Geo. Lull, City Attorney, of San Francisco, for respondents.

BEASLY, Judge pro tem. [1] On May 1, 1913, MacPhee was a police officer of the city and county of San Francisco. On that day an accusation was made against him before the police commission of that city for violating section 182 of the Penal Code of the state of California, in that he was charged with having joined other police officers in a conspiracy with a gang of confidence operators to protect the latter in their criminal activities. Certain specified charges of crimes committed in carrying out the conspiracy were embodied in the complaint filed against MacPhee, illustrative of which was one to the effect that one of the conspirators named Frank Ross had fleeced a victim of $900, and that the police officers who were members of the conspiracy blackmailed him of $700 of this amount as hush money, and, incidentally, that in the original bargain made by the conspirators the police officers were to have but 15 per cent. of the results of the confidence operations.

MacPhee had a hearing on these charges, which progressed to the point where the evidence of the complainants was before the commission, when he suggested that the grand jury were considering the matter, and asked for a continuance until that investigation should be concluded, which was granted. The grand jury did consider the matter, and indicted MacPhee and several others, and MacPhee was subsequently convicted and sentenced to confinement in the county jail. Thereupon the police commission, without notifying MacPhee and without hearing him, and apparently without reference to the charges made, dismissed MacPhee from the force. He appealed from the conviction in the criminal case, and this court reversed the judgment and granted him a new trial. Proceedings in the lower court were thereupon dismissed, and MacPhee subsequently demanded that the police commission proceed to set aside his dismissal on the accusation before that body and hear the charges against him. This the commission refused to do, and he then applied to the superior court for a writ of mandate to compel them to act in accordance with his demand. That court denied the application, and MacPhee now appeals.

The appellant relies upon a section of the charter of the city and county of San Francisco which provides, generally speaking, that no member of the police department shall be subject to dismissal for any cause except after trial before the commission had upon notice to him of the time and place of hearing. Charter, art. 8, c. 7, § 3. But there is another provision of this charter which must be construed with the section above referred to so as to reconcile them, if possible, with each other, namely, section 10 of article 16, which provides that an office becomes vacant when the incumbent thereof dies, resigns, is adjudged insane, convicted of a felony or of an offense in violation of his official duty, or is removed from office, ceases to be a resident of the city and county of San Francisco, or absents himself from the state without leave for more than 60 consecutive days. Upon first reading, these two sections of the charter appear, as contended by the appellant, to be irreconcilable, but a closer reading shows that section 3 of chapter 7 of article 8 refers to trials generally for breach of duty or misconduct and other cases before the commission; while section 10 of article 16 specifically makes a rule by which offices of the city and county become vacant under certain specified and carefully defined conditions.

[2] Viewing the first section above cited as providing a rule governing the dismissal of a member of the police department, and the latter section as designating a condition under which an office, either in the police or any other department of the city government, shall become vacant, there is no irreconcilable conflict between these two sections of the charter; and it therefore becomes unnecessary to apply the rule invoked by the appellant that particular provisions prevail over more general provisions of a statute. This being so, the case of McKannay v. Horton, 151 Cal. 711, 91 Pac. 598, 13 L. R. A. (N. S.) 661, 121 Am. St. Rep. 146, covers this case, where it is held that by section 10 of article 16 of the charter of San Francisco an office ipso facto becomes vacant on the conviction of the incumbent of a felony. Here the conviction was of a misdemeanor, but it was a misdemeanor of such character as involved a violation of official duty, and therefore comes within the section of the charter upon which the case of McKannay v. Horton rests.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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36 Cal. App. 815

TAYLOR v. BOARD OF POLICE COM'RS OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 2123.)

(District Court of Appeal, First District, California. Feb. 18, 1918.)

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Application by Charles H. Taylor for writ of mandate against the Board of Police Commissioners of the City and County of San Francisco and others. Application denied. Plaintiff appeals. Affirmed.

Nathan C. Coghlan, E. V. McKenzie, and A. L. O'Grady, all of San Francisco, for appellant. Geo. Lull, City Atty., of San Francisco, for respondents.

BEASLY, Judge pro tem. This case is identical in all respects with that of MacPhee v. Board of Police Commissioners et al., 171 Pac. 1086, and upon the authority of that case the judgment herein is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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36 Cal. App. 278

NORRIS v. WRIGHT. (Civ. 2312.)

(District Court of Appeal, First District, California. Feb. 16, 1918. Rehearing Denied by Supreme Court April 16, 1918.)

FRAUD ⚷58(1)—EVIDENCE.

In the absence of showing of fraud, misrepresentations, incapacity, minority, or confidential relationship, the court cannot relieve against a sale of an heir's interest, purporting to be made for its full value, out of which she received but a small part of its value on account of excessive commissions, interest, and expenses charged for loans made to such heir by the purchaser.

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Action by Hazel P. Norris against Eli Wright. Judgment for defendant, and plaintiff appeals. Affirmed.

J. C. Black, of San Jose, for appellant. H. A. Hardinge, of San Jose, for respondent.

KERRIGAN, J. This is an action to recover damages alleged to have been sustained by the plaintiff in conveying certain property interests to the defendant, said transfer being charged to have been procured by means of false and fraudulent representations made by the defendant.

The plaintiff was the owner of a one-quarter interest in a certain estate in course of probate, and soon after she had acquired such interest the defendant made to her at short intervals of time six loans of comparatively small amounts, taking from her at each transaction a grant, bargain, and sale deed of her said one-quarter interest as security for the repayment of the sum then loaned, with interest, commission, and costs. On the first of this series of transactions the defendant took plaintiff's note for $85, with interest at 2 per cent. per month, for which she received from him in cash $50, which was the amount she desired to borrow; the balance of the note

($35), representing so-called expenses, and being the amount charged by defendant for his trouble in ascertaining whether or not the loan might be safely made. On the occasion of each of the other loans, the defendant, in addition to deducting interest at the rate of 2 per cent. per month on the previous loans, also deducted 10 per cent., by agreement with the plaintiff, as a commission for making the loan. When the indebtedness of the plaintiff to the defendant thus created reached the sum of $900, and the defendant had received six several conveyances of the plaintiff's said interest (which it is not disputed were in effect mortgages given to secure the repayment of the loans), the defendant refused to advance plaintiff any further money on her interest in said estate, but agreed to purchase her said interest for a total sum of $1,550, which he did, the purchase price being made up of the $900 owed as aforesaid by plaintiff to the defendant; $100 paid by defendant, with the consent of plaintiff reluctantly given, to an attorney who represented her interest in said estate; $75 paid by defendant with her consent for searching and perfecting title to the property covered by the conveyance; $75 charged by the defendant as a commission for making this sale to himself; and finally, the sum of $400 paid by defendant to plaintiff. According to the appraisement made in the estate in which the property in question figured and other evidence in the case, $1,550 appears to have been about the market value of the plaintiff's interest thus sold to the defendant, although evidence was also introduced placing its value at a much higher figure. It also appears that on the occasions of her transactions with the defendant, plaintiff was accompanied by her husband, who approved of them.

It is perfectly apparent that the plaintiff was unfamiliar with business affairs, and that the defendant imposed unconscionable burdens upon her; but it is not claimed that at the time of the transactions she was an infant, or incompetent, or that the relations between her and the defendant were confidential. No evidence was introduced to show that the defendant made any misstatements or misrepresentations of fact to the plaintiff, or that he practiced upon her any deceit or fraud. It follows that this appellate court is powerless, as was the court of first instance, to afford the plaintiff any relief against this modern Shylock.

Some criticism is made of the findings. While they cannot be commended for clearness, still under all the circumstances of the case they cannot be regarded as seriously defective.

Judgment affirmed.

We concur: LENNON, P. J.; FLOOD, Judge pro tem.

36 Cal. App. 280

GLOBE INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

(Civ. 2414.)

(District Court of Appeal, First District, California. Feb. 16, 1918. Rehearing Denied by Supreme Court April 16, 1918.)

MASTER AND SERVANT 🔑373—WORKMEN'S COMPENSATION—INJURIES "ARISING OUT OF EMPLOYMENT."

Where one employed as a bookkeeper and clerk crossed a public street to mail a letter written for his employer according to custom and was injured by an automobile driven by a third party, the injury arose out of the employment.

Application by the Globe Indemnity Company for writ of certiorari to review an award of the Industrial Accident Commission and others. Petition denied.

D. Hadsell, Jos. G. Sweet, and E. A. Ingalls, all of San Francisco, for petitioner. Chris. M. Bradley, of San Francisco, for respondents.

BEASLY, Judge pro tem. This application for a writ of certiorari to review an award of the Industrial Accident Commission against the petitioner is denied upon the following considerations:

The applicant for compensation, Roberts, was a bookkeeper and clerk of one C. H. Kobicke at the time the accident happened. Among his duties was to write letters for his employer and to take these letters to the nearest mail box, which was at the corner of Valencia and another street, in doing which it was necessary for him to cross Valencia street and this he did in performing this duty perhaps once each working day of the month. On the day of the accident he took two letters to the mail box for the purpose of posting them. The letters were written for his employer in the course of his duty. He crossed the street, posted the letters, and while on his way back recrossing Valencia street was struck by an automobile driven by one E. S. Kimberly, Jr., who was in no way connected with any of the parties to this proceeding. When struck Roberts was between the sidewalk and the street car track which runs up the middle of the street. There is no testimony showing or tending to show that the point where the accident occurred was any different or more dangerous than any other section of Valencia street or any other street in San Francisco. He was not loitering along the street, was not diverging in the least from his duty, and was strictly in the course of his employment when this accident happened.

It is conceded by petitioner that Roberts was so in the course of his employment at the time he sustained the injury, but it contends that this injury did not arise out of the employment.

We take the opposite view, and hold that it did arise out of his employment.

The general rule is laid down very clearly in Kimbol v. Industrial Accident Commission, 173 Cal. 351, 160 Pac. 150, L. R. A. 1917B, 595, Ann. Cas. 1917E, 312, thus:

> "The injury arises out of the employment when there is apparent to the rational mind upon consideration of all the circumstances a causal connection between the conditions under which the work is required to be performed and the resulting injury."

The conditions under which the work here was required to be performed took Roberts upon the street. He was subjected to the perils of the street in the course of such employment in exactly the same manner as that in which a factory hand is subjected to the dangers of the factory while in the course of his employment. There is a direct causal connection here between the fact that the man was on the street and the fact that he was injured. The accident was a natural accident of his work resulting from the exposure occasioned by the necessity of his going upon the street while performing such work. He was not exposed to this danger of the street "apart from his employment." The causative danger was peculiar to the work, in that, had he not been upon the street in the course of his duty, he would not have been injured.

Petitioner cites the English cases as opposed to this view, and also cites some California cases. Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164, and Fishering v. Pillsbury, 172 Cal. 690, 158 Pac. 215, are not in point, because there the applicant for compensation was injured by the skylarking of a fellow employé—an injury which did not arise out of his employment in any manner, and to which an agency not in any manner connected with his employment contributed, namely, the agency of a fellow employé engaged in horseplay.

Neither do the English cases, we think, support the contention of the petitioner when the facts of those cases are carefully examined—at least most of them do not do so. As an instance, take the case of Andrew v. Industrial Society, 2 K. B. Div. 1904, p. 32, where an employé was killed by being struck by lightning. He might have been struck by lightning had he been on the street or in his home or any other place. He was not struck by lightning because of the fact that he was engaged in a peculiar kind of work, while Roberts was run down and injured while in the performance of an act in the course of his duty, and was placed in his position of peril by that very performance. The person injured by the dropping of a stone in a railroad cab while the engine was passing under a bridge, and the woman injured while attempting to ward off a cockchafer that flew into the open window of the place where she was employed—the other English cases cited—are upon the same footing as the California cases cited by petitioner. And so of the case of Kelly v. Los Angeles County, 3 Decisions of the Industrial Accident Commission, 539, where a laborer was struck by a stray bullet from a boy's gun.

On the other hand, it seems to us that the case of Kimbol v. Industrial Accident Commission, above cited, in principle covers this case completely. In the case of Balboa Amusement Co. v. Industrial Accident Commission, 171 Pac. 108, the injured person was not in the course of his duty when injured. While waiting for an assignment as a moving picture actor, he crossed the street to change his coat, and on his way back stopped to talk with another employé. Manifestly, while so stopping he was not in the line of his duty.

The petitioner contends that, because Roberts was exposed only to the ordinary perils of the street to which any other person on the street is exposed, he does not fall within the rule which awards compensation for an injury arising out of the employment of the injured man. When the logical result of the application of the rule for which petitioner is contending is considered, the justice of treating this case as one arising out of Roberts' employment is apparent. Consider the case of a messenger boy. He is in no greater peril on the street than any other person there. He carries perhaps his message in his pocket, leaving his arms disengaged and perfectly free to move about. But he is on the street constantly in the course of his employment. To hold that Roberts is not entitled to compensation would be to hold that this messenger boy would likewise not be entitled to compensation for an injury caused to him by the perils of the street. The illustration might be extended further to truck drivers, teamsters, and numerous other classes of employment whose followers use the streets in the regular course of their duty, and whose peril on the streets is no greater than that of any other person, but who would not be injured but for the fact that their duty takes and keeps them on the street. It does not seem to us that the Legislature ever intended that these persons should be excluded from the benefit of industrial accident compensation.

The petition is denied.

We concur: LENNON, P. J.; KERRIGAN, J.

36 Cal. App. 335

CRAIG v. LEE et al. (Civ. 1973.)

(District Court of Appeal, First District, California. Feb. 20, 1918. Rehearing Denied by Supreme Court April 17, 1918.)

1. Limitation of Actions 🔑53(1)—Account Stated—Accrual of Cause of Action.

The limitation of two years prescribed by Code Civ. Proc. § 339, subd. 1, for action on a liability not founded on writing, applicable to an account stated by reason of an acknowledgment not in writing of the debt, begins to run from the date of such settlement.

2. Account Stated 🔑6(1) — Acknowledgment—"Adjust."

There is not the absolute acknowledgment or admission of a certain sum due, necessary for an account stated, where, to letters sending bill for services, the recipients answered that they expected money soon, and then would endeavor to adjust the account forthwith and agreeably to the parties; "adjust" meaning to settle or bring about a satisfactory state, so the parties will agree in a result, as to adjust accounts (quoting Words and Phrases, Adjust).

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by J. Early Craig against James A. Lee and another. Judgment for defendants, and plaintiff appeals. Affirmed.

M. H. Hernan and John A. Hoey, both of San Francisco, for appellant. N. E. Wretman, of San Jose, and Houghton & Houghton, of San Francisco, for respondents.

KERRIGAN, J. This is an appeal from a judgment rendered in favor of the defendants in an action brought by plaintiff to recover the sum of $650, alleged to be due from them upon an account stated for legal services.

On April 22, 1912, plaintiff sent to the defendants by mail a statement of his account showing a balance due from them of $650. This letter or statement was not answered. On August 14, 1913, the plaintiff again wrote to the defendants in reference to the account; but this letter was not received by them and was returned to the plaintiff. On the 18th of that month the plaintiff wrote another letter to the defendants, being a copy of the letter of the 14th, and inclosed with the letter a bill for $650, together with a promissory note for that amount, payable in 90 days, which he requested the defendants to execute. On August 22d this letter was answered by the defendant James A. Lee to the effect that he expected to receive some money at an early date, and that when funds were available he would endeavor to adjust the account. Respecting the request for a note, the letter states: "The time is so short that I do not deem it necessary to issue any note at this time." There were two other letters from the plaintiff to the defendants concerning the amount claimed to be due from them, but they have no bearing upon the points to be decided. Later on in the same year plaintiff again wrote to the defendants asking for a settlement of his bill of $650, to which the defendants shortly thereafter replied, stating that, while they were anxious to pay all their just debts, they at that time were without funds, but that in the near future they expected to receive some money, in which case they would endeavor "to adjust the account forthwith." In addition to these letters, there was a conversation between the plaintiff and the defendants, in which the latter said that within a certain number of days they would perhaps be able to "settle up." It is conceded, as of course it must be, that this conversation did not create an account stated.

[1] 1. As to the letter of April 22, 1912, written by plaintiff to the defendants inclosing his bill for $650, assuming that because it remained unanswered it became an account stated on that date, still the statute of limitations had run against it when the present action was commenced. Where the acknowledgment of a debt is not in writing, the statute begins to run against the account stated from the date of the settlement, and an action must be brought within two years after such settlement. Code Civ. Proc. § 339, subd. 1; Auzerais v. Naglee, 74 Cal. 60, 15 Pac. 371.

[2] 2. From the other correspondence we think it cannot be held that an account was stated between the parties.

> "An account stated presupposes an absolute acknowledgment or admission of a certain sum due or adjustment of accounts between the parties, the striking of a balance, or an assent, express or implied, to the correctness of the balance. If the acknowledgment or admission is qualified and not absolute, or if there is but an admission that something is due without specifying how much, there is no account stated, nor does an account stated exist if there is but a partial settlement of accounts without arriving at a balance, or if there is a dissent from the balance as struck." 1 Corpus Juris, p. 695, par. 287; Coffee v. Williams, 103 Cal. 556, 37 Pac. 504.

From the letters of August and November, 1913, we think there was no meeting of minds respecting the amount which was to be paid to plaintiff for his services; and the language of Lee's letter of August 22d, as well as that contained in the letter of both defendants of November 26th, negatives any construction or presumption of a promise to pay the full amount of the bill. According to the language of the letter of August 22d, the account rendered was to be "adjusted * * * agreeably" to the parties interested; and, according to the language of the letter of November 26th, the defendants would endeavor to adjust the account when they received certain money which they expected shortly.

The word "adjust," as defined in volume 1 of Words and Phrases, p. 194, means "to settle or bring about a satisfactory state, so the parties will agree in a result, as to adjust accounts." When losses under policies of insurance are adjusted, the amount of the loss is ascertained and determined. Miller v. Consolidated, etc., 113 Iowa, 211, 84 N. W. 1049; Ruthven v. American Fire Ins. Co., 102 Iowa, 550, 71 N. W. 374.

Excepting from consideration, for the reason already stated, the letter of April 22, 1912, and defendants' failure to reply to the same, it would appear from the other correspondence that they never intended to pay in full the amount of plaintiff's claim, but expected at some time, perhaps in the near future, to agreeably adjust or settle the account. There was therefore no account stated between them, which would leave plaintiff's claim barred by the statute as pleaded.

The judgment is affirmed.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

36 Cal. App. 292

PEOPLE v. PERA. (Cr. 406.)

(District Court of Appeal, Third District, California. Feb. 18, 1918. On Rehearing, March 20, 1918.)

1. Intoxicating Liquors 🔑236(9)—Criminal Prosecution—Weight and Sufficiency of Evidence—Commission of Acts.

Evidence *held* sufficient to justify the conclusion that defendant kept a supply of alcoholic liquors at his place within no-license territory for general sale.

2. Intoxicating Liquors 🔑236(3)—Criminal Prosecution—Sale—Evidence of Local Option Territory.

Testimony of the county clerk that the town in which defendant had his public resort for sale of intoxicating liquor was outside of incorporated cities and towns, and within a certain supervisorial district which had voted no-license and not since held an election on the question, *held* sufficient.

3. Criminal Law 🔑695(4)—Reception of Evidence—Objection.

In a prosecution for the keeping of a public saloon within no-license territory, the objection to a map of the county introduced in evidence, and authenticated as copy of official map did not show the no-license district, was insufficient to require its exclusion; the presumption under Code Civ. Proc. § 1963, subd. 32, being that the boundaries of such district have not changed.

4. Criminal Law 🔑442—Evidence—Proof of Signature.

The introduction in evidence upon trial for violation of local option law, of written application of defendant to the United States revenue office for federal liquor license, was improper without evidence that the signature was defendant's; the application not being under seal.

5. Criminal Law 🔑400(3)—Incorporation of Town—Record.

In a prosecution, under the local option law (St. 1911, p. 599), for the keeping of saloon within the Fifth supervisorial district, it was proper and competent for the county clerk to testify, when he had no knowledge, except from examination of the records and common notoriety, that the town of Dos Palos was not incorporated.

6. Criminal Law 🔑304(7), 1144(½)—Judicial Notice—Incorporation of City—Presumption.

The courts may take judicial notice of the incorporation of cities, and in a prosecution for violation of local option law, where defendant's guilt depends upon whether his saloon was in an incorporated town, it will be presumed that if the town had been incorporated, the court would have taken notice thereof.

7. Criminal Law 🔑372(2) — Evidence — Prior Acts.

In a prosecution for violation of local option law, the testimony of witness as to another sale of liquor made 14 days previous was properly admitted for the purpose of showing that defendant kept a public resort for sale of liquor.

8. Criminal Law 🔑656(9) — Trial — Conduct of Judge—Expression as to Weight of Evidence.

In prosecution for violation of local option law, where counsel objected to the competency of a map in evidence, court's remark, "Well, we have other evidence here," was not an expression on the weight of the evidence.

9. Intoxicating Liquors 🔑131—Offenses—Intention.

It is not necessary for consummation of crime of running public saloon in no-license territory that the intent of the defendant to commit the act be proved; the local option statute not requiring scienter.

10. Criminal Law 🔑1172(2)—Instructions—Harmless Error.

An instruction that the possession by defendant of a federal liquor license could not legally operate as a shield to a person shown to have kept a public liquor resort within no-license territory, being a correct statement of law, could not have caused a miscarriage of justice, even though written application for such license may not have been introduced according to rules of evidence.

On Rehearing.

11. Intoxicating Liquors 🔑242—Criminal Prosecutions—Punishment.

A sentence to imprisonment for one month and under Penal Code, § 1205, to a fine of $600, and in default of payment, imprisonment not exceeding one day for each $2 thereof, is void as to imprisonment for nonpayment of fine, as violating Local Option Law, § 19, limiting imprisonment to 7 months.

12. Criminal Law 🔑1191—Appeal—Power to Modify Judgments.

The Court of Appeals before a judgment becomes final, or the cause is transferred to the Supreme Court, upon petition still possesses right and jurisdiction to modify its judgment.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

G. Pera was convicted for keeping a place of public resort for sale of alcoholic liquor in no-license territory, motions in arrest of judgment and for new trial were denied, and accused appeals from judgment and orders denying motions. Judgment reversed in part, and affirmed in part, order denying new trial affirmed, and appeal from order denying motion in arrest of judgment dismissed.

L. J. Schino, of Merced, and Terry W. Ward, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. Defendant was informed against by the district attorney of the county of Merced for the crime of keeping a place of public resort in no-license territory for the purpose of sale in no-license territory of alcoholic liquor. The jury returned a verdict of guilty as charged in the information. Defendant made a motion in arrest of judgment and a motion for new trial, both of which motions were denied. Judgment was pronounced and, as entered in the minutes of the court, read as follows:

"It is ordered, adjudged and decreed that said defendant, G. Pera, be, and he is, fined in the sum of $600, said sum to be paid to the clerk of this court, immediately, and in default of said payment of fine, said defendant to be imprisoned in the Merced county jail for a term not exceeding one day for each $2 of such fine so remaining unpaid. It is further ordered, adjudged and decreed that said defendant be, and he is hereby, sentenced to serve a term of one month in the Merced county jail."

The appeal is from the judgment, the order denying the motion in arrest of judgment, and the order denying the motion for a new trial. Appellant contends that the "judgment is excessive, void, and unintelligible."

It appears from the record that, at the time of pronouncing judgment, the court imposed the fine of $600, with the alternative of imprisonment, and then the following colloquy ensued:

> "The Court: Now, Mr. District Attorney, of course I don't think there is any question but what the court has the right to go ahead, after this kind of a judgment, and impose a sentence of imprisonment.
>
> "Mr. McCray: I will just read the section.
>
> "The Court: This imprisonment, of course, is only in default of the payment of the fine, that's all, and there is no imprisonment at all except for a default in the payment of the fine, that is only to compel the payment of the fine, that is all. It is therefore ordered, adjudged and decreed that you be imprisoned in the county jail of the county of Merced for the term of one month."

It is the contention of appellant that, under the first part of the judgment, imposing a fine of $600, or imprisonment for one day for each $2 of the fine, he may be compelled to serve 300 days, while, in addition, under the second part of the judgment, he must serve one month without the alternative of a fine, a total of 330 days. Section 19 of the local option act (Stats. 1911, p. 604), under the provisions of which the defendant was tried and convicted, provides:

> "Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding six hundred dollars, or by imprisonment in the county jail not exceeding seven months, or by both such fine and imprisonment."

Section 1205 of the Penal Code reads as follows:

> "A judgment that a defendant pay a fine may also direct that he be imprisoned until the fine be satisfied. But the judgment must specify the extent of the imprisonment, which must not exceed one day for every two dollars of the fine, nor extend in any case beyond the term for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted."

It is manifest that the penal clause of the local option statute limits the power of the court to impose punishment by imprisonment to a term of 7 months, and that, therefore, the alternative punishment by imprisonment imposed by the court in this case for default in the payment of the fine of $600 imposed would, in case the fine were not paid, be in excess of the power of the court to inflict. Section 1205 of the Penal Code originally read as follows:

> "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which must not exceed one day for every dollar of the fine."

The Supreme Court, in Ex parte Rosenheim, 83 Cal. 388, 23 Pac. 372, construing said section as it then read, held, quoting the syllabus:

> "When the court sentences a defendant to a term of imprisonment, and also to pay a fine, there can be no further imprisonment for nonpayment of the fine, under section 1205 of the Penal Code, that section not applying to cases in which the judgment is for a fine coupled with a sentence of imprisonment."

The Attorney General has cited us to no case giving section 1205 a different construction from that given it in the above case. He contends, however, that the amendment of the section by the Legislature of 1891 (St. 1891, p. 52) so changed the section as to make the construction given it in the Rosenheim Case inapplicable or without controlling force in determining the true meaning thereof as it now stands. The section as amended, it will be noted, besides changing the rate per day at which a fine shall be satisfied by imprisonment from $1 to $2, adds the following language to the section:

> "* * * Nor [the imprisonment in case of fine] extend in any case beyond the term for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted."

We feel frank enough to say that the Rosenheim Case went to the extreme limit in holding section 1205 inapplicable to cases where "the court has imposed a term of imprisonment and also a fine." It seems to us that the section may justly be interpreted to mean that, where the law of the violation of which a person has been convicted authorizes the imposition of a sentence of imprisonment and also a fine, both a fine and a sentence of imprisonment may be imposed and the alternative of imprisonment ordered to satisfy the fine, provided the fine is such that the imprisonment for the nonpayment thereof, taken alone or together with the sentence of imprisonment, will not have the effect of extending the imprisonment beyond the maximum term of imprisonment prescribed by the statute. But, as stated, the Rosenheim Case, supra, goes further and holds that section 1205 has no application to such a case, and since, as declared, our attention has been called to no subsequent decision of the Supreme Court overruling that case upon the point under consideration, this court is bound by the conclusion therein announced, assuming that there is no such change in section 1205 by reason of its amendment by the Legislature of 1891 as to justify us in holding, as the Attorney General undertakes to point out, that the said amendment has rendered the Rosenheim decision without force in its application to said section. But, accepting, as we are required to do, the construction given section 1205 in the Rosenheim Case, we perceive nothing in the language added to the section which warrants the conclusion that it should be given a different construction from that to which it is subjected in the case named, or (in other words) that makes it any the less inapplicable now than before its amendment to cases where a fine, in addition to a sentence of imprisonment, has been imposed. Indeed, it seems to us that the purpose of the amendment was merely to make it plain that in no case should the alternative of imprisonment for default in the payment of a fine be such as would make the imprisonment extend beyond the maximum term of imprisonment which is prescribed for the offense of which the defendant is convicted. However, under the rule laid down in the Rosenheim Case, we are constrained to hold that that portion of the judgment in this case whereby a fine of $600, with the alternative of imprisonment in the county jail for a period of time not exceeding one day for each $2 of such fine, was imposed, is void. But that portion of the judgment sentencing the defendant to a term of one month in the county jail is undoubtedly valid, and will have to stand.

[1, 2] It is next urged that the evidence was insufficient to justify the verdict, in that there is a failure of proof of the following essential facts: (1) That on or about the 4th day of February, 1917, defendant kept a place of public resort, where the alcoholic liquors specifically designated in the information were kept for the purpose of sale and distribution; (2) that the said town of North Dos Palos was not on said date within the boundaries of any incorporated city or town; (3) that said supervisorial district was not then and there "no-license territory."

The testimony upon which the verdict was predicated may briefly be stated as follows:

J. R. Ryan, a deputy sheriff of Merced county, testified that he met the defendant at his place in South Dos Palos on Sunday, the 4th day of February, 1917; that he and Claud Wills, another deputy sheriff, had gone there with a search warrant "to search for liquor in the place." He testified:

> "I went into a house. * * * This room has a bar in it; it has a big safe in it, and in this safe there is a whole lot of cases; there might be 8 or 9 cases in there; soda water, ginger ale, and stuff on that order."

He described the bar and fixtures, and stated that, on the rack end of the bar, he found a half bottle of whisky. This bottle was produced and identified and admitted in evidence. The witness said that he saw a woman, afterward proven to be the wife of the defendant, in the back of the house who had two pitchers and was pouring something into the sink; that Mr. Wills took the pitchers from her and emptied the contents into two bottles, and these bottles, containing wine, were also received in evidence. The witness testified that:

> About ten minutes after he reached the premises, "the defendant drove into the yard, and Mr. Wills addressed him in my presence. He asked him if he was Mr. Pera, and he said he was; there was a little shed there (afterward proven to be about 60 feet from the house), and Mr. Wills asked him if that was his shed, and he said it was, and it had a lock on it, and Mr. Wills lifted the lock out and opened the door, where we found this stuff in there, and he asked him if that was his, and he said it was, and we proceeded to take it out and check it up to see how much was there. * * * While we were checking this stuff up Mr. Pera walked up within probably 6 or 8 feet of me, and he had his hand laying on a little girl's shoulder, or head, I don't remember which, and he said to her, 'What do you know about these fellows;' he said, 'They are taking the bread away from you.'"

There were identified, as having been taken from the shed, 53 bottles containing various liquors, and a case containing 33 bottles of beer, all of which were admitted in evidence. The witness further said that defendant said that the house and shed and the liquors were his.

Claud Wills corroborated generally the testimony of witness Ryan. He said that when they searched the shed and found liquor there the defendant said that it was his, and that it was "for the family use"; that he also said, "I don't deny selling any whisky;" that he said that he had sold liquor to one Wegner, "but Wegner did not have no bottle of his."

W. M. Morrison testified that, in December, 1916, and January, 1917, he was engaged as foreman of the construction of a school building at South Dos Palos, and that W. L. Wegner was a carpenter at work on said building; that some time between the 7th and 25th of January, 1917, he and Wegner went to a building and into a room which he said he supposed had been a saloon, because it had a bar, and that Wegner purchased and paid for a drink for each of them, and that he (witness) drank beer. He said that he did not know the defendant, and he indicated the house in which he had the beer by drawing a diagram on the blackboard.

W. L. Wegner was sworn as a witness and identified the building referred to by witness Morrison and indicated on the diagram drawn by him, and said that defendant told him that that property belonged to him. He corroborated the testimony of Morrison as to the purchase of drinks in the house, and said that defendant sold them. A bottle of whisky was received in evidence which the witness said he had bought of defendant on the 21st of January, 1917. He described the building, and stated that in front of it was a sign reading: "Hotel and Saloon. G. Pera, Proprietor."

That the town of South Dos Palos was not, on the 4th day of February, 1917, situated within the boundaries of an incorporated city or town was sufficiently shown by the testimony of P. J. Thornton, the county clerk of Merced county, who first produced the record of the board of supervisors showing that, on November 5, 1912, the Fifth supervisorial district outside of incorporated cities and towns voted in favor of no license and declaring that 90 days thereafter such territory should be "no-license territory," and then testified that since the said 5th day of November, 1912, there had been no "wet and dry election" in said district; that South Dos Palos was within the boundaries of the Fifth supervisorial district, and that the town of Los Banos was the only incorporated city in the district. While, it would seem, the prosecution could directly and more clearly have shown that South Dos Palos was not at the time mentioned within the boundaries of an incorporated city or town, still, as above stated, it was sufficiently shown by the statement of the county clerk that the town of Los Banos was then the only incorporated town situated within the boundaries of the Fifth supervisorial district. It was not attempted to be shown, nor was it claimed, that South Dos Palos is situated within the incorporated limits of Los Banos, or is a part of that municipal corporation, and the fact that the two towns bear and are known by and under different names warranted the jury in concluding that South Dos Palos was no part of Los Banos, and that, the latter town having been shown to be the only incorporated town within said supervisorial district, the former town was not incorporated and formed no part of any incorporated town.

The contention that the evidence failed to show that the place kept by defendant in South Dos Palos was a public resort, at which alcoholic liquors were kept for sale and distribution, is not borne out by the record. As already shown, there was testimony tending to prove that in near proximity to the date of the arrest of the defendant, alleged in the information as about the time he sold and distributed intoxicating liquors at his place, the defendant sold various kinds of liquors to the parties giving that testimony; that, on the 4th of February, 1917, the officers who searched his premises found a large supply of various kinds of liquors on his premises and in his possession; that the defendant admitted to the witness Wegner that he owned the place; that on the exterior of the building there was attached thereto a sign, bearing the words, "Hotel and Saloon"; that the defendant admitted to the witness Wills that he sold whisky there.

The foregoing was sufficient to justify the conclusion that the defendant kept a supply of alcoholic liquors at his place for the purpose of selling the same to any one desiring to purchase them. Of course, it will not be disputed that a "public resort," within the contemplation of the statute, means any place, whatever the character of the building, where the public may purchase and obtain alcoholic liquors at any time they may be asked for. It may be true, and doubtless is generally true, that where the traffic in such liquors is forbidden, and, therefore, illicit, the business of dispensing the liquors may be carried on in a clandestine manner, and that, in some instances, in the exercise of caution, lest arrest and prosecution for the unlawful act may follow, the dispenser may refuse to make the illicit sales to some certain individuals; but even so, the place is nevertheless a public resort within the meaning of the law if there be sales of such liquors to any part of the public. It is, in brief, a place of public resort if it be a place to which any part of the public are offered the opportunity to resort for the purpose of purchasing alcoholic liquors.

[3] It is claimed that it was prejudicial error for the court to have admitted in evidence a map purporting to be the official map of Merced county. The objections to it were that the document offered as the map was only an unauthenticated copy thereof, and that, the original having been made in the year 1909, it could not show the Fifth supervisorial district as it existed at the time of the alleged commission of the offense charged. As to the first objection, it is to be answered that by the county clerk the map received in evidence was shown to be a copy of the original map as prepared by the county surveyor and accepted as the official map of the county by the supervisors. As to the second ground of objection, it is to be remarked that if the purpose of introducing the map in evidence was to show the boundaries of the Fifth supervisorial district, and it failed to show such boundaries as they are now established, or if there was a difference between the boundaries as delineated on the map and as they actually existed at the time the crime charged is alleged to have been committed, and such difference was of material importance to the defendant, then the latter's counsel, in their objection to the map on that ground should have specifically pointed out such difference and called the trial court's attention thereto. The mere objection, as counsel stated it, that "the map of itself would not naturally show the supervisorial district in 1917," was not in our opinion sufficient to require the trial court to order the map excluded. There is no presumption that the boundaries of said district now or at the time the crime charged is alleged to have been committed are any different from what they are shown to be by the map. Indeed, if a presumption is allowable at all with reference to the fact, we think it should be that the boundaries of the district continued to be precisely as they were when the map was made and as they are delineated thereon. Code Civ. Proc. § 1963, subd. 32. Moreover, if the map showed that South Dos Palos was not situated within the boundaries of said supervisorial district, the effect of allowing the map in evidence would then more likely be to assist rather than to injure the accused, or at least not to prejudice him.

[4] It is claimed that the court seriously erred in admitting in evidence a document, offered by the people, purporting to be a written application by the defendant to the United States revenue office at San Francisco for a federal liquor license. While the document bore a certificate purporting to be that of the chief deputy revenue collector, setting forth that it was an exact copy of a docu-

ment on file in his office, and that it was "executed by G. Pera," it is very doubtful whether it was competent proof of the intent of the defendant or of the character of the business he was carrying on, since there was no proof that the name, "G. Pera," subscribed to the purported application, was signed or written by the defendant or that it was his signature, and since, furthermore, the purported certificate is not sealed or under a seal, and there is no proof that the person signing his name thereto as "Chief Deputy Collector" attached his name thereto, or that such name is his signature. But, in view of the other evidence in the case, of which a brief résumé is given above, and which is amply sufficient to support the verdict, we cannot say, after considering the entire record, that the result of the error in admitting the document in evidence, if error it was, has resulted in a miscarriage of justice. Const. art. 6, § 4½.

[5, 6] We think the testimony of the county clerk that there was no other incorporated town within the limits of the Fifth supervisorial district was a proper and competent method of proving that fact. He stated, it is true, that he had no knowledge of that fact except such as he had obtained from an examination of "the records." We can conceive of no "records" which will affirmatively disclose that a particular town or city is not incorporated, but no doubt the witness knew from common notoriety that South Dos Palos was not incorporated, and we think upon such knowledge it was proper for him to state the fact. But the courts may take judicial notice of the fact that a town or city is incorporated, if such be the fact, and in this case the court judicially knew that Los Banos was incorporated, and we may assume would have taken such notice of the fact of the incorporation of South Dos Palos, if it were an incorporated town, and have declared such knowledge to the jury, as it would have been its duty to do. No such declaration was made by the court to the jury, nor was there any request by the defendant that the court state to the jury that said town was incorporated. We are authorized to assume that if, in point of fact, the town of south Dos Palos was an incorporated town at the time the offense charged is alleged to have occurred, the defendant would have asked for an instruction to that effect. In the absence of such an instruction, the jury, without any consideration of the testimony of the county clerk upon that question, were warranted in finding that South Dos Palos was not an incorporated town at the time mentioned in the information, or at the time referred to in the evidence.

[7] It is also complained that the court erred in allowing the witness Wegner to testify that, on January 21, 1917—14 days prior to the date of the alleged commission of the offense—the defendant, at his place, in South Dos Palos, sold him whisky, for which he paid the defendant the sum of 35 cents. This testimony was properly admitted, not for the purpose of proving another and distinct offense from that charged, but to show the character of the place and the purpose of the defendant. People v. Cavallini, 29 Cal. App. 526, 531, 156 Pac. 73. The information, as has been shown, charges the defendant with keeping a place of public resort in the designated no-license territory for the purpose of sale and distribution therein of certain specifically enumerated alcoholic liquors, and the sale by defendant to Wegner was so near the time at which the offense charged is alleged to have been committed that most clearly testimony of said sale tended to prove that the defendant did keep such public resort at or about the time named in the information.

[8] At the close of the case for the people, counsel for the defendant moved the court to advise the jury to acquit on the ground that the state had failed to present sufficient proof to justify a verdict of conviction. The particular point upon which counsel relied for the support of their motion was that there was a fatal paucity of proof of the location of the defendant's alleged place of public resort within the boundaries of the Fifth supervisorial district, counsel asseverating that the only proof upon that subject was in the purported map of said district above referred to, and that said map failed to show that the place was within said supervisorial district. Replying to this statement by counsel, the court remarked, "Well, we have other evidence here." Counsel excepted to the remark as improper and as tending to indicate to the jury that the court was of the opinion that "the other evidence" was such as to warrant a finding that the defendant's place was situated in said district. There is no merit in this point.

Necessarily, the court was compelled to determine, in passing upon the motion, whether there was sufficient evidence in the record upon all essential points to justify the submission of the case to the jury. This would have been the necessary effect of a denial of the motion even if the court had merely denied the motion without expressing any opinion in the presence of the jury as to whether there was evidence in proof of the fact stated other than that to which counsel called special attention. But the court had the right to express its views upon the motion and its reasons for holding it to be without a substantial basis, and a party making such a motion must expect this. Unless there is plainly and obviously a total failure of proof upon some essential element of the offense charged, the defendant, when making such a motion, merely takes a chance on the allowance of the motion and himself must assume responsibility for and abide by the consequences of a denial of the motion and the incidents attending the ruling thereon, assuming, of course, that the court, in its ruling, if it denies the motion, does not trench upon the province of the jury by discussing and expressing an opinion upon the weight or evidentiary value of the testimony. In this instance, however, it will be observed that the court made no comment or expressed or intimated no opinion upon the weight or the effect of "the other evidence" to which it referred. It merely stated that there was other evidence addressed to the point and very properly left to the jury the question whether such "other evidence" was of sufficient probative force to satisfy their minds of the existence of the fact to which it related. Besides, had counsel for defendant, previously to making and arguing their motion, requested the court to exclude the jury from the courtroom during the argument on the motion, such request would undoubtedly have been complied with, and there could have been no possibility of the jury hearing anything which might be prejudicial to defendant.

[9] It is complained that the court erred and thus seriously prejudiced the rights of the accused by instructing the jury that it was not necessary to the consummation of a crime of the character of the one with which the defendant is here charged that there should exist and be shown an intent to commit the act, and that, therefore, all that the jury were required to find, to reach a verdict of guilty, was that the defendant kept a place of public resort for the purpose of selling and distributing alcoholic liquors within no-license territory—that the specific intent with which the act was done was immaterial. We think the rule as declared by the instruction is correct, in so far as it relates to a case of this character. The decisions appear to be quite uniform upon the proposition that where, in invoking and applying the police power, the Legislature has prohibited certain acts and denounced them as criminal, the mere commission of such acts, regardless of the intent with which they were committed, is sufficient to constitute the crime so denounced. There are, perhaps, certain exceptions to this rule, as, for instance, where the statute itself uses language in describing or defining the crime indicating that scienter or a specific intent to do the act was essential to constitute it a crime. But particularly in cases interdicting the traffic in intoxicating liquors the rule generally is that the mere commission of the act is sufficient to consummate the offense, and in the present case the law authorizing the establishment of "no-license territories" uses no language indicating an intention in the Legislature to make the intent with which the act of keeping a resort for the purpose of selling intoxicating liquors is committed an ingredient of the offense. In Commonwealth v. Holstein, 132 Pa. 357, 19 Atl. 273, the court, having before it a case in which the defendant had been convicted of the unlawful sale of alcoholic liquor, said:

> "It is not necessary to sustain a conviction for selling intoxicating liquors under the act of 1887 for the commonwealth to prove a criminal intent. It is enough to show the sale, when the defendant may, if he can, shield himself behind a license. If the sale is contrary to law, the intent has nothing to do with it. A contrary ruling would fritter away the act of 1887, and convictions under it would be rare."

[10] The instruction in which it was stated to the jury that the payment of a federal license tax required by any law of Congress to be paid by a person "for carrying on any trade or business" does not exempt such person from any penalty or punishment provided by the laws of the state for carrying on such trade or business within such state, etc., was manifestly intended to bear upon the testimony purporting to show that the defendant applied to the United States internal revenue office for a liquor license, no such license having been introduced in evidence. It is claimed that the instruction was not pertinent to the case and prejudicial to the defendant. While we have expressed a doubt as to the competency of the written application by the defendant for a federal liquor license, because it was not shown to have been genuine, yet, as applied to that testimony, the instruction was pertinent, inasmuch as the jury might have inferred from that proof that the accused did secure and possess such a license. Assuming, however, that that testimony was not for the reason suggested admissible, and that, therefore, the instruction was out of place, still, as we have shown, there is sufficient competent testimony which, if believed by the jury, as obviously it was, justified the verdict, and, moreover, the court in plain and readily understandable language instructed the jury that a conviction could not legally be had, unless the evidence satisfied them beyond a reasonable doubt that the accused sold alcoholic liquor at a place of public resort kept by him in no-license territory; and the instruction complained of here was abstract in form and abstractly correct in the statement of the principle declared therein. In view of all these considerations, we cannot justly say that the mere statement to the jury that the possession by the defendant of a federal liquor license could not legally operate as a shield to any person shown to have committed the act charged here against the penal consequences thereof—a perfectly sound proposition of law—could have had the effect unduly of influencing the jury in arriving at a verdict, or, at any rate, of producing a miscarriage of justice.

The defendant complains of other instructions given and of the action of the court in disallowing a number proposed by him. We have carefully examined all these assignments and find nothing in them calling for special notice. The general charge of the court contained generally a full, fair, and pertinent statement of all the principles of law essential to an enlightened consideration by the jury of the evidence.

We have found no errors militating against the substantial rights of the accused and, accordingly, that portion of the judgment whereby the defendant was sentenced to imprisonment in the county jail of Merced county for the term of one month and the order denying the accused a new trial are affirmed. That portion of the judgment imposing upon the defendant a fine of $600, with the alternative of imprisonment for default in the payment thereof at the rate of one day for every $2 of such fine, is reversed. There is no appeal from an order denying a motion in arrest of judgment, and the pretended appeal from said order is therefore dismissed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Rehearing.

HART, J. [11] The Attorney General, in a petition for a rehearing of this case, has called our attention to two cases (People v. Brown, 113 Cal. 35, 45 Pac. 181, and People v. Kerr, 15 Cal. App. 273, 114 Pac. 584), not cited in the original briefs, which bear upon the question whether the court in this case exceeded its jurisdiction in adjudging that the defendant, upon defaulting in the payment of the fine imposed, should be imprisoned for one day for every $2 of said fine until the same is satisfied. It will be observed that, in the original opinion, we construed the broad language used in the case of Ex parte Rosenheim, 83 Cal. 388, 23 Pac. 372, as declaring or implying that section 1205 of the Penal Code had no application whatever to a case where a term of imprisonment and also a fine were imposed. The cases above mentioned do not appear to give that construction to said section. They seem to hold that the Rosenheim Case merely meant to hold that in a case where both a fine and an imprisonment are authorized to be imposed and a sentence of imprisonment is adjudged, the court, while having authority also to impose a fine, is without legal power or authority, in case the fine be not paid by the defendant, to impose the alternative of imprisonment at the rate of one day for every $2 of such fine until the same is so satisfied. We say that this appears to be the construction the Brown and Kerr Cases, supra, put upon the language and the decision in the Rosenheim Case. We have, upon careful reconsideration of the Rosenheim Case, concluded that its language is reasonably susceptible of that construction, and that, as so construed, it gives the true meaning of section 1205 of the Penal Code. At any rate, it is very clear that the Brown and Kerr Cases, which were decided after the Rosenheim Case, hold that, in cases in which the law authorizes the imposition of both a fine and an imprisonment, the defendant may be subjected to both a fine and an imprisonment, but that in such case the court has no authority to impose the alternative of imprisonment to satisfy the fine if the defendant defaults in the payment thereof. That part of the judgment imposing the fine nevertheless, however, constitutes a lien upon the defendant's realty in like manner as a judgment for money rendered in a civil action, and its payment may be enforced by due proceedings. Pen. Code, § 1206; People v. Brown, 113 Cal. 35, 45 Pac. 181.

It follows that the judgment in this case imposing an imprisonment of 30 days in the county jail and also a fine of $600, except that part thereof providing that in default of the payment of the fine the defendant shall be imprisoned until the same be satisfied, is perfectly valid.

[12] The point herein discussed constitutes the sole and only ground upon which a rehearing is asked by the Attorney General. In view of that fact and of the further fact that we are now firmly convinced that our former judgment in the respect herein considered is erroneous, and, inasmuch as the result sought to be obtained by the application for a rehearing may as well be brought about by a modification of the judgment heretofore rendered by this court herein, we can perceive no good reason for reopening the case for the further consideration of said point, and so defer the final disposition of the case. Of course, it will not be questioned that this court, before its judgments become final or before the causes in which such judgments are rendered are transferred to the Supreme Court upon petition, still has the right or jurisdiction to modify its judgments or, indeed, set them aside, if for good reasons such a course is required.

Accordingly, the petition for a rehearing is denied; but the former judgment rendered herein by this court is hereby modified so as to read as follows:

> "That portion of the judgment appealed from by the defendant providing that the defendant, in default of the payment of the fine imposed shall be 'imprisoned in the Merced county jail for a term not exceeding one day for each $2 of such fine so remaining unpaid,' being void, is reversed. The remaining portion of the judgment appealed from and the order denying the defendant a new trial are affirmed. There is no appeal from an order denying a motion in arrest of judgment, and the pretended appeal from said order is therefore dismissed."

We concur: CHIPMAN, P. J.; BURNETT, J.

36 Cal. App. 265

AMOK GOLD MINING CO. v. CANTON INS. OFFICE, Limited. (Civ. 1999.)

(District Court of Appeal, First District, California. Feb. 14, 1918. Rehearing Denied by Supreme Court April 15, 1918.)

1. Appeal and Error 🔑930(1), 1002—Review of Verdict—Presumption.
Where the evidence is conflicting, the jury's finding is conclusive, and it must be assumed that the jury adopted that construction most favorable to plaintiff, in order to sustain the verdict.

2. Insurance 🔑665(4)—Marine Insurance—Failure to Deliver Goods.
In action on marine insurance policy, evidence *held* insufficient to show that vessel ever reached destination.

3. Insurance 🔑646(6)—Marine Policy—Stranding—Burden of Proof.
In action on marine policy, the plaintiff has the burden of proving that the ship stranded.

4. Insurance 🔑412—Marine Policy—"Stranded."
The word "stranded" means that the vessel must remain stationary for a time, and implies a settling of the vessel and an interruption of the voyage under extraordinary circumstances.
[Ed. Note.—For other definitions, see Words and Phrases, First Series, Stranded.]

5. Evidence 🔑10(5)—Insurance 🔑658—Marine Policy—Stranded—Judicial Notice.
In determining whether vessel stranded, the jury may consider that she had only a foot of water under her at high tide, and that the tide rises and falls 14 feet, the state of the tide being a matter of judicial notice, that the vessel drifted for an entire day, and that the condition of her bottom showed that she had pounded on the beach or rocks.

6. Trial 🔑142—Questions for Jury—Construction of Testimony.
The jury are always the judges of the meaning of language employed by witnesses unless the language admits of no substantial doubt.

7. Insurance 🔑665(4)—Marine Policy—Location of Goods—Evidence.
Evidence *held* to sustain finding that goods covered by marine policy were under deck at the time of the loss so as to warrant recovery.

8. Insurance 🔑646(2)—Marine Policy—Burden of Proof.
In action on marine policy, where insurer contended that the consignee refused to accept the goods the burden of proof on such issue was on the insurer.

9. Insurance 🔑665(3)—Marine Policy—Evidence—Sufficiency.
In action on marine policy, evidence *held* insufficient to show that the consignee refused to accept delivery of the goods insured.

10. Insurance 🔑668(10)—Marine Policy—Sale of Vessel—Questions for Jury.
Whether the master of the vessel was forced by circumstances to sell after a partial wreck, *held* for the jury.

11. Insurance 🔑481—Marine Policy—Right to Sell.
Under a marine policy, the right to sell as well as the right to abandon must be determined by the vessel's master in the light of facts available, and he cannot await developments before deciding what to do.

12. Insurance 🔑481—Marine Policy—Right to Sell.
The mere fact that a vessel on which goods under a marine policy were shipped was repaired after being sold did not establish that the sale was unnecessary.

13. Insurance 🔑413—Marine Policy—Proximate Cause of Loss.
Where a vessel carrying goods insured under marine policy encountered a storm, which carried away some of her sails and rendered her unmanageable, such storm was the proximate cause of the loss, though she afterwards stranded near the destination and was sold, and the consignee of the goods could recover under the policy.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Amok Gold Mining Company against the Canton Insurance Office, Limited. Judgment for plaintiff, and defendant appeals. Affirmed.

Andros & Hengstler and Golden W. Bell, all of San Francisco, for appellant. Ira S. Lillick, of San Francisco, for respondent.

BEASLY, Judge pro tem. This is an action upon a policy of marine insurance, in which plaintiff recovered a verdict of $1,923, interest and costs, and defendant appeals from the judgment entered thereon.

By the policy the defendant insured mining supplies consisting of 1,500 feet of fuse, 5 drums of gasoline, 1 ton of sacked coal, 7 tons of dynamite, and 1M blast caps, "in the power schooner Harold Blekum, at and from Seattle, Wash., to Uyak, Alaska." Subject to the effect of certain conversations between the master of the schooner and the owner, it is conceded that the underwriters were liable upon the policy until the goods could be discharged and safely landed at Uyak, Alaska; and the first question on which counsel disagree is the meaning to be attached to the words "to Uyak."

To persons unacquainted with the remote coasts and harbors of the Alaskan peninsula and the conditions existing there this would seem an easy question; but it is not so under the facts of the case, and in view of the varied adventures which befell the schooner on its unlucky voyage. The facts are such that these words must be defined in view of all the surrounding circumstances and conditions; and some light may be shed upon their meaning by another question, namely, Where was it intended that the goods should be landed from the Harold Blekum?

Uyak Bay is a deep inlet from the Shilikof Strait into Kodiak Island. There was in January, 1915, when the Harold Blekum arrived there, a cannery, a store, and a postoffice situate near the mouth of the bay, and marked "Uyak" on the maps in evidence at the trial. There were other canneries and also mines at various points on Uyak Bay, and among the mines that of plaintiff, situate some 12 or 15 miles up the harbor. One witness testified that there is no such thing as a town at Uyak. In the busy season of the cannery there were 400 or 500 people there, but in winter there was a caretaker and three or four other persons who lived in the neighborhood. The evidence discloses that the plaintiff had been shipping for 10 or 12 years up there; that their cargo was always marked "Uyak," and that the ships, to use the language of one of the witnesses, "came right to our place, Uyak. They stopped at the cannery on the way back," and that the manager of the mining company expected that the captain would bring the cargo up to the mine, "and," said one of the witnesses, "the mine is as much a part of Uyak as the cannery is a part of Uyak." There is no public landing at the cannery, but only a private wharf of the canning company. Upon this the cargo insured by the defendant could not be discharged; and this "point on the map," as it is called by one of the witnesses, is on the opposite side of the bay from the Amok mine, and distant 12 or 15 miles therefrom. The bay is from 1 to 5 miles wide, and is a deep water harbor up to the mine. The Harold Blekum was not permitted to tie up to the cannery wharf, but having done so without permission, temporarily, was promptly ordered away.

Another incident bears on the question of the destination of this freight. The Harold Blekum had on board as merchandise 13,000 feet of lumber, and this lumber the manager of the Amok mine, while the schooner was off the cannery, agreed to purchase, it being clearly intended by both him and the captain of the schooner that this lumber should be delivered at the mine.

[1] Counsel for the defendant accumulates much persuasive evidence in support of his contention that the terminus ad quem of this voyage was the cannery; but while we might so find if it were left to us, we must, nevertheless, under the well-known rule, leave the defendant to the finding of the jury on this point, which, to support the verdict, must be presumed to have been that the terminus ad quem as to the insured cargo involved in this case was the mine and not the cannery.

[2] But conceding that the destination was the cannery, it is still not apparent that the Harold Blekum ever actually reached that port in the sense in which this policy contemplates. She arrived off the cannery wharf in the roughest kind of wintry weather; she tied up to the wharf for a very brief space of time without permission, and was promptly ordered away. She was never in a position in which cargo could be unloaded. Where she lay, as the witnesses testified, it was impossible to discharge the cargo, and this was in part on account of injuries which the schooner had sustained by reason of a storm which she had encountered, and in part by reason of the position in which she lay. She was compelled, as we shall hereafter see, to leave the bay without discharging this cargo, and to proceed to Kodiak, and she never returned to the bay. To have reached the terminus ad quem of the voyage, as it concerned this insured cargo, she must have come into a position in Uyak harbor at least from which this cargo could have been discharged and at which the owners could have received it; in other words, to a place where the master of the ship had a right to demand that the owner of the cargo should receive it at his hands. She never came into such a position.

The history of this voyage throws light on all the questions involved in this case. The Harold Blekum departed from the port of Seattle on the 1st day of December, 1914, bound ultimately for Unga, Alaska, where she had cargo to discharge, and with the insured cargo on board. On December 26th, while at Karluk anchorage, the schooner encountered heavy weather off the entrance to Karluk bay. A black squall with snow struck her, and she pitched bows under, and, being at the time at anchor, started to drag towards the shore. The master and crew, fearing an explosion of the caps which formed a part of this cargo, jettisoned them. The vessel cleared soon after, and the master put her before the wind for Uyak; but two hours later, in a terrific woolly, she lost much of her rigging. She was finally again brought to anchor in 14 fathoms, but the heavy weather snapped her moorings and she went adrift. The mainsail still held, though much damaged, and it was set, and an attempt made to beat up to the cannery wharf, but the snow blinded the crew, and she got too close to the west shore, missed stays, and to save the vessel three iron rails were jettisoned on the end of the fore deck with ropes attached. One parted and the other two held. The vessel was then right amongst the rocks. The crew, fearing that when she started to pound at low tide the dynamite might be exploded, and also with the indication of a dirty night, refused to remain on board and landed on the beach.

The subsequent history of the schooner's adventures can be best discussed after understanding the question for the consideration of this court which arose from them, namely, whether the schooner stranded. It is conceded that if the vessel stranded the warranty was opened.

The question whether she stranded is earnestly presented on both sides, the defendant contending that there is no evidence that the vessel ever stranded, and that as a matter of law it appears from the evidence that she did not strand; and the plaintiff asserting that there was sufficient evidence that the vessel did strand to warrant the jury in finding the fact, and that the whole question is one of fact for the jury.

[3] The burden of proof of the stranding is, as contended by appellant, upon plaintiff.

On the morning following the abandonment of the vessel the master and mate, with one Peter Petrofskey, found the vessel, quoting the log, "on east shore of the bay, with two irons still down and one foot of water under her at high water." There was no evidence as to whether it was then high water or not. They pumped her out, and the master and mate, using the anchor and line of Petrofskey's launch, kedged her into deep water, slipping the lines on the irons.

The contest of counsel is over the meaning of the words "on east shore," found in the log of the schooner. Defendant contends that this expression means that she was found near the east shore, but still afloat. Plaintiff contends that the words, taken with other evidence, were sufficient to justify a jury in finding that she had stranded. The other evidence is found in a survey of the vessel subsequently made at Kodiak, and which showed the false keel of the schooner to be torn off 65 feet abaft the fore rigging, and the main keel considerably bruised and battered, the stern started, and the bolts driven inwards over a distance of about six inches, six butts on the bottom and the stanchions on the port side started, and 30 feet of the rail crushed inward; the deck strained and the rigging badly battered; the windlass strained, the spindle bent, and all the anchors missing. There was no evidence that the ship had been aground at any time between the occasion when she was kedged into deep water from her position on the morning of the 27th of December and the time when she was surveyed at Kodiak, nor any evidence that this damage was done before the crew abandoned her on the afternoon or evening of December 26th.

[4] The meaning of the word "stranded" is well settled. The vessel must remain stationary for a time. Stranding implies a settling of the vessel, some rest or interruption of the voyage under extraordinary circumstances. If the ship merely touch and go she is not stranded, but a settling of the ship on land, be it rocks or bar or shore, so that she be stationary for even a brief period, is a "stranding." 26 Cyc. 654. Neither the master nor any member of the crew was a witness. Probably after the lapse of time between the catastrophe and the trial they were unavailable.

[5] Some of the considerations which the jury may have taken into account in construing this language are obvious. A ship left unattended, and with so slight a fastening as the two jettisoned railroad irons, in a wintry season, with a storm so severe as to cause the crew and the master to abandon her, might reasonably be supposed to have drifted until she came up against something solid enough to hold her; and the only substantial thing here was the east shore of the bay. The jury had a right to consider the state of the tide as a matter of judicial notice; but, in addition to this, the rise and fall of the tides at Uyak bay appear to some extent from the maps in evidence. The fact that she had only a foot of water under her at high tide; that the tide rises and falls 14 feet at that point; that the vessel drifted from early in the afternoon of the 26th to the morning of the 27th at a time when the daylight hours were very short in that latitude, and the condition of her bottom when surveyed, which was such as to show that she had pounded on the beach or rocks for a considerable period—all were circumstances which the jury had a right to consider in construing the words "on east shore of the bay."

[6] Where language such as this, somewhat technical in character, or, if not technical, at least colored by the manner of expression of seafaring men, with which landsmen are more or less unacquainted, is to be construed it is far safer to leave the meaning thereof, with all the circumstances in mind, to the jury, than for courts to lay down a hard and fast rule as to what the language means; and, indeed, this is in line with the authorities on this point of practice. The jury are always the judges of the meaning of language employed by witnesses unless the meaning admits of no substantial doubt. Carpenter v. Fisher, 175 Mass. 9, 55 N. E. 479; Snyder v. Bougher, 214 Pa. 453, 63 Atl. 893; Reel v. Elder, 62 Pa. 308, 1 Am. Rep. 414. In view of this rule, we do not feel that we can disturb this finding.

Another question earnestly debated is whether the goods were stowed under deck.

[7] The insurance was on the goods while "under deck" only. The defendant insists that there was no evidence that these goods were under deck; and here again counsel disagree as to the construction to be placed upon a particular part of the evidence. Mr. Erskine, a business man of Kodiak, who purchased the schooner at her sale, was examined as to the condition of the cargo. In the course of his examination by counsel for plaintiff he was asked if, from his examination of the cargo made at Kodiak, he could state whether or not the damage from salt water had occurred 10 or 15 days before the cargo was discharged at Kodiak, and answered that he could do so. The court, interrupting counsel, then asked him how he could do this, and he answered as follows: "For instance, the sugar and some of the flour was mouldy. It was not very wet at the time we received it; it had been wet and had dried to some extent, and the mould had started." Thereupon counsel for plaintiff, resuming his examination, asked the following question: "Where was that particular cargo in the hold of the vessel with reference to the parts of the deck that were open?" The witness answered, "Well, it was under the damaged part of the deck." The court then again took the examination on itself and asked two or three questions. This, in effect, is the only direct evidence in the record on the question of whether the goods were under or above deck. It is very evident to any one with even a sometime passenger's knowledge of the sea that with weather such as that encountered by the schooner

no cargo such as this stowed on deck would remain fast. At least, it must be said that the jury from these physical facts might have inferred that this cargo was under deck, since it remained on the schooner until it reached Kodiak. In addition to this, no other reasonable construction can be given to the question asked of the witness by counsel above quoted than that both he and the witness referred to the particular part of the cargo involved in this action; that is, to the cargo insured by the defendant for the plaintiff here. The court, it is true, interjected a question of its own in the course of the examination; but counsel's examination was directed to ascertaining where this particular cargo, namely, the cargo which was the subject of this action, was stowed, and the witness answered that it was under the damaged part of the deck.

It seems to us that any other construction than that placed upon the evidence by the jury would have been strained indeed; and it certainly does not lie with this court to say that the jury could not have understood counsel and the witness to refer to the cargo involved in this action, and not to the sugar and flour mentioned by the witness in answering a question incidentally propounded by the court in the course of the examination. We will let this finding stand.

[8] Chronologically at this point the question arises whether the insured refused to receive the cargo while the schooner was at Uyak. Counsel for defendant claim such refusal, which claim is contested by plaintiff's counsel.

We have seen that the jury must have found that the cargo did not reach its destination; but certain conversations and circumstances in which Cornell, the mining company's manager, and Captain Timm, the master of the schooner, figured while the vessel was off the cannery, is the basis for the defendant's claim that the plaintiff refused to accept delivery of the cargo.

Here again we think the conversation open to two constructions, of which it must be assumed that the jury adopted that most favorable to the plaintiff. Let it be noted that here the burden is upon the defendant.

[9] Cornell met Capt. Timm at the cannery on the morning of the 27th of December. He testified positively that no time was given him in which to discharge the cargo if he had tried; that he could not have done so without the consent of the captain; that he could not have taken if off in the condition in which the schooner lay at that time, and also that he had no men at the mine whom he could have sent out to get the cargo if it could have been discharged where the schooner lay. The caps had been jettisoned, as we have seen, and could not be delivered. There are two or three versions of these events in the transcript. The captain told Mr. Cornell that he had jettisoned the caps. The latter then said that the powder was of no use to him and he could not receive it without the caps. The captain then volunteered to get other caps. He went to Kodiak, which was only eight or ten hours journey by launch from the cannery; but instead of returning and taking the cargo up the bay, as he and Cornell evidently expected that he would, the captain brought back a launch from Kodiak and towed the schooner to that port. That there was a misunderstanding between the two men is possible—even probable; but there is no evidence here from which the jury was bound to find that Cornell refused to receive this cargo. Two letters of Cornell to the president of the mining company, and a letter from the latter to the agents of the underwriters, give slightly different versions of this conversation from that contained in Cornell's testimony; but the burden of proof resting upon defendant to show the refusal of the plaintiff to accept delivery was not sustained—at least we cannot say that the jury were wrong in determining that it was not.

[10, 11] After she had been hauled off shore the schooner was taken to Kodiak, and after survey and notice she was sold. And here we meet the next question in the case, and that is whether the master was justified in taking her to Kodiak and making the sale.

There can be no question that the storms had greatly damaged the rigging and hull of the vessel. Her crew had abandoned her. She was, it is fair to say, in a dangerous condition. The extent of her damage was not known or ascertainable at Uyak. She could tie to no wharf there; there was no dock in which she could lie. The master was no doubt justified in concluding that his ship could not safely sail from there under her own power. Her crew refused to serve her further without a survey to ascertain the extent and character of her damage. The law requires that in such cases the master must communicate with the owners; and Capt. Timm accordingly went to Kodiak, the nearest port from which such communication was possible. When there he at once wired the owners reporting the wreck and the condition of the vessel, and received the reply "to use his best judgment and to act for all concerned." He arranged accordingly to have the vessel towed to Kodiak, where there were ship's carpenters, seamen, and others competent to make survey of her damage, and repairs if possible. That this was the only course that the master could in reason pursue seems very clear to us. It is easy to argue what might have been the better or more economical course; but this master faced the perils of the sea in a high latitude, subject to terrific storms on a treacherous coast, in the depth of winter, with a vessel which was practically a wreck. We cannot say now that he did not exercise his best judgment in doing what he did.

The right to sell as well as the right to abandon must be determined by the master in the light of the facts available at the time, and he may not await the development of subsequent facts before deciding what to do (Fuller v. Insurance Co., 31 Me. 325); and, of course, the question of whether a sale was necessary was a fact for the jury (Insurance Co. v. Winter, 38 Pa. 176; Robinson v. Ins. Co., 3 Sumner, 220, Fed. Cas. No. 11,949).

[12] Nor does the fact that this schooner was subsequently repaired by the purchaser show that the sale was not necessary. Fuller v. Ins. Co., supra; Hale v. Insurance Co. (C. C.) 37 Fed. 371; In re Sarah Ann, 2 Sumner, 206, Fed. Cas. No. 12,342. And conceding that counsel's contention is correct, and that the question of necessity is one of law and not of fact (which we are not willing to hold), we think the course pursued by the master in this case was necessary.

[13] One other matter may be briefly mentioned. It appears plainly that Cornell did not consent to the schooner being taken to Kodiak. The owners received nothing from the sale of the ship or cargo. The storm which was encountered near the entrance to Uyak bay was the proximate cause of its loss, as all the subsequent events depended upon and flowed from the injury to the vessel caused by that storm. These considerations entitle the plaintiff to recover.

Some criticisms are offered upon the instructions of the trial judge. We have read them with care in the light of the strictures made upon them in the briefs of the appellant, and we find no reason to quarrel with them. They were clear and definite, and presented the questions of fact upon which the jury must find very plainly to them, and the court seems to have committed no error of law of any moment in these instructions.

From what has been said it is clear that the demurrer to the complaint was properly overruled, and the motion for a nonsuit properly denied.

The judgment is affirmed.

We concur; LENNON, P. J.; KERRIGAN, J.

CALIFORNIA REPORTER

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36 Cal. App. 785

In re WELLS. (Cr. 336.)

(District Court of Appeal, Third District, California. April 16, 1918.)

ATTORNEY AND CLIENT 🔑40—ADMISSION TO PRACTICE—REVOCATION OF ORDER—IMPOSITION ON COURT.

Where an applicant to a District Court of Appeal for admission to the bar failed to apprise the court that he had previously applied on two different occasions to another District Court of Appeal to be admitted to practice, and had withdrawn his applications when confronted with objections by the bar association of the county of his residence founded upon his lack of good moral character, etc., the District Court of Appeal is justified in revoking its order admitting him to practice.

In the matter of the admission of T. Alonzo Wells to practice law. Petition by the bar association of the county of Orange praying for an order revoking an order by the District Court of Appeal admitting Wells to the practice of the law, etc. Order admitting to practice revoked, license canceled, etc.

See, also, 174 Cal. 467, 163 Pac. 657; 171 Pac. 110.

Clyde Bishop, R. Y. Williams, J. C. Burke, L. A. West, and S. M. Reinhaus, all of Santa Ana, for petitioners. H. N. Mitchell, of Sacramento, and T. Alonzo Wells, of Santa Ana, for respondent.

PER CURIAM. In the month of October, 1915, the respondent, Wells, was admitted to practice law by the Supreme Court of the state of Nevada, after having been a resident of said state for the period of approximately six months. Within a few days after being so admitted as a member of the bar and late in the said month of October he was, upon the motion of H. N. Mitchell, Esq., an attorney-at-law and a member of the Sacramento city bar, and on the production of his license from the Supreme Court of Nevada and the assurance of the said Mitchell that the applicant was a person of good moral character, admitted by this court to practice law in all the courts of the state of California. Thereafter a committee of the bar association of the county of Orange, this state, acting for and in behalf of said association, presented a petition to this court, praying for an order revoking the order by this court admitting the respondent to the practice of the law in the courts of this state, and revoking and canceling the license thereupon issued to said respondent evidencing his right so to practice the law in this state, and striking his name from the roll of attorneys and counselors at law in the state of California. The petition is founded on a number of specific charges involving the integrity and moral character of the respondent.

Here it should be stated that in a former opinion on this petition we took the position that the proceeding was, in legal character and effect, the equivalent of a proceeding in disbarment, and that the same was therefore of a quasi criminal nature. We hence held that the rules of criminal pleading applied, and that the charges or the more serious of them were not set forth with that precision with which a charge of crime is required to be set out, and that as to the charges amenable to that objection there was no substantial ground upon which to predicate an order revoking the respondent's license to practice law. Some of the charges were stricken out on motion upon the ground that they revealed no ground justifying the order asked for in the petition. The result of these several rulings was that the petition was denied. See In re Wells, 174 Cal. 467, 163 Pac. 657. Subsequently to the decision by this court, a hearing was granted herein by the Supreme Court, and there it was held that the analogy drawn by this court between a proceeding of the character of the one now before us and a proceeding in disbarment was inept and without any foundation, particularly in so far as the purpose of the analogy was to invoke and apply the rules of criminal pleading to a proceeding of the kind under consideration. In re Wells, 174 Cal. 467, 163 Pac. 657. The court, among other things, said, quoting from the syllabi:

> "An application to revoke an order admitting an attorney to practice law, on the ground that he obtained the order by means of a fraudulent concealment of his real character, is not a proceeding in disbarment. Allegations as to his character are necessary in such application in order to show that, if there shall be a bona fide inquiry regarding it, the court would be authorized to reject him because of the facts alleged. If the court should conclude that the fraudulent means were sufficiently established to justify a revocation of the order, it would then be its duty to inquire again into his moral character, and that inquiry would have the same scope, and be subject to the same rules, as if it had been made upon his original application."

Again, the Supreme Court properly said:

> That it was not "advisable to take up in this court the investigation of these charges. It is proper to say that they are now mere allegations which put the court upon inquiry as to the truth of the matter. The law has devolved that duty upon the District Court of Appeal. The court that should conduct the investigation in this case, both as to the alleged fraud in obtaining the order and as to the good moral character of the applicant, is the District Court of Appeal of the Third District, the court which, it is alleged, was improperly led to make the order sought to be revoked."

The matter was accordingly remanded to this court for further proceedings in accordance with the views of the Supreme Court as expressed in said opinion. Upon a return of the proceeding to this court, testimony bearing upon the charges preferred against the accused was taken at Santa Ana, the county seat of Orange county, before a referee commissioned by this court for that purpose.

As stated in the outset of this opinion, there were several different and distinct charges alleged against the respondent in the petition for the revocation of the order licensing him to practice law. As to some of these charges there was a pronounced conflict in the testimony. A large amount of testimony, pro and con, was presented upon the question of the general reputation of the respondent in the localities in Orange county in which the respondent had resided for many years for morality and truth, honesty, and integrity. The testimony upon this question was decidedly conflicting. But, after a full consideration of this matter as it is before us now, we do not regard it necessary to consider and determine the merits of the charges upon which the bar association opposed the admission of the respondent to practice by the Court of Appeal of the Second District and which charges are, as above stated, incorporated in the petition for the revocation of the order of this court admitting the respondent to practice law. As we now view the situation as it is presented here, the first inquiry presented is whether the respondent imposed upon this court when making his application by omitting to disclose to the court or justices thereof the fact that he had made two previous applications to the Second District Court of Appeal for admission to practice and had withdrawn each application upon the filing by the bar association of Orange county of a written objection to the allowance of his application, based upon charges challenging his moral fitness to become a licensed member of the bar. We will therefore confine ourselves to a consideration of that proposition, as to which the petition alleges:

> "That, in January, 1911, said Wells filed his application in the District Court of Appeal of the Second District of the state of California to be admitted to practice law in all the courts of this state in accordance with rule 1 of the rules of the Supreme Court and District Courts of Appeal of the state of California, as adopted January, 1912."

The rules of the second appellant court regulating the matter of the application of persons to be admitted to practice law by said court are then set out in the petition. These rules provide, among other things, that, to afford the court an opportunity to inquire into and determine the moral fitness of applicants for admission to the bar, applicants shall file their applications and certificates with the clerk of the court at least 10 days before the date fixed for the examination. The petition proceeds:

> "That there was at all times a practice of said court for the clerk thereof to transmit a copy of each application for admission to practice upon examination to the president of the bar association of the county in which the applicant was a resident; that, in accordance with said rule and practice, a copy of said application of said Wells was transmitted to the president of the bar association of the county of Orange, which met and considered the matter, and upon its being shown to the association by several of its members that said Wells was not a man of good moral character and had been guilty of serious irregularities in his practice in the justices' courts, a committee was appointed through which the association filed charges and objections to his admission to practice; that, upon learning of the filing of said charges and objections to his admission, said Wells withdrew his application therefor."

It is alleged that, in July, 1912, said Wells again applied to the court of the second appellate district for admission to practice—

> "and asked the bar association of Orange county to give him a hearing before filing an objection to the granting of said application; that his request for such hearing was granted, and he personally appeared before the said bar association at a meeting at which practically every active member of the association was present; that, it appearing from the hearing that the original objections still continued to his admission, * * * a committee was appointed and instructed to renew the charges and objections; and, although said Wells in his defense had assured the association that he would insist upon a hearing upon his application and a trial of the charge, he failed to do so and again withdrew his application."

Following these allegations is a statement of the several charges upon which the objection to his admission to practice by the second appellate court and to the order of this court admitting him to practice was and is founded. It is then charged, in substance and effect: That Wells, knowing that he would be unable to secure admission to practice law in the courts of California by examination therein (objections to his admission having been duly made known to the two other District Courts of Appeal), in the month of May, 1915, departed from the state of California and went to Carson City, in the state of Nevada, "where he and the facts hereinbefore alleged were unknown to the officers of the Supreme Court of Nevada," and that, by concealing said facts, in October, 1915, he secured admission by said Supreme Court of the state of Nevada to practice law in said state, that:

> "In further pursuit of said purpose, said Wells thereafter, on October 20, 1915, presented his license to practice law from the Supreme Court of the state of Nevada to the District Court of Appeal of the Third Appellate District of the state of California and applied for admission thereon under and in accordance with the provisions of section 279 of the Code of Civil Procedure of this state. That said Wells and all of the facts hereinbefore alleged were unknown to the judges and officers of said court, the former clerk of said court, G. Horatio Chase, who had received and filed the former charges and objections to the admission to practice of said Wells, as hereinbefore stated, having in the meantime died, and that said Wells intentionally made such application to said court, so unacquainted with said facts, for the purpose, by fraudulent concealment of said facts hereinbefore alleged, of indirectly and fraudulently securing admission to practice law as an attorney-at-law in all the courts of this state, and to evade the law of said state and the rules and practices of the Supreme and appellate courts therein, as hereinbefore set forth. That with the same intent, and in carrying out the same purpose, he also induced one H. N. Mitchell, Esq., an attorney-at-law, admitted to practice in all the courts of this state, who had no knowledge of said facts and was totally unacquainted with said Wells prior to the time of making said application, to move said court to grant said application and to vouch for the good moral character of the applicant."

As above suggested, we are not required, under the view we now take of this proceeding, to pass upon or undertake to determine the merits of the several charges upon which objection to the admission of Wells to practice law by the Second District Court of Appeal was predicated. Nor is it necessary for the expression of an opinion by this court relative to the charge that Wells, for the purpose of overcoming the effect of the objection interposed by the Orange county bar association to his admission to practice, went to the state of Nevada and there sought and secured his admission to practice by the Supreme Court of that state. It is enough, to justify this court in revoking its order admitting him to practice in the courts of California under the circumstances alleged in the petition, to know, as we do know, that when he applied here for admission he failed to apprise this court of the fact that he had previously applied on two different occasions to another court of co-ordinate general jurisdiction with this court to be admitted to practice, and had withdrawn said applications when confronted with an objection by the bar association of the county in which he resided to his admission founded upon charges impeaching his personal character for those traits which are justly esteemed as among the first essentials of a practicing lawyer. We do not hold, assuming that there was substantial foundation for the charges, that he should then have admitted them to be true, but it cannot for a moment be questioned that it was his duty to have informed this court, at the time his application was presented to us, that he had withdrawn the previous applications upon the filing of charges involving an attack upon his moral fitness to be admitted into the practice of the law. This court was entitled to be put in possession of this information at the time mentioned, not that the fact of the mere filing of the charges and the subsequent acts of the respondent in withdrawing the applications would in and of themselves be sufficient or have been deemed sufficient to warrant a refusal to admit him but that this court might then, as it would have been its duty to do in such case, have prosecuted an investigation for the purpose of ascertaining and determining whether the objection to his admission interposed in the Court of Appeal of the Second District was or was not well founded. To this extent we hold that the respondent acted in bad faith with and thus imposed upon this court, and while we are not prepared to say that he purposely intended to do so, the necessary legal effect of his omission to furnish the court with the information mentioned at the time he presented his application amounted to a fraud upon the court and the justices thereof.

It is therefore ordered that the order of this court of October 20, 1915, admitting the respondent, T. Alonzo Wells, to practice law in all the courts of the state of California is hereby revoked; that the license thereupon issued to said Wells evidencing his right so to practice law is hereby canceled; and that his name be, and the same is hereby, stricken from the roll of attorneys and counselors at law of the state of California.

178 Cal. 27

In re FRIEDMAN'S ESTATE.

HEBREW HOME FOR AGED DISABLED et al. v. FRIEDMAN et al.

(S. F. 7796.)

(Supreme Court of California. March 25, 1918.)

1. Evidence 🔑313—Declarations—Pedigree.

Declarations of deceased members of the family or alleged family of a decedent testified to by depositions on written interrogatories through an interpreter, while properly admissible, are extremely unsatisfactory, for the witnesses testify without any fear of incurring the penalties of perjury.

2. Witnesses 🔑317(3) — Material False Testimony—Rejection of Whole Testimony—Statute.

Under Code Civ. Proc. § 2061, subd. 3, providing that a witness false in one part of his testimony is to be distrusted in others, the court, if a witness willfully swears falsely to a material fact, is justified in rejecting his whole testimony.

3. Appeal and Error 🔑717—Opinion of Trial Court—Review.

The Supreme Court, on appeal, cannot consider a complaint of parts of the opinion of the trial court.

4. Appeal and Error 🔑877(2)—Parties Entitled to Allege Error—Interest.

Where claimants against an estate seeking distribution to them as heirs or next of kin were properly found not to be next kin to the deceased, testate, they had no interest in the other questions involved in the decree, and could not urge error in the decree in favor of other claimants or as to the evidence in support thereof.

5. Descent and Distribution 🔑71(4)—Heirs—Presumption.

There is a very strong presumption that a decedent left heirs, which is merely a recognition of that expressed in Code Civ. Proc. § 1963, subd. 28, that things have happened according to the ordinary course of nature.

6. Trial 🔑75—Evidence—Right to Assign Error.

Appellants, claiming that a decedent was a member of their family, could not object to his declarations on the ground that they were inadmissible because he was not a member of their family.

7. Evidence 🔑291—Declaration—Relationship.

Under Code Civ. Proc. § 1870, subd. 4, providing that the act or declaration, verbal or written, of a deceased person in respect to the relationship or death of any person related by blood or marriage to such deceased person, may be given in evidence, declarations of a decedent that he had no surviving relative were in fact declarations that each and every member of his family to whom he was "related by blood or marriage" was dead, and were admissible; the fact that they might be erroneous not affecting their admissibility, but going only to their weight.

8. Appeal and Error 🔑1046(1)—Harmless Error—Proceeding to Determine Rights of Heirs—Participation of Executors.

In such proceeding under Code Civ. Proc. § 1664, to determine rights of persons claiming to be heirs or entitled to distribution, in which the executors are parties, their active participation in the trial by offering evidence and objecting to evidence was not so far erroneous or prejudicial as to authorize a reversal of the judgment, as that question would depend upon the evidence offered by them or objected to by them.

9. Appeal and Error 🔑973—Descent and Distribution 🔑71(7)—Statutory Proceeding—Nonsuit.

In such proceeding where the plaintiff, a charitable organization, had introduced the will and its probate, but failed to show that testator left no heirs, there was no such failure to establish its right to the entire residue so as to require a nonsuit, as parties claiming as heirs or next of kin were, in effect, plaintiffs, so far as their own claims were concerned, and were not injured because some other claimant failed, especially where the charity was a beneficiary under the will to the property over and above that claimed for the heirs, and as the real effect of the denial of the motion to nonsuit was to regulate the order of procedure within the discretion of the trial court under Code Civ. Proc. § 607.

10. Depositions 🔑83(4)—Motion to Suppress Evidence—Opposing Depositions.

Where a witness testified by deposition in 1903 and a motion was made to suppress the deposition on the ground that it had not been fairly taken, the depositions of those present at the taking of the earlier deposition, including the interpreter, the commissioner, and the nephew of the witness and the deponent herself, taken in 1905, were admissible as going to the weight of the earlier deposition, as the circumstances under which testimony is given, such as assistance in giving names and dates, etc., always affect its weight.

11. Descent and Distribution 🔑71(1)—Statutory Proceeding—Jurisdiction of Court.

In a proceeding under Code Civ. Proc. § 1664, to determine the rights of all persons claiming to be heirs or entitled to distribution and requiring such petition to be filed within one year after the issuing of letters testamentary, the question as to whether such letters were properly issued is not a jurisdictional question.

12. Appeal and Error 🔑185(1)—Statutory Proceeding—Jurisdiction—Failure to Object.

In such proceeding where a devisee, acting as plaintiff, alleged that the order admitting the will to probate was duly made and that letters testamentary were issued and the alleged heirs or next of kin did not in their pleadings deny such allegations, and appeared and submitted to the jurisdiction and attempted to establish their claims, they waived right to object to the trial court's jurisdiction.

13. New Trial 🔑17—Irregularities—"Bias" or "Prejudice" of Judge.

While the course of conduct alleged in affidavits used on motion for change of judge on the ground of bias or prejudice under Code Civ. Proc. § 170, subd. 4, can be used as evidence of irregularities in motion for new trial under section 657, subd. 1, the question of bias or prejudice cannot be raised upon the motion for new trial. "Bias" or "prejudice" of a judge is not an irregularity, but a condition of mind to be taken advantage of in the manner prescribed by section 170, subd. 4.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bias; Prejudice.]

14. Appeal and Error 🔑874(5)—Denial of Change of Judges—Review.

On an appeal from an order on motion for a new trial, the Supreme Court can review the propriety of an order denying a motion for a change of judges, which may also be reviewed on direct appeal.

15. New Trial 🔑140(2)—Irregularities—Denial of Bias or Prejudice.

On a motion for a new trial under Code Civ. Proc. § 657, subd. 1, on the ground of irregularities preventing a fair trial, it is immaterial whether they result from bias or prejudice of the judge, and hence it is unnecessary for the judge to file a counter affidavit denying bias and prejudice on a hearing of such motion for a new trial.

16. Descent and Distribution 🔑71(7)—Statutory Proceeding—Findings.

In a proceeding under Code Civ. Proc. § 1664, to determine the rights of persons claiming to be heirs or next of kin of a deceased, testate, a finding that claimants were not related to deceased in any degree was a finding of the ultimate fact in issue which rendered unnecessary detailed findings upon the degree of relationship alleged.

In Bank. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Statutory proceeding by the Hebrew Home

for Aged and Disabled and others to determine the rights of all persons claiming to be heirs or entitled to distribution in the estate of Julius Friedman, deceased, testate, against Liebe Friedman and others, and Edward J. Lynch, administrator, etc., and others. From a decree in favor of the Hebrew Home for Aged and Disabled and others and against all the other claimants, Edward J. Lynch, administrator, etc., and others appeal. Affirmed.

See, also, 171 Cal. 431, 153 Pac. 918; 173 Cal. 411, 160 Pac. 237; 168 Pac. 21.

Houghton & Houghton, of San Francisco (Sullivan & Sullivan and Theo. J. Roche, of San Francisco, of counsel), for appellants. Charles W. Slack, Marshall B. Woodworth, Edmund Tauszky, D. Freidenrich, Edgar D. Peixotto, Marcus Rosenthal, A. A. Sanderson, Cullinan & Hickey, and Chickering & Gregory, all of San Francisco (Lucius L. Solomons, of San Francisco, of counsel), for respondents.

WILBUR, J. This is an appeal from a decree in a proceeding under section 1664 of the Code of Civil Procedure, determining the rights of all persons claiming to be heirs, or entitled to distribution. For convenience, appellants now before this court are designated as the "Kagan claimants."

The deceased left the bulk of his property by will to respondent, the Hebrew Home for Aged Disabled, a charitable corporation (hereinafter called the Hebrew Home). Such disposition was invalid as to the bulk thereof, if the testator left "legal heirs" (there being no noncharitable residuary legatee or devisee), and all the property of the testator devised or bequeathed to charitable purposes in excess of one-third of the entire estate would, in that event, descend to "the next of kin, or heirs, according to law." Section 1313, Civ. Code. The appellants claimed to be such legal heirs, and that the property, therefore, goes to them by the law of succession. Numerous other claimants were before the court in this proceeding and introduced evidence in support of their respective claims; but the court found that none of the parties was a legal heir of the deceased or his next of kin, and that the deceased died leaving no legal heirs nor next of kin, and therefore that the will was valid as to its charitable bequests and devises. The main question upon this appeal is whether or not the evidence before the trial court was sufficient to justify the findings that the deceased died without legal heirs and that the appellants are not next of kin or legal heirs of the deceased. Appellants claim that they are cousins of the decedent. This claim is based upon the allegation that their aunt, Rasche Kagan, was the mother of Julius Friedman, the deceased. By this chain of evidence they claim to be relatives in the fourth degree. The next claim of appellants is that Julius Friedman and the Kagan claimants are all the descendants of David Friedman, who, it is alleged, was the grandfather of Solomon Elias Friedman, the father of the deceased, and of Marcus Kagan, the father of one group of Kagan claimants, and of a David Kagan, the father of the other group of Kagan claimants. This claim is entirely independent of the question of who was the mother of the deceased. It is alleged that the Kagan claimants are all the grandchildren of Jossel Kagan, but that they are related in different degrees of kinship to deceased. For it is claimed that Jossel first married Malke Friedman, a daughter of the decedent's great-grandfather, David Friedman, by whom he had a son Marcus, the father of one group of the Kagan claimants, who are thus related to the decedent in the sixth degree; and that after Malke's death he married Hinde Friedman, a niece of his deceased wife, a granddaughter of said David Friedman, and by her had a son, David Kagan (thus a half-brother of Marcus Kagan), whose children constitute the other group of the Kagan claimants, and are thus related to the decedent in the seventh degree. In other words, it is claimed that Jossel Kagan first married a great-aunt of the deceased on his father's side, and upon her death in 1800 married a second cousin of the deceased on his father's side.

[1] The evidence relied upon to establish these claims is both oral and documentary, the oral consisting, in part, of declarations of deceased members of the family, or alleged family of the decedent, testified to by deposition on written interrogatories through an interpreter. Such pedigree declarations so elicited, while properly admissible in evidence, are extremely unsatisfactory, for the witness testifies without any fear of incurring the penalties of perjury. 2 Moore on Facts, 1150, 1156, 1166; Estate of Emerson, 167 Pac. 149; People v. Ah Yute, 56 Cal. 119; People v. Jan John, 137 Cal. 220, 69 Pac. 1063. The Kagan claimants produced evidence tending to show that Rasche Kagan, a daughter of their grandfather Jossel Kagan, married Solomon Elias Friedman of Mitau, Russia, whom the deceased declared in his will to be his father. There is no record evidence showing who was the wife of Solomon Elias Friedman other than the census records of the town of Mitau, Russia, in which it is stated that the wife of Solomon Elias Friedman was Rossel (maiden name not given). For the purposes of this discussion we will assume that the Solomon Elias Friedman of Mitau, the husband of "Rossel," was the father of the decedent, and that "Rossel" was his mother. The first difficulty in appellants' claim of relationship through decedent's mother is that the name of the wife of Solomon Elias Friedman is given as "Rossel," not "Rasche." Chaie Rasche Rosen

and her niece Helena Goldberg both testify that "Rossel" and "Rasche" were the same person and that she was a daughter of Jossel Kagan and a sister of Marcus Kagan, and half-sister of David Kagan, the father of one branch of the Kagan claimants. If this testimony was given full weight and was uncontradicted, it was sufficient to establish the relationship of all the Kagan claimants in the fourth degree (first cousins). The testimony of Chaie Rasche Rosen, as to her personal knowledge and as to the pedigree declarations, was also mainly relied upon to establish the above-mentioned claims of relationship in the sixth and seventh degrees. Was there contradictory evidence, or evidence going to the weight of this testimony that justified the trial court in finding the fact to be contrary to this evidence?

[2] If it can fairly be said that these witnesses willfully swore falsely as to any material fact, the court was justified in rejecting their whole testimony. Section 2061, subd. 3, Code Civ. Proc. Respondents point out one item of material evidence as to which appellants admit that both Chaie Rasche Rosen and Helena Goldberg testified to a fact that was not true. If this testimony was willfully false and material, or if the trial court was justified in arriving at the conclusion that it was willfully false, then the testimony of these witnesses might have been entirely disregarded, and we are not required to consider whether or not the court had the power arbitrarily to reject the testimony of a witness. In order to present the significance and effect of this testimony it will be necessary to elaborate the relationship involved in this controversy. The untrue statement was that Hirsch Friedman, a brother of the decedent, died in Alt Sagar, a town in Russia near Schavli, not far distant from Mitau, in the year 1830; whereas, it is admitted and proved beyond question by appellants that Henry Friedman, the brother of the decedent, died 51 years later (1881) in New York City, as a result of a street car accident. It is claimed by appellants that "Hirsch" and "Henry" are one and the same person. It was a material essential part of the proof of heirship by all the Kagan claimants to show that all the brothers and sisters of the decedent were dead, without issue surviving them. The witness Chaie Rasche Rosen testified that Henry's mother, Rasche Friedman, as she claimed, who died before 1871, told her that Henry (or Hirsch) had died of the cholera in 1830, as above stated. Appellants argue that this was an honest mistake of the witness, due to misinformation. Respondents argue that it was willfully false. The question as to which of these contentions is correct was exclusively for the trial court, and justified that court in wholly rejecting the testimony of Chaie Rasche Rosen and Helena Goldberg, if that court decided the testimony to be willfully false. There were certain parties to this proceeding, among others, known as the Grunwaldt claimants, the Bernstein claimants, and the Liebe Friedman claimants. As we said in dismissing their appeals from the decree:

> "Each of these groups claims by an asserted kinship to the decedent, wholly distinct from, independent of, and antagonistic to the claims of each and all of the other groups." Estate of Friedman, 173 Cal. 411, 160 Pac. 237.

The evidence introduced by the Grunwaldt, the Liebe Friedman, and the Jacobson claimants tended to prove that the mother of Julius Friedman was not Rasche Kagan, the aunt of the Kagan claimants, and therefore to contradict the claims of the Kagans to relationship to decedent in the fourth degree. There are many declarations of the decedent in evidence inconsistent with both their claims of heirship. After the death of his brother Nathaniel (1895), he frequently said that he had no relatives left. In the will (from which statement the word "not" is evidently omitted by inadvertence) he declared, "I am (not) aware of any kin," etc. Although he did not state who his mother was, he made declarations to many witnesses concerning his relationship to the Grunwaldt claimants, through his mother, entirely inconsistent with the claim that she was Rasche Kagan. Even if it were proper for us to do so, it would be impossible, within the reasonable limits of an opinion, to discuss the weight and credibility of the evidence before the trial court. The trial occupied nearly 2 years (246 days of actual trial). The case was under submission to the trial court for over a year. The reporter's transcript of the evidence taken on the trial contained 6,000 pages, with 3,000 pages more of documentary evidence; the printed transcript on appeal, on bill of exceptions, 1,895 pages, containing 754,000 words (as indicated by folio numbers), and the briefs of nearly 1,600 pages about 640,000 words, present for our consideration 1,394,000 words, not to mention oral argument and diagrams, and we are admonished that an opinion should contain about 2,333 words. It is sufficient for us to say that, after a careful consideration of the evidence and arguments in relation thereto, we hold that the finding that the Kagan claimants are not of kin to the deceased is supported by substantial evidence.

[3, 4] The appellants complain of portions of the opinion of the trial court, but we cannot consider this matter. Goldner v. Spencer, 163 Cal. 317, 320, 125 Pac. 347. Holding as we do that the Kagan claimants were properly found not to be of kin to the deceased, many of the questions raised by appellants become immaterial, for if they are not entitled to inherit they are not interested in the other questions involved in the decree and cannot be heard to urge error in the

decree in favor of other claimants or the evidence in support thereof. Blythe v. Ayres, 102 Cal. 254, 257, 258, 36 Pac. 522; Estate of Walker, 148 Cal. 162, 166, 82 Pac. 770; Estate of Fleming, 162 Cal. 530, 123 Pac. 284.

[5] This consideration disposes of all claims of error based on the very strong presumption that decedent did leave heirs. People v. Roach, 76 Cal. 294, 297, 18 Pac. 407; State v. Miller, 149 Cal. 209, 211, 85 Pac. 609. There was no presumption of law that appellants were such heirs. The presumption is merely a recognition of the "ordinary course of nature." Section 1963, subd. 28, Code Civ. Proc. For the same reason it is unnecessary to consider the effect of this presumption upon the interpretation of section 1313, Civil Code, supra. This consideration also disposes of the point that the complaint of the Hebrew Home was improperly brought in its individual capacity and not as trustee, and also of the claims that the decree in favor of the Home was not in accordance with the will, as appellants, if not heirs, are not entitled to complain of such error, of any was committed.

[6, 7] Appellants rely upon some of the declarations of the deceased concerning his family, such as the declaration that he was a son of Solomon Elias Friedman of Mitau, Russia, contained in his will, and his numerous declarations concerning his relationship to his brothers, David, Henry, and Nathaniel; that he had a sister named Esther, who had four children, Morris, Helena, David, and Rosetta Gottleib; but appellants object to the admissibility of statements made by the deceased after the death of his brother Nathaniel (the other relatives just mentioned having theretofore died) that he had no relatives. The basis of such objection is that, until it is shown that the deceased was a member of the family of the Kagan claimants, his declarations in that regard are inadmissible, and that, where the declaration itself is offered for the purpose of showing that there was no such relationship it is inadmissible. It would seem absurd for the appellants, claiming that the decedent is a member of their family, to object to his declarations on the ground that they are inadmissible because he was not a member of the family, were it not for the fact that such contention finds support in Estate of James, 124 Cal. 653, 57 Pac. 578, 1008, wherein it was held that the declaration of the deceased that he was a widower was inadmissible against a woman who claimed that she was his widow. Section 1870, subd. 4, of the Code of Civil Procedure of this state, provides that "the act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person" may be given in evidence. The other declarations of the decedent that he had no surviving relative, that all his relatives were gone, that he had no one left, were in effect declarations that each and every member of his family, to whom he was "related by blood or marriage, was dead" and were admissible for that reason. See Estate of Hartman, 157 Cal. 206, 107 Pac. 105, 36 L. R. A. (N. S.) 530, 21 Ann. Cas. 1302, on general subject. The fact that the effect of this testimony would be to rebut evidence tending to show that the Kagan claimants were "relatives by blood or marriage" does not affect its admissibility. They were declarations concerning the members of his family. The fact that they were erroneous, if it be a fact, would not affect their admissibility, but only their weight. As to the declarations being ante litem motam, it will be observed that the declarations covered a period from 1895 on. We think the declaration in the will was not of that class. But even if it were, no objection was offered to its admission in evidence. See 1 Wharton on Evidence, §§ 193, 213; Chamberlayne's Best on Evidence (3d Am. Ed.) p. 458a.

[8] The appellants complain that the executors actively participated in the trial, offered evidence, and objected to testimony offered by others. They were parties to the proceeding (section 1664, Code Civ. Proc.), and, while we have held (Estate of Friedman, 168 Pac. 21) that they had no duties to perform as executors for or against any of the claimants in the proceeding, it does not follow that their participation was so far erroneous or prejudicial as to authorize the reversal of the judgment. That question would depend upon the evidence produced by them and objected to by them. From an examination of the case we are satisfied that the Kagan claimants were in no wise prejudiced by such conduct of the executors. The appellants have no just cause of complaint that witnesses were introduced by the executors if their testimony was relevant and competent, and if they in effect acted, as it is claimed, as attorneys for the Hebrew Home, appellants are no more affected prejudicially than they would have been had the Hebrew Home employed them.

[9] It is urged that the Hebrew Home, acting as plaintiffs, having introduced the will and its probate, only should have been nonsuited for a failure to prove that decedent left no heirs, and hence a failure to establish their right to the entire residue. There are several answers to that proposition. As has been said, unless appellants establish their claim of heirship, they are not aggrieved by the ruling of the court on the claims of others. Appellants were, in effect, plaintiffs, so far as their own claims were concerned. They were not injured because some other claimant failed. It may also be said that the Hebrew Home was a beneficiary under the will to property over and

above the two-thirds claimed by the heirs, and that therefore, if for no other reason, the motion for nonsuit should have been denied. The only real effect of the denial of the motion was to regulate the order of procedure, which was within the discretion of the court. Section 607, Code Civ. Proc.

[10] The witness Chaie Rasche Rosen having testified by deposition in 1903, a motion was made to suppress the deposition upon the ground that it had not been fairly taken, and the depositions of those present at the taking of the deposition of 1903, including the interpreter, the commissioner, a nephew of the witness, Dr. Goldberg, and the witness herself, were taken in 1905 and were read in evidence at the trial on the motion to suppress, which motion was denied. Counsel discuss at considerable length the question of whether or not these depositions can properly be considered by this court and were properly before the trial court upon the question of heirship, or whether their proper consideration was confined to the admissibility of the deposition. We do not think the court was bound to ignore these depositions in weighing the value of the deposition of 1903. The proof may not have been sufficient to have excluded the deposition, but nevertheless might seriously affect the weight of that deposition.

The court was entitled to take these depositions into consideration for that purpose. The circumstances under which testimony is given always affect its weight. If a witness testifying before the court is being assisted in giving names and dates, there being a great number of each, such fact would be considered in the determination of the value to be given to the evidence, and if this condition is disclosed in any proper manner, where the witness has been examined outside the presence of the court, we see no reason why it is not equally to be considered. We are satisfied therefore that these depositions were properly before the trial court in determining the appellants' claims. From the record we do not know, however, whether or not the trial court considered them in reaching a conclusion and we do not find it necessary to do so. A comparison of these two depositions, however, is very persuasive of what seems almost self-evident without it, that the witness had some assistance, either in or out of court, in giving names and dates, as the interpreter testifies.

[11, 12] Section 1664 of the Code of Civil Procedure provides that:

> "In all estates now being administered or that may hereafter be administered, any person claiming to be heir to the deceased, or entitled to distribution in whole or in part of said estate, may, at any time after the expiration of one year from the issuing of letters testamentary or of administration upon such estate, file a petition," etc.

It is claimed that the trial court was without jurisdiction to hear and determine the claims of the parties to this proceeding for the reason that the notice of the hearing of the proof of the will was defectively published, in that it was not published on Sundays during the period of publication; the publication being in a daily paper. An order admitting the will to probate was made and letters testamentary were in fact issued, and we do not think the question as to whether or not such letters were properly issued is a jurisdictional question in this proceeding, but appellants are in no condition to raise this question for two reasons: First, the Hebrew Home, acting as plaintiff, alleged that the order admitting the will to probate was duly given and made and that letters testamentary were issued, and the appellants did not in their pleadings deny that allegation; second, they appeared and submitted to the jurisdiction of the court and attempted to establish in the lower court, as they do here, their claims of heirship. Under such circumstances they waived all objections to the jurisdiction of the trial court.

[13-15] Appellants gave notice of intention to move for a new trial, alleging as one of the grounds of such motion irregularity in the proceedings of the court by which the appellants were prevented from having a fair trial (section 657, subd. 1, Code Civ. Proc.), and on July 3, 1913, served affidavits in support of such claim, for use upon the motion. Appellants subsequently, before the hearing of the motion for a new trial, made a motion under the provisions of section 170, subd. 4, Code of Civil Procedure, on the ground of alleged bias and prejudice, to prevent the judge from hearing the motion for a new trial. Upon this motion, the affidavits served July 3, 1913, and supplementary affidavits, were offered by appellants, counter affidavits were filed, including one by the judge denying any bias or prejudice, and the motion was denied. An appeal was taken from the order and the order was affirmed by this court. Estate of Friedman, 171 Cal. 431, 153 Pac. 918. Reference to the opinion upon that appeal is made for a discussion of the showing made by said affidavits. We there said:

> "* * * The foundations of the charge itself are so unsubstantial that it would have been a failure of duty on the part of the judge to have made any other order. * * *"

Mr. Justice Shaw, in his concurring opinion, said: "The charge of bias and prejudice scarcely deserves serious consideration, even if there were no denial." While that appeal was pending, the motion for new trial came on for hearing, and upon such motion the same affidavits presented by appellants upon the previous motion were offered in support of the charge of irregularity in the proceedings of the court; but the counter affidavit of the judge himself was not again offered in evidence. Appellants claim that, in reviewing the order denying the motion for new trial, the record is thus different from that involved upon the previous appeal from the order denying the motion under section 170, subd. 4, Code of Civil Procedure, and that the failure of the judge to file another affidavit denying bias and prejudice, or of the attorneys to offer the one already on file, requires a reversal of the order denying a new trial. While it is true that the course of conduct alleged in the affidavits used on the first motion could also be used as evidence of irregularities, the question of bias or prejudice cannot be raised in this way. Bias or prejudice is not an irregularity. It is a condition of mind. The statute provides the method by which that condition may be taken advantage of. Section 170, subd. 4, Code Civ. Proc. It is true that on an appeal from an order on motion for new trial this court can review the propriety of an order denying the motion for a change of judges (Keating v. Keating, 169 Cal. 754, 147 Pac. 974), or it can be reviewed on direct appeal (Estate of Friedman, 171 Cal. 431, 153 Pac. 918, supra). On a motion for a new trial, upon the ground of irregularities in the proceedings of the court, we are dealing with those irregularities, and it is immaterial whether they result from bias and prejudice or not. Hence it was unnecessary for the judge to file a counter affidavit denying bias and prejudice upon the hearing of the motion for new trial. Upon the question as to whether or not the affidavits of appellants show any irregularities in the conduct of the court, we hold that they do not, and find it unnecessary to add anything to the discussion on that subject in the opinion above referred to. Estate of Friedman, 171 Cal. 431, 153 Pac. 918.

[16] Appellants complain of the failure to find upon the second claim of heirship, by which it is sought to establish their relationship to the deceased in the sixth and seventh degrees, by reason of their being descendants from the great-grandfather of the deceased. The ultimate fact in issue between the parties in this case is as to whether or not they were related to the deceased, and, if so, their degree of kinship. The finding that they are not related to the deceased in any degree is a finding of this ultimate fact and renders unnecessary findings in detail upon the claim of relationship set up by the appellants.

We find no merit in the other claims of irregularities.

There are no other matters in the record meriting discussion.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; SHAW, J.; RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

(178 Cal. 65)

CALIFORNIA GAS & ELECTRIC CORP. et al. v. UNION TRUST CO. OF SAN FRANCISCO. (S. F. 7518.)

(Supreme Court of California. April 1, 1918.)

1. Corporations 🔑486—Mortgage—Sinking Fund.

The unifying and refunding mortgage of a gas and electric company subject to earlier "underlying" mortgages provided that the mortgagor should maintain a sinking fund to be specially applied to the purchase, redemption, and payment of the underlying bonds, and for such purpose should pay to the trustee a certain sum annually, reserving "the right to deduct from any such annual payment to be made by it on account of the sinking fund herein provided all sums paid by it during the year next preceding the date when such sinking fund payment is payable on account of the sinking funds required to be created and maintained under the respective mortgages securing the payment of the underlying bonds." One of the underlying mortgages required the mortgagor therein to call in each year or to provide the trustee with funds to purchase 20 of the bonds secured thereby, payment to be made either by calling the bonds wanted and paying for them a 3 per cent. premium plus accrued interest or by advertising for and buying the proper quota of bonds at a sum not to exceed 103 per cent. *Held*, that the amounts paid by the mortgagor for the purchase and cancellation of the bonds under the provisions of the underlying mortgage could not be applied in reduction of the sum to be paid into the sinking fund of the refunding mortgage, since the provisions therein referred to sinking funds so called, and in terms required to be maintained.

2. Corporations 🔑486—Mortgage—Sinking Fund.

Interest paid by the mortgagor under such refunding mortgage to the trustee pursuant to a provision in the underlying mortgages allowing him to apply money in the sinking fund thereunder to the redemption of bonds secured thereby, "but that bonds so acquired should be deemed to be outstanding and continue to bear interest," which interest was to become part of the sinking fund, could not be applied as credits on the payment into the sinking fund in the refunding mortgage; the obligation to pay interest on underlying bonds being specially provided for therein.

3. Corporations 🔑486—Mortgages—Sinking Fund.

Interest paid by the mortgagor on the bonds of corporations, the obligations of which it had assumed subsequent to the execution of such refunding mortgage, could not be credited in reduction of the payments on account of the sinking fund in the refunding mortgage, notwithstanding the trustee in the underlying mortgages had invested part of the sinking fund in such bonds; such payments being made in pursuance of the mortgagor's independent obligation.

4. Corporations 🔑486—Mortgages—Sinking Fund.

Profits realized by the trustee under such refunding mortgage arising from the redemption by the mortgagor at more than par and accrued interest of bonds held under the sinking funds of the underlying mortgages could not be credited as payments on account of the sinking fund under the refunding mortgage, such bonds not being underlying bonds, and the redemption thereof not being made under the provisions of the refunding mortgage.

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Suit by the California Gas & Electric Corporation and another against the Union Trust Company of San Francisco. From an adverse decree, plaintiffs appeal. Affirmed.

Wm. B. Bosley, of San Francisco, for appellants. Heller, Powers & Ehrman, of San Francisco (James L. Robison, of San Francisco, of counsel), for respondent.

MELVIN, J. Plaintiffs sued under the provisions of section 1050, Code of Civil Procedure, to obtain a decree determining certain adverse claims made by defendant as trustee so created by the provisions of a certain "unifying and refunding mortgage." Dissatisfied with the amount of the defendant's recovery under the terms of the judgment, plaintiffs appeal, asking for a modification of the said judgment. The appeal is upon the judgment roll alone, and all of the questions involved in the controversy pertain to and involve an interpretation of the "sinking fund" provisions of the "unifying and refunding mortgage."

In 1908 California Gas & Electric Corporation executed to defendant as trustee its "unifying and refunding mortgage" supporting a bond issue of $45,000,000. This mortgage was subordinate to and subject to the lien of a prior mortgage executed by the California Gas & Electric Corporation and 17 other earlier mortgages given respectively by predecessors in estate of the California Gas & Electric Corporation to secure the payment of bonds, the face value of which outstanding and unmatured then amounted to more than $30,000,000. In the briefs these prior mortgages and bonds are respectively designated by the adjective "underlying," and we shall employ that term in this opinion.

In section 1 of article 9 of the unifying and refunding mortgage the California Gas & Electric Corporation agrees, among other things:

> That it "will create and maintain a sinking fund, to be specially applied to the purchase, redemption, and payment of the underlying bonds and of the bonds issued under this Indenture on or before their maturity, and for that purpose will pay to the trustee on the 1st day of November, 1912, and on the same day in each and every year thereafter to and including 1916, the sum of $450,000."

There is, however, the following proviso in article 9, most important in view of the fact that all of the questions involved in this litigation arise from disagreements as to its proper interpretation:

> "The California Corporation shall have the right to deduct from any such annual payment to be made by it on account of the sinking fund herein provided all sums paid by it during the year next preceding the date when such sinking fund payment is payable, on account of the sinking funds required to be created and maintained under the respective mortgages securing the payment of the underlying bonds, upon filing with the trustee satisfactory receipts or other evidence showing the making of such payments."

The unifying and refunding mortgage also contained a separate and distinct covenant that the California Gas & Electric Corporation would pay all underlying bonds and the interest thereon.

At the time of the execution of the unifying and refunding mortgage there were eight of the underlying mortgages containing explicit and undoubted requirements for the creation and maintenance of sinking funds. Of these eight, two have been satisfied and released. Two of the remaining six mortgages containing unequivocal provisions for sinking funds were so treated with reference thereto that no controversy arises over them. In each of the four remaining underlying mortgages were provisions by which the mortgagor covenanted that it would make an annual payment of a specified amount into a sinking fund; that money in this fund might be applied by the trustee to the redemption of bonds secured by the mortgage; that bonds so acquired should be deemed to be outstanding and continue to bear interest; that such interest should become part of the sinking fund; that the trustee might, upon certain conditions, invest the sinking funds in securities other than those covered by the mortgage; and that the income derived from such investments in outside securities should become a part of the sinking fund.

The first mortgage of the Sacramento Electric Gas & Railway Company (one of the underlying mortgages) contained a provision that required the mortgagor during a period of years, including that covered by the controversy herein, to call in each year or to provide the trustee with funds to purchase 20 of the bonds of the par value of $1,000 each. These were to be immediately canceled. One of the controversies here involved is the assertion of appellants and the denial of respondent that this provision really amounted to a requirement for the creation and maintenance of a sinking fund. None of the other underlying mortgages contains any provision for a sinking fund. The trustee named in all of the underlying mortgages with which we are concerned here was the Mercantile Trust Company of San Francisco.

On or about January 28, 1908, California Gas & Electric Corporation conveyed to its coplaintiff herein, Pacific Gas & Electric Company, all of its property, and the latter assumed all of the former's obligations. Hereafter in this opinion we shall refer to the latter corporation as "Pacific Company," and will omit the qualification, understood in each instance, that it was acting as successor of its grantor.

This litigation is confined to transactions during the two years from November 1, 1911, to October 31, 1913. During each of these years the Pacific Company paid $450,000 to defendant under the terms of its trust, and this action was for credits against said payments on account of alleged payments into sinking funds of trustees administering underlying mortgages. During the first of these years the Pacific Company paid large sums as interest on underlying bonds to the Mercantile Trust Company, including $79,515 interest upon bonds held in the sinking funds created pursuant to four of the mortgages which we have described above. And in the following year the amount of interest paid by the Pacific Company on bonds held in these sinking funds was $87,075. It is asserted by the Pacific Company and denied by respondent that these were payments "on account of sinking funds." Respondent insists that they were mere payments of interest under that part of the unifying and refunding mortgage requiring the Pacific Company's predecessor to pay interest on all bonds included within the purview of the underlying mortgages. During each of said years the Pacific Company paid $20,000 to the trustee, Mercantile Trust Company, for the redemption and cancellation of bonds of the Sacramento Electric Gas & Railway Company. It is asserted by appellants and denied by respondent that these were likewise payments "on account of a sinking fund."

Another point of dispute arose as follows: After the execution of the unifying and refunding mortgage the Pacific Company acquired and assumed all the obligations of four other companies—San Francisco Gas & Electric Company, Pacific Gas Improvement Company, Mutual Electric Company, and Suburban Light & Power Company. These four corporations had executed mortgages, and the trustee of some other underlying mortgages had invested part of their sinking funds in some of the bonds secured by the four mortgages. In paying the interest on the bonds of its acquired corporations the Pacific Company expended $8,842.50 the first year and $12,277.50 the second year in interest on bonds thus held in sinking funds provided for in underlying mortgages. These sums were claimed as a credit "on account of the sinking funds" required to be created and maintained in accordance with the underlying mortgages, but the respondent successfully maintained in the court below the proposition that the Pacific Company paid this interest solely in compliance with its later independent contract; that the transaction could have no possible connection with the unifying and refunding mortgage; and that no part was payment on account of the sinking funds of any of the underlying mortgages merely because some of the bonds of these newly acquired corporations had been taken into those sinking funds by way of investment.

During the year 1913 the Mercantile Trust Company held in the sinking funds of two of the underlying mortgages certain bonds of the San Francisco Gas & Electric Company, one of the four newly acquired corporations, said bonds having been purchased at a price below par. The Pacific Company, which had become liable for the full amount of these bonds and interest, redeemed them at a premium, paying the accrued interest also. In this way the trustee made a profit of $3,295.50 for the sinking funds, and appellants assert that they have a right to a credit of this sum "on account of" payments for the sinking funds of the underlying mortgages. In this contention they were also unsuccessful in the court below.

[1] Counsel for the Pacific Company, with admirable conciseness, has reduced the matters at issue to four questions or propositions, and we will follow his arrangement in discussing the law which we deem applicable to the problems involved in this appeal. The first of these questions is substantially as follows: Does article 11 of the first mortgage of the Sacramento Electric Gas & Railway Company, quoted in full in the findings, when given its true legal meaning, require the mortgagor to create and maintain a sinking fund? It is asserted that, if this question be answered in the affirmative, such reply will compel a deduction from the amount found due to the respondent of the $40,000 paid during the two years for purchase and cancellation of bonds of the Sacramento Company.

Without quoting at length from said article 11, it is sufficient to say that under it the electric company was required under a schedule covering many years to cause certain varying numbers of bonds to be paid off and canceled yearly by one of two methods—either by calling the bonds wanted and paying for them 103 per cent. (that is to say, a 3 per cent. premium), plus accrued interest, or by advertising for and buying the proper quota of bonds at a sum not to exceed 103 per cent. This, says counsel for appellants, amounts to a requirement that the mortgagor create and maintain a sinking fund. It is contended that the term "sinking fund" applies to any fund "created for extinguishing or paying a funded debt," citing Chicago & Iowa Railroad Co. v. Pyne (C. C.) 30 Fed. 86; Ketchum v. City of Buffalo & Austin, 14 N. Y. 356; Bouvier's Law Dictionary. While this definition is rather more circumscribed than the ordinary conception of the scope of the expression "sinking fund," even if we adopt it, we cannot see how the provision for gradual retirement of fixed numbers of bonds paid for, not from a separate fund, but by stated yearly purchases made from the general assets of the corporation, amounts to the creation and maintenance of a sinking fund. The very idea of a "fund" involves a concept of a sum of money maintained in existence for some purpose—a supply hoarded and kept to be called on when needed. For example, we might cite the definition of a "fund" contained in the Century Dictionary and quoted by respondent as follows:

> "A stock or accumulation of money or other forms of wealth devoted to or available for some purpose, as for the carrying on of some business or enterprise, or for the support and maintenance of an institution, a family or a person, as a sinking fund, the funds of a bank or corporation, the widows' and orphans' fund," etc.

But we need not enter into a lengthy discussion of the shades of meaning attributed by various lexicographers to the words "sinking fund," because it is clear that the qualifying language of section 1 of article 9 of the unifying and refunding mortgage, describing the sinking funds "to be created and maintained under the respective mortgages securing the payment of the underlying bonds," had reference to sinking funds so called in the said mortgages and in terms required to be maintained. If the purchase of so many bonds a year during given years, required under the terms of the mortgage of the electric company, may be called a "sinking fund," it is not one required to be maintained, because as soon as money to buy the bonds is appropriated it may be spent at once. There is no provision for holding the bonds for the accumulation of interest nor for reselling and reinvesting the proceeds by the trustee. Cancellation is the one fate for the bonds acquired, and cancellation is not "maintaining" a fund. The learned judge of the superior court correctly decided that appellants were not entitled to credit against their trustee for the $40,000 expended in the purchase of bonds of the Sacramento Electric Gas & Railway Company.

[2] The next point in controversy is in substantial effect as follows: Are appellants entitled, against their payments to defendant of $450,000 annually, to credit for interest paid Mercantile Trust Company on underlying bonds held in sinking funds created and maintained in obedience to the provisions of underlying mortgages? It is undisputed that during the two years involved herein payments aggregating $166,590 were thus made. It is the belief of plaintiffs that these payments should not be considered as interest at all, but by way of performance of the obligations created by the sinking funds required to be maintained.

In this connection it is to be remembered that the California Gas & Electric Corporation had covenanted to pay punctually "or cause to be paid the interest on all such underlying bonds not acquired and deposited hereunder as and when such interest shall become due and payable, until all underlying bonds shall have been fully paid and discharged or shall have been acquired and deposited hereunder." This language is as direct, emphatic and understandable as it could well be made. Under its terms, at least, the only excuses for omitting to pay interest on underlying bonds would be either full payment and discharge or acquisition and deposit with the trustee. This covenant, which is now binding upon the other plaintiff, makes no provision for escaping payments of interest upon bonds held in sinking funds created because of the terms of underlying mortgages, and it seems highly probable that, if the parties to this contract had intended other credits for interest payments, they would have expressed such intention in the unifying and refunding mortgage itself.

The immediate predecessor of the unifying and refunding mortgage was the California Gas & Electric Corporation's general and collateral trust mortgage. The Mercantile Trust Company was trustee under this mortgage, and occupied a similar function with reference to the mortgages underlying it. This general and collateral trust mortgage contained a provision requiring the California Gas & Electric Corporation to pay annually into the sinking fund, during the years here involved, $200,000. This fund was to be applied by the trustee (not by the mortgagor) to the redemption of the bonds of certain named corporations. The trustee was "authorized to apply said sinking fund to the redemption of said bonds and to make the necessary payments out of said sinking fund." There was the further provision in the general and collateral trust mortgage that:

> "All moneys in said sinking fund not so used shall be invested by said Mercantile Trust Company in the purchase of bonds [of the specified companies] and the bonds of the party of the first part [California Gas & Electric Corporation] issued under this deed of trust."

Then followed the sentence:

> "All interest or other income derived under this investment shall in like manner be invested as part of said sinking fund in accordance with the above conditions."

The provision regarding the status of the bonds, immediately following the last quotation, is as follows:

> "All bonds so purchased and acquired by said Mercantile Trust Company of San Francisco as provided in this article, together with the coupons thereto attached, shall continue to be negotiable, and said bonds shall be deemed outstanding hereunder, and shall not be canceled, and shall continue to bear interest, and the Mercantile Trust Company of San Francisco shall collect and receive the proceeds of the coupons paid thereon and add the same to the sinking fund, and said bonds shall be held as existing obligations for the security of the outstanding bonds thereby secured."

In accordance with the mandate of the above-quoted provisions the trustee, the Mercantile Trust Company, as the court duly found, had purchased and placed in its sinking fund a part of the bonds issued under the same mortgage and a part of the bond issues of some of the companies mentioned in the general and collateral trust mortgage.

The court found with reference to the year 1911-12 (and the same is true except as to amount for the following year) that the Pacific Company paid to the Mercantile Trust Company "all the interest coupons appertaining to said underlying bonds which became due during that year, including the coupons appertaining to all the underlying bonds held in said sinking funds as well as all the coupons appertaining to all others of said outstanding underlying bonds." As respondent's counsel in their brief emphasize the fact to be, the Pacific Company did not pay the trustee specifically the interest on the underlying bonds held in the sinking fund, but paid the said trustee all the coupon interest on the whole outstanding issue. That such payments were not, as to any part of them, "on account of sinking funds" required to be created under the general and collateral trust mortgage, is, we think, very clear. In virtually all of the mortgages herein involved in which trust funds were required to be kept up there were the two sources of income to the trustee, namely, direct payments of money into the trust funds and the interest on the purchased bonds. That these two sources were not to be mingled by any sort of bookkeeping which would credit the mortgagor as having paid for one purpose when in reality it had expended the money for the other is emphasized by the circumstance that the trustee was given great latitude not only in the investment, but in the sale of securities and reinvestment of the proceeds. It was expressly provided that the purchased bonds should "continue to be negotiable," should be "deemed outstanding," should "not be canceled," and that they should "continue to bear interest." The trustee was required to collect the proceeds "of the coupons paid thereon" and "add the same to the sinking fund." And such bonds were to be "held as existing obligations for the security of the outstanding bonds." The intent to require payment of interest on bonds held in the sinking fund, as interest, and not as part of the other money payments directly into the fund, seems to us very clear from the whole structure of the sinking fund requirement.

And, if that be true of the California corporation's own bonds, it is even more evident in the case of the bonds of the other corporations held in the sinking fund for the general and collateral trust mortgage. Take, for example, the bonds of the Valley Counties Power Company. The Mercantile Trust Company was the trustee under the mortgage of the said Valley Counties Power Company. It had been administrating the office of such trustee when the general and collateral trust mortgage was executed; therefore the California corporation could not, if it had wished to do so, confer upon the Mercantile Trust Company as trustee of the general and collateral trust mortgage power to cancel any of the bonds of the Valley Counties Power Company. As trustee of the California corporation, it was authorized to purchase, and it did acquire for the sinking fund, bonds of the Valley Counties Power Company, but these remained in its custody as outstanding obligations bearing interest until redeemed or paid, without regard to any covenant in the unifying and refunding mortgage. If the Valley Counties Power Company itself had paid the interest on these, its own obligations, it could not have been said that the corporation was paying such interest on account of the sinking fund of the California corporation. We can see no escape from the proposition advanced by respondent that the payment of this interest by the Pacific Company bore no relation to and had no connection with the fact that the bonds on which the interest was paid were held in the sinking fund of the California corporation. The interest was paid under an obligation to pay interest on all the underlying bonds, no matter where they might be found.

It is contended that bonds held in the various sinking funds are "redeemed" in contemplation of law, and that therefore, when it is provided that they shall be deemed to be outstanding, and that the trustee shall collect the interest coupons for the sinking fund, the mortgagor's obligation to pay the sums specified in the interest coupons exists solely by reason of the maker's covenant contained in the sinking fund provisions of the mortgage, and not by reason of the mortgagor's covenant to pay interest on the debt evidenced by its bonds. But by the very terms of the mortgage the bonds are not to be regarded as redeemed. They are mere investment bonds, and bear, so far as the payment of interest is concerned, the same relation to the corporation for which the sinking fund is maintained as the bonds of an entirely alien corporation bought for the sinking fund would bear to the persons or corporations bound to pay interest on them. Bonds of any of those companies are no more redeemed, so far as the necessity for the payment of interest is concerned, by the fact that the trustee purchased them for the sinking fund than would United States government bonds be considered as redeemed when bought for like purpose.

In support of his contentions counsel for appellants cites Bank for Savings in the City of New York v. William R. Grace, Mayor, 102 N. Y. 313, 7 N. E. 162, Brooke v. City of Philadelphia, 162 Pa. 123, 29 Atl. 387, 24 L. R. A. 781, and Wilds v. St. Louis, Alton & Terre Haute R. R. Co., 102 N. Y. 410, 7 N. E. 290. In the first of these cases it was held that "city stock" of the city of New York held by the commissioners of the sinking fund is not an indebtedness of the city within the meaning of the Constitution, prohibiting such a city whose present indebtedness exceeds 10 per cent. of the assessed valuation of its real estate subject to taxation from becoming indebted to any further amount. It was decided, in short, that the city stock so held was not a debt which the municipality could be called upon to pay. But it was held that such stock was subject to payment of interest which the commissioners were to add to the sinking fund. In the Brooke Case a question precisely similar was decided. In the other New York case the court was considering a sinking fund into which the railroad company was to pay $12,500 twice a year out of its net earnings. With such money and the interest accumulations thereon the trustees were to buy first mortgage bonds so long as they could be purchased for not exceeding 10 per cent. beyond par, the bonds so purchased to remain in force and interest thereon to be paid by the company. In case of inability to buy bonds below the prescribed rate the money was to "remain at interest until bonds can be purchased at public or private sale, at such rate; and no further payments shall be payable to the said sinking fund till the money so remaining in the said fund can be used in purchasing said bonds at such rate or under, when such payments of $12,500 semiannually shall be resumed." The bonds went above 110 per cent., and the semiannual payments were thereupon discontinued, but, the company intending to continue to pay interest upon bonds held by the trustees in the sinking fund, a holder of preferred stock objected to that course and brought the suit. The court held that the action might not be maintained, and that the duty of payment of interest on bonds in the sinking fund must continue until the maturity of the mortgage. We cannot see that the citations support the position of appellants.

[3] The next argument advanced by appellants is that sums aggregating $8,842.50 in one year and $12,277.50 in the other, which were paid by Pacific Gas & Electric Company to Mercantile Trust Company as interest on bonds of San Francisco Gas & Electric Company, Mutual Electric Light Company, Pacific Gas Improvement Company, and Suburban Light & Power Company held in the sinking funds provided for in certain underlying mortgages, were in fact and in legal effect made "on account of the sinking funds required to be created and maintained under the respective mortgages securing the payment of the underlying bonds."

It appears from the findings that Mercantile Trust Company, as trustee under the mortgages of the Valley Counties Power Company and California Central Gas & Electric Company, held in the sinking funds certain bonds of San Francisco Gas & Electric Company, Mutual Electric Light Company, Pacific Gas Improvement Company, and Suburban Light & Power Company which were not underlying bonds, but which Pacific Gas & Electric Company, as successor of the makers thereof, had assumed and agreed to pay. The last-named corporation did pay interest on such bonds which was added by the Mercantile Trust Company to the sinking funds provided for in the mortgages of the Valley Counties Power Company and the California Central Gas & Electric Company. It is contended that the payment of this interest was, in legal effect, a payment made by Pacific Gas & Electric Company on account of the sinking funds maintained under the mortgages of Valley Counties Power Company and California Central Gas & Electric Company, which were included in the mortgages securing the payment of underlying bonds. With this contention we cannot agree. It is to be remembered that the Pacific Company had covenanted directly with the makers of the four mortgages to assume the payment of the bonds and interest thereon. By the four mortgages we mean those of the San Francisco Gas & Electric Company, Mutual Electric Light Company, Pacific Gas Improvement Company, and Suburban Light & Power Company. The other plaintiff, California Gas & Electric Corporation, had not covenanted to pay the bonds of any of the four companies. If the several makers of these bonds had paid the interest, as it became due, to the Mercantile Trust Company, they would have paid it without any care whether or not the bonds were held in the sinking funds of the Valley Counties Power Company or the California Central Gas & Electric Company. Their payments would have been to the purchaser of the bonds. Therefore the payments made by the Pacific Company were made in the liquidation of obligations assumed on its own account, and not as a successor of its coplaintiff, the California corporation. These payments were made in pursuance of an obligation assumed long subsequent to the execution of the unifying and refunding mortgage. We can see nothing in the opinion in Union Pacific Railroad Co. v. United States, 99 U. S. 700, 25 L. Ed. 496, cited by appellants, which contradicts in any way our conclusion upon this branch of the case.

[4] By their final contention appellants insist that profits realized by Mercantile Trust Company from the redemption by Pacific Company, one of the plaintiffs herein, of certain bonds of San Francisco Gas & Electric Company then held under the sinking funds of the mortgages of Valley Counties Power Company and Central Gas & Electric Company, and which had been purchased for those sinking funds at less than par and accrued interest, were, in legal effect, payments "on account of sinking funds required to be created and maintained under the respective mortgages securing the payment of the underlying bonds."

The argument is that the legal effect of the transactions whereby these bonds were redeemed for more than par was as if the profits in the first instance had been made by the Pacific Company and paid to the Mercantile Trust Company on account of the sinking funds. But the bonds purchased at a premium were not underlying bonds. The obligation of plaintiff Pacific Company regarding their payment arose subsequently to the execution of the unifying and refunding mortgage and bore no relation thereto. In redeeming these bonds the Pacific Company did not act as a successor of its coplaintiff. We can see no logical reason for deducting the amount of this profit from the payments required to be made to the defendant herein, as trustee, for the maintenance of the sinking fund which defendant was required to maintain by the unifying and refunding mortgage.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; VICTOR E. SHAW, Judge pro tem.; RICHARDS, Judge pro tem.

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PEOPLE v. BEGGS. (Cr. 2128.)

(Supreme Court of California. April 2, 1918. Rehearing Denied May 2, 1918.)

1. THREATS 🔑1(1)—ACCUSING THIEF—GOOD FAITH—"EXTORTION."

Threatening a thief with accusation, and prosecution based thereon, unless he pays the value of property stolen, and which he pays by reason of fear induced by the threats, is, without reference to good faith in exacting the amount justly due, "extortion," within Pen. Code, § 518, defining the offense as obtaining of property from another with his consent, induced by a wrongful use of force or fear, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Extortion.]

2. CRIMINAL LAW 🔑507(1)—"ACCOMPLICE"—VICTIM OF EXTORTION.

The victim of extortion is not an "accomplice."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

3. THREATS 🔑7—EVIDENCE—ADMISSIBILITY TO PROVE FEAR.

In a prosecution of an attorney for extortion, by threatening to accuse and prosecute a thief, inducing fear, by reason of which he paid money, testimony as to the value of certain articles, theft of which he admitted, was material, as tending to prove fear, without which extortion would not be established.

4. CRIMINAL LAW 🔑1170½(5)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Defendant was not prejudiced by error in excluding a question, asked the prosecuting witness on cross-examination, as to whether, threatened or not, he would have been willing, to get out of trouble, to pay $2,000, the amount claimed to have been extorted; it being substantially and fully covered by subsequent like questions negatively answered.

5. CRIMINAL LAW 🔑696(1)—STRIKING OUT EVIDENCE.

Where evidence of conversations was admitted on the statement that a conspiracy would be shown, and no proof of a conspiracy was made, the court should have granted a motion to strike it out.

6. EXTORTION 🔑7—FEAR AS OPERATING CAUSE.

To constitute extortion, the wrongful use of fear must be the operating cause producing consent.

7. CRIMINAL LAW 🔑417(2) — EVIDENCE — CONVERSATIONS.

In a prosecution of an attorney for extortion, conversations between the prosecuting witness and his father and between the latter and another, so far as they related to the propriety of the witness consulting an attorney, were incompetent, and should not have been admitted.

8. CRIMINAL LAW 🔑1169(1) — APPEAL — HARMLESS ERROR—EVIDENCE.

The admission thereof, however, could not have been prejudicial.

9. CRIMINAL LAW 🔑363 — EVIDENCE — RES GESTÆ.

In a prosecution of an attorney for extortion, a conversation between the prosecuting witness and a police officer, in defendant's absence, and before paying money claimed to have been extorted through fear of a threatened prosecution for theft, was admitted, showing that the witness complained about taking his hard-earned money that way, and inquired if he thought it was right, and the officer replied that it was all right, that they knew what they were doing, and that when the witness said he had no witnesses, and asked what they could do, and if they could send him to prison, the officer replied they would "fix everything over there," but without saying where. *Held* competent, as part of the res gestæ, to show fear.

10. CRIMINAL LAW 🔑722(2)—TRIAL—ARGUMENT OF COUNSEL.

In a prosecution for extortion by an attorney, to whom the prosecuting witness claimed he paid money through fear of threatened prosecution for theft, the district attorney, after discussing the comparative personalities of defendant and the witness, picturing the latter as a weak, crippled boy, frightened and crying after a night in jail, and defendant as an astute lawyer of experience, said defendant must be experienced in this class of shakedown, and knew to a nicety just how far he could go, and, on objection being interposed, remarked that there was a proper, sound, logical, inference from defendant's conduct to say that he was experienced, as before stated. *Held*, that he did not assert as a fact that defendant had committed like offenses, but that it was a fair inference from his conduct that he was experienced in collecting money by similar methods, designated as a "shakedown," and the language used was legitimate argument.

11. CRIMINAL LAW 🔑1144(16) — APPEAL — PRESUMPTION ON REVIEW.

It must be presumed on appeal that the jury followed an instruction to disregard statements of counsel, not made as witnesses under oath.

12. CRIMINAL LAW 🔑713 — TRIAL — ARGUMENT OF COUNSEL.

Remarks of a district attorney as to how the law protected defendant, and how unprotected the district attorney was against improper instructions and unfair argument for accused, was improper, as calculated to induce the jury to place a light estimate on their duties, and as not a proper subject for consideration in reaching a verdict.

13. CRIMINAL LAW 🔑730(1)—APPEAL—ARGUMENT OF COUNSEL—ACTION OF COURT.

It cannot be said that defendant was prejudiced by the improper remarks, in view of an instruction to disregard statements by counsel, not made as witnesses under oath, or not supported by evidence.

14. CRIMINAL LAW 🔑1037(2)—APPEAL—ARGUMENT OF COUNSEL—OBJECTIONS BELOW.

The possibility of injury from improper statement in argument, not properly assigned as misconduct, nor any request made for an instruction to disregard it, cannot be considered on appeal.

In Bank. Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge, and Franklin A. Griffin, Acting Judge.

William M. Beggs was convicted of extortion, and he appeals. Affirmed.

James P. Sex, of San Jose, R. P. Henshall, of San Francisco, R. C. McComish, of San Jose, and A. H. Jarman, of San Francisco, for appellant. U. S. Webb and John H. Riordan, both of San Francisco, and Arthur M. Free and Archer Bowden, both of San Jose, for the People.

VICTOR E. SHAW, Judge pro tem. Defendant, who is an attorney at law, appeals from the judgment pronounced upon the verdict of a jury finding him guilty of the crime of extortion, as defined in section 518 of the Penal Code. The verdict was based upon facts which the evidence tended to establish, as follows:

Joseph Steining was the proprietor of a store from which goods had from time to time been stolen. Acting upon information which pointed to Joseph N. Da Rosa, an employé of the store, as the one guilty of the thefts, Steining caused him to be arrested by a detective and taken to the police station, where, in the absence of a complaint filed, he was "booked" as charged with the crime of petit larceny. At the time of his arrest Da Rosa admitted that he was guilty of purloining certain articles, including two suits of clothes, the value of all of which did not exceed $50, which sum he then offered to pay Steining. On the following morning Mr. and Mrs. Steining, accompanied by defendant, who meanwhile had been employed by them as an attorney in the matter, went to the police station, where, in response to a request made by defendant, he was permitted to see Da Rosa, who was brought into a private office, and, in the interview had, defendant learned that Da Rosa had about $2,500 on deposit in two banks. Accompanied by a police officer, Da Rosa was taken by defendant to the house of his sister, where he said he kept the bank books, and after a prolonged search one of them was found, and either taken by or turned over to defendant, who, with the officer, accompanied by Da Rosa, went to the office of defendant, where, leaving the officer in an outer room, he took Da Rosa alone into his private office, where he impressed upon him the gravity of his offense, stating that he could be sent to San Quentin, and that unless he immediately paid defendant $2,000, for the purpose of settling with Steining, he would be sent to prison for 7 or 10 years. As a result of what defendant said, and by reason of the fear induced by such threats, Da Rosa went with defendant to the banks where his money was deposited, and, as directed by Beggs, signed receipts upon which $2,000 was drawn and delivered to defendant in payment of what he claimed to be due Steining on account of the thefts committed by Da Rosa, $900 of which sum defendant paid to Steining. It is unnecessary for our purpose to quote further from the testimony. Suffice it to say that it appears therefrom that Da Rosa stole certain articles from Steining, who, after having him lodged in jail upon a charge of petit larceny, and without at any time filing a complaint against him, employed defendant as his attorney, who, by means of threats that he would send him to state prison for 7 to 10 years, induced him to pay $2,000, the purpose of which payment, as claimed by defendant, was to compensate Steining for loss due to thefts committed by Da Rosa.

[1] Several alleged errors in the trial are asserted as grounds for reversal, chief of which in importance is the claim that the court erred in refusing, at defendant's request, to give certain instructions to the jury, among which were the following:

> "The effort on the part of a creditor to collect a debt by threat to accuse the debtor of the crime out of which the debt arose does not constitute extortion, nor does it cover the case of an owner who demands from an employé compensation for property which he has stolen or embezzled. The threat of one to prosecute for the theft of his property unless settlement is made does not constitute extortion. In order to constitute extortion, there must exist in the person making the threats an intent to gain unlawfully."

Other instructions of like import were requested and refused. While refusing the instruction so requested, the court instructed the jury that:

> "The law does not permit the collection of money by the use of fear induced by means of threats to accuse the debtor of crime. It makes no difference whether Da Rosa stole any goods from Steining, nor how much he stole"

—and that:

> "It is your duty to convict the defendant, even though you should also find that he believed that Da Rosa was guilty of the theft of Steining's goods in an amount either less than, equal to, or greater than any sum of money obtained from Da Rosa."

Other like instructions were given, the effect of which was to withdraw from the consideration of the jury all questions as to the good faith with which defendant acted in thus enforcing payment of the money alleged to be due to Steining.

Section 518 of the Penal Code provides that:

> "Extortion is the obtaining of property from another with his consent, induced by a wrongful use of force or fear, or under color of official right."

The consent of the injured party in surrendering his property must, in the language of the statute, be "induced by the wrongful use of fear." This implies there may be a rightful use of fear. What meaning is to be ascribed to the word "wrongful"? Is it wrongful for A., from whom B. has stolen goods, to threaten the latter with prosecution unless he pay the value thereof, and thus, by means of the fear induced by such threat, obtain from B. that which is justly due to A.? In our opinion, the answer is found in provisions of the Code other than section 518, which, read in connection with section 518, clearly show that the use of fear induced by such threats, as a means of collecting a debt, is wrongful. Thus section 519 of the Penal Code provides:

> "Fear, such as will constitute extortion, may be induced by a threat either: 1. To do an unlawful injury to the person * * * of the individual threatened. * * * 2. To accuse him * * * of any crime."

And section 523, Penal Code, provides that one who, with intent to extort money from another by means of a letter containing—

> "any threat such as is specified in section 519, is punishable in the same manner as if such money * * * was actually obtained by means of such threat."

Section 650, Penal Code, makes it a misdemeanor for one by letter to threaten another with the accusation of a crime. These provisions, all adopted at the same time and relating to the same subject-matter, clearly indicate that the Legislature, in denouncing the wrongful use of fear as a means of obtaining property from another, had in mind threats to do the acts specified in section 519, the making of which for the purpose stated is declared to be a wrongful use of fear induced thereby. The first subdivision of section 519 provides that fear, such as will constitute extortion, may be induced by a threat to do an unlawful injury, thus excluding fear induced by threat to do a lawful injury. People v. Schmitz, 7 Cal. App. 330, 94 Pac. 407, 419, 15 L. R. A. (N. S.) 717. No such qualifying words are used in other subdivisions of the section. Subdivision 2 thereof, under which the prosecution in the instant case was had, in effect declares that fear as a means of extortion may be induced by a threat to accuse one of crime. The absence of any qualifying words, such as are found in subdivision 1 of the section, is significant. In reading section 518 with sections 519, 523, and 650, we cannot escape the conclusion that, assuming Da Rosa had in fact stolen goods of the value of $2,000 from Steining, the threats made by defendant to prosecute Da Rosa therefor unless he paid the value of said goods, which sum of $2,000 the latter, by reason of fear induced by such threat, paid, constitutes the crime of extortion. It is the means employed which the law denounces, and, though the purpose may be to collect a just indebtedness arising from and created by the criminal act for which the threat is to prosecute the wrongdoer, it is nevertheless within the statutory inhibition. The law does not contemplate the use of criminal process as a means of collecting a debt. To invoke such process for the purpose named is, as held by all authorities, contrary to public policy. Hence good faith, or the fact that the end accomplished by such means is rightful, cannot avail one as a defense in such prosecution, any more than such facts would constitute a defense where one compels payment of a just debt by the threat to do an unlawful injury to the person of his debtor.

In line with this view is the opinion in the case of Morrill v. Nightingale, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. Rep. 207. There the party, by reason of fear induced by a threat to prosecute him for embezzlement, gave a note secured by mortgage in settlement of the debt created by the embezzlement. In an action to foreclose the mortgage he pleaded as a defense the facts under which the execution of the mortgage was procured. The defense pleaded was sustained; the court in its discussion saying:

> "It certainly would be no defense to the accusation of extortion that the charges or publications threatened to be made by the defendant and by which he obtained valuable property were true. The truth or falsity of these matters form no element in establishing the guilt or innocence of a defendant charged with extortion."

Conceding this language unnecessary to the decision in that case, it is deemed applicable to the facts involved in the case now under consideration. If, instead of paying the $2,000, Da Rosa, under the circumstances shown to exist, had given his note and a mortgage securing the same, then, under the authority of the case cited, payment thereof could not have been enforced; the reason therefor being that execution of the security was procured by the wrongful use of fear induced by the threat to prosecute him for the crime out of which the indebtedness arose. If it be a wrongful use of fear in the one case, is it not likewise an equally wrongful use of fear in the instant case?

Our interpretation of the statute finds full support in an able and exhaustive opinion of the Supreme Court of South Dakota in a case entitled In re Sherin, 27 S. D. 232, 130 N. W. 761, 40 L. R. A. (N. S.) 801, Ann. Cas. 1913D, 446, where the court, having under consideration code provisions identical with sections 518, 519, and 523 of our Penal Code, said:

> "The word 'wrongful,' as used in the statute, has no reference whatever to the question of the justness of the ultimate result sought, but relates solely to the methods used to obtain such results."

In State v. Bruce, 24 Me. 71, it is said:

> "A person whose property has been stolen cannot claim the right to punish the thief himself without process of law, and to make him compensate him for the loss of his property by maliciously threatening to accuse him of the offense."

In the case of People v. Eichler, 75 Hun, 26, 26 N. Y. Supp. 998, it is said:

> "The moral turpitude of threatening, for the purpose of obtaining money, to accuse a guilty person of the crime which he has committed, is as great as it is to threaten, for a like purpose, an innocent person of having committed a crime. The intent is the same in both cases—to acquire money without legal right by threatening a criminal prosecution."

Appellant's contention that an honest effort on the part of a creditor to collect a just debt, by accusing or threatening to accuse the debtor of the crime out of which the debt arose or with which it is connected, does not come within the purview of the statute, finds apparent support in a number of cases. Such, indeed, is the conclusion of the court in the case of People v. Griffin, 2 Barb. (N. Y.) 427, followed by State v. Hammond, 80 Ind. 80, and Mann v. State, 47 Ohio St. 556, 26 N. E. 226, 11 L. R. A. 656, all of which cases, however, appear to have been based upon statutes materially different from the provisions under consideration.

The plain import of the language of our Code is that to threaten a thief with an accusation and prosecution based thereon, unless he pays the value of property stolen, and which by reason of fear induced by such threat he does pay, is extortion, within the meaning of section 518 of the Penal Code; and this without reference to the exercise of good faith in exacting the amount justly due. In effect, the jury were so instructed. There was no error in the rulings of the court as to instructions given and requested.

[2] There is no merit in the contention that Da Rosa was an accomplice of defendant. It is the act of defendant that constituted the crime, and in this act Da Rosa had no part other than as his will was coerced by the wrongful threats which induced the fear that in the absence of consent he would be sent to state prison. In People v. Coffey, 161 Cal. 432, 446, 119 Pac. 901, 906 (39 L. R. A. [N. S.] 704), in discussing the point, the court by way of illustration said:

> "To the crime of seduction two parties are necessary, but the co-operation of the seduced is not criminal. She is a victim, and she is not therefore an accomplice of the seducer."

So here Da Rosa was a victim in the same sense as though Steining, to whom he was admittedly indebted, had at the point of a gun enforced collection by a threat to inflict bodily injury upon him. Cases of bribery and kindred crimes cited by appellant have no application, for they involve a willing cooperation in the commission of the offense. In reaching this conclusion reference is had to section 1111, Penal Code, as it stood prior to the amendment thereof in 1915, when the crime was committed. Assuming there was, as claimed, an implied agreement on the part of Steining not to prosecute if the money was paid, nevertheless, as we have seen, there was no voluntary assent by Da Rosa, without which it cannot be said that he was a party to an agreement for the compounding of a felony. Moreover, defendant is not being prosecuted for the compounding of a felony, but for extortion, wherein Da Rosa was the victim of his wrongful acts.

[3] Error is predicated upon the fact that the court, over defendant's objection, permitted the prosecuting witness to testify to the value of certain articles, the theft of which he admitted. A necessary element of the crime was fear induced by the threat. The making of the threat being established, did it incite fear which operated upon the mind of Da Rosa in parting with his money? If the value of the goods stolen did not exceed $50, why, except for the fear induced by such threat, did he pay $2,000 in liquidation of a liability, recovery for which in a civil action could not exceed the former sum? While, under our interpretation of the statute, defendant's guilt did not depend upon the value of the goods stolen, the testimony was nevertheless material as tending to prove the existence of fear, which he claimed was induced by the defendant, and without which the offense would not be established.

[4] Neither was defendant prejudiced by reason of the court sustaining an objection to a question asked the prosecuting witness on cross-examination, as follows:

> "And you would have been willing to pay $2,000 to get out of trouble, whether they threatened you or not?"

The question was proper, in that it was sought thereby to ascertain whether the fear induced by the threat was the cause which prompted him to pay the money. The statute can only mean that the wrongful use of force or fear must be the operating or controlling cause which produced the consent, and hence, if some other cause were the primary and controlling one in inducing the consent, there would be no extortion. People v. Williams, 127 Cal. 212, 59 Pac. 581. Conceding it to be error, it is nevertheless apparent that no prejudice resulted therefrom, for the reason that it was substantially and fully covered by subsequent like questions asked of the witness, to all of which he gave negative answers.

[5] The admission of evidence as to conversations had with other persons by Da Rosa at which defendant was not present is assigned as prejudicial error. When the evidence was offered, defendant objected to its introduction upon the ground that the conversations were hearsay and not had in the presence of the defendant. Thereupon the district attorney stated that he would show that a conspiracy existed between defendant, Tevis, and Police Officer Condron. Upon such representation the court, in the absence of any evidence tending to establish a conspiracy, admitted the evidence. No proof that a conspiracy existed was offered, and at the close of the people's case defendant moved the court to strike from the record all evidence touching the conversations so had without defendant's presence. In response to the motion, the court said:

> "The thing is, the testimony is in now, and I don't see how you are going to strike it out of the minds of the jurors, even if the court would grant the motion to strike out the testimony from the record."

The record discloses no evidence tending even in a remote degree to establish that Condron, Tevis, and Da Rosa's father, or either of them, participated in the commission of the crime with which defendant was charged. Hence the admission of the testimony, and ruling of the court in denying defendant's motion to strike it out, cannot be upheld upon the theory that there was evidence of the existence of a conspiracy. We are of the opinion, however, that in so far as the evidence could have had any influence upon the minds of the jury in arriving at a conclusion it was admissible as part of the res gestæ.

[6-9] To constitute extortion, the wrongful use of fear must be the operating cause which produces the consent. As said in People v. Williams, supra:

> "If some other cause were the primary and controlling one in inducing the consent, then there would be no extortion."

As shown by the record, the chief direct proof of the making of the alleged threats by defendant is the testimony of Da Rosa as to what defendant did and said when they were alone in the latter's private office. Da Rosa's testimony as to these occurrences is flatly contradicted by defendant, whose story of the transaction is, in effect, that no threats whatever were made, and that Da Rosa, when he met him at the jail the morning after his arrest, expressed a desire to make amends for his misdeeds, and, when told that Steining claimed to have lost by theft goods of the value of $2,000 during the preceding nine months, voluntarily said he was willing to pay said sum; hence the existence or nonexistence of the chief element of the offense depended for its determination upon whether the jury believed the testimony of Da Rosa or that of defendant. The evidence complained of relates to three conversations, one of which was between Philip Da Rosa, father of the prosecuting witness, and Tevis, who, as a friend of the father, went with him to see his son the morning after the arrest. As to this conversation, Da Rosa's father testified that while at the city hall, in company with Tevis, waiting to see his son, and before defendant had seen him:

> "I told Mr. Tevis better go and see Mr. John S. Williams, and Mr. Tevis told me he don't need it; anything you need, I am just as good." "He said you don't have to go to see Mr. Williams, because I understand the law myself. I am here. If you need anything, I am here to help you out. I know something about the law."

This conversation so had between the father and Tevis had reference solely and alone to the propriety of employing an attorney for his son. It had no bearing whatever upon the guilt or innocence of the defendant. While thus clearly immaterial, it is nevertheless impossible to conceive any theory upon which the substantial rights of the defendant could have been prejudiced by reason of the testimony.

As stated, defendant, in his interview with Da Rosa in the jail, learned that he had money on deposit in two banks. He was also told that the books evidencing such deposits were at the house of Da Rosa's sister, Mrs. Dutra. For the purpose of securing these bank books, the presentation of which was a necessary requirement in withdrawing the money, the defendant took Da Rosa with Officer Condron, having custody of him, to Mrs. Dutra's house, from which place, having found one of the books only, they went to defendant's office. As they were leaving the office to make a search for the other bank book, after the making of the threats and before payment of the money, Da Rosa saw his father and Tevis on the sidewalk near defendant's automobile, which they were using, and, as he testified:

> "I did rush up a little faster to speak to my father, and I told him to go to J. S. Williams, because they were taking my money away. Somebody robbed my money."

This statement to his father was in Portuguese, language with which defendant was unacquainted. In substance, the testimony as to what Da Rosa said to his father was corroborated by the evidence of the latter, who was permitted to testify that, owing to the fact that he did not fully understand his son, he asked Mr. Tevis:

> "My son talk about Williams; maybe he wants to see Mr. Williams. Mr. Tevis reply: 'Oh, he don't need to go to see Williams at all. He don't have to go and see Mr. Williams, because the boy is going to pay a little bit, small amount, and don't have to see Mr. Williams then. It will be all right.'"

The conversation had by Da Rosa with Condron, the officer in whose custody he had been placed while permitted to accompany defendant, occurred in the private office of defendant, while he was absent from the room, after the making of the threats, and before the money was paid. As stated by Da Rosa, he asked Condron who he was, when he—

> "lifted his coat and show me a star and said: 'I am sheriff, Police Detective Condron.' And I complained to him about taking my money that way, if he thought it was right, and been working so hard for it in canneries, etc., and save every cent possible for my next operation, and he said: 'Well, that is all right; they know what they are doing.' I said: 'But I haven't got no witnesses here. What can they do? Can they send me to San Quentin?' He said: 'They fix everything over there.' He didn't say where at all."

This, in substance, covers all the evidence of conversations had without the presence of defendant. Like the discussion first referred to, had between the father and Tevis as to the propriety of consulting an attorney, that part of the second conversation as to what Tevis said to the father is immaterial, and therefore should not have been admitted. Nevertheless, we are unable to perceive how it could have had any prejudicial effect upon the rights of the defendant in the deliberations of the jury. The declarations of Da Rosa to his father with reference to employing Mr. Williams, an attorney, assigning as a reason therefor that they were taking his money, and the statement to Officer Condron while in his custody in defendant's office, were spontaneous utterances, made during the transaction, under the immediate influence of the acts constituting the offense, and which as a natural result provoked them. As such they were not only material, but competent evidence tending to establish the fact that the boy was then laboring under fear induced by the alleged threats. Moreover, what the prosecuting witness said to both his father and Condron was, in effect, nothing more than a repetition of his testimony, namely, that defendant threatened him with prosecution and imprisonment in the state prison unless he made the payment demanded. While, as hereinbefore stated, the record fails to disclose even prima facie evidence of the existence of a conspiracy, nevertheless, in so far as the evidence admitted was prejudicial to the substantial rights of the defendant, it was competent and proper as part of the res gestæ in establishing that at the time and immediately following the making of the threats he was laboring under fear induced by such threats.

[10, 11] Appellant insists that his substantial rights were prejudiced by gross misconduct of the district attorney in his argument of the case to the jury. The contention is based upon the fact that in discussing the comparative personalities of defendant and Da Rosa the district attorney, after picturing the latter as a weak crippled boy, frightened and crying after a night spent in jail, and the defendant as an astute lawyer of experience, said:

> "Now, the defendant certainly must be experienced in this class of shakedown, as the phrase goes. He knows to a nicety just how far he can go."

And after an objection interposed by defendant he continued:

> "I tell you, gentlemen, there is a proper, sound, logical, inference from Beggs' conduct to say he must be experienced in this class of shakedown."

In his statements the district attorney did not assert as a fact that defendant had committed like offenses with that for which he was being tried, but did claim that from the manner in which he dealt with Da Rosa it was a fair inference deducible from his conduct that he was experienced in collecting money by similar methods designated as a "shakedown." The manner in which a crime is committed, such as the opening of a safe or forgery of another's signature, may indicate a degree of skill from which experience in such line of work may be fairly inferred. In our opinion, the circumstances were such that it cannot be said the language used transgressed the rules of legitimate argument which the district attorney had the right to make. However this may be, we must assume that the jury recognized its oath-bound duty and followed the instruction of the court wherein it was said:

> "The court has had occasion several times during this trial to instruct you as to what is to be taken into consideration by you in determining this case. * * * In order that there may be no misunderstanding upon this point, the court again instructs you that statements and declarations made either on behalf of the prosecution * * * or counsel for the defendant, and not made as witnesses under oath, are not evidence, and are not to be taken or considered as evidence, either for or against the defendant. * * * Statements in argument, not supported by the evidence, * * * are not evidence, and should be disregarded by you."

[12-14] Further misconduct is predicated upon the fact that in the course of his argument the district attorney, in referring to restrictions imposed by law upon the people's right to have alleged errors, as compared with that of defendant, reviewed on appeal, said:

> "The law is such that if the defendant proposes an instruction that is the law, and that the judge does not give, it is reversible error, and the case comes back for retrial; on the other hand, the district attorney has no appeal. The defense can do anything in this courtroom, and I cannot object beyond what I say in the courtroom here. I cannot go to another court, and in exchanges between Mr. Sex and myself he can say anything here, and I have no protection other than what I get at the hands of Judge Griffin on the bench."

The statement was highly improper. In effect, it was calculated to induce the jury to place a lighter estimate on their duties than they would otherwise have done. The right, or want thereof, in either party to appeal, or extent of review granted by law to either party on appeal, is not a subject for consideration by a jury in reaching its verdict. McDonald v. People, 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep. 547; Brazell v. State, 33 Tex. Cr. R. 333, 26 S. W. 723. Nevertheless, in view of the instruction given, it cannot be said that defendant was prejudiced by reason thereof. Moreover, the statement so made was not properly assigned as misconduct, nor any request made that the court instruct the jury to disregard it, without which the possibility of injury resulting to defendant cannot be considered on appeal. People v. Walker, 15 Cal. App. 400, 114 Pac. 1009; People v. Mancuso, 23 Cal. App. 146, 137 Pac. 278; State v. Biggerstaff, 17 Mont. 510, 43 Pac. 709.

There is no merit in appellant's contention that the court erred in denying his peremptory challenges to prospective jurors. People v. Schafer, 161 Cal. 573, 119 Pac. 920; People v. Ochoa, 142 Cal. 268, 75 Pac. 847; People v. Martinez, 31 Cal. App. 413, 160 Pac. 868.

The ruling of the court in denying defendant's motion for a change of venue upon the ground that a fair and impartial trial could not be had in the county is fully supported by what is said in People v. Kromphold, 172 Cal. 512, 157 Pac. 599, where the discussion was addressed to a like motion made upon similar grounds, in support of which, however, there was an absence of the sharp conflict in evidence disclosed by the record in the instant case.

In the light of defendant's lengthy briefs and oral argument, we have examined the voluminous record with care. We find no error therein which, in our opinion, can be said to have been prejudicial to the substantial rights of defendant, or by reason whereof he was deprived of a fair and impartial trial by a jury, whose reluctance in finding him guilty is shown by the fact that they incorporated in their verdict a recommendation to the mercy of the court.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SLOSS, J.; MELVIN, J.

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36 Cal. App. 323

PEOPLE v. LEE. (Cr. 424.)

(District Court of Appeal, Third District, California. Feb. 20, 1918.)

1. Criminal Law 🔑433—Evidence—Letter Written to Defendant in Name of Another.

In a prosecution for murder, a letter headed "Dear Charley" and signed "Billy," addressed to defendant's brother-in-law, whose name was not Charley, and opened by defendant's mother-in-law, was improperly admitted in evidence as a letter meant for defendant where, though defendant's name was Charles, the evidence did not connect letter with defendant, and did not show identity of sender or that defendant knew of the existence of the letter before the trial.

2. Criminal Law 🔑719(1) — Conduct of Counsel.

Where a love letter was not addressed to defendant and there was no evidence that it was meant for defendant, statements, by prosecuting attorney in a prosecution for murder, during his opening statement and closing address to the jury, that the letter was from a woman and intended for defendant, and his conduct in reading and repeatedly commenting on letter and his interpretation of mysterious phrases thereof as intended for a married man with domestic trouble, *held* improper.

3. Criminal Law 🔑1186(4)—Prejudicial Error.

In prosecution for murder of a married man with children, improper admission of a love letter not written by defendant's wife and containing mysterious phrases interpreted by prosecutor as intended for a married man with domestic trouble *held* prejudicial error not avoided by Const., art. 6, § 4½.

4. Criminal Law 🔑991(3)—Sentence.

Under Pen. Code, § 1168, added by St. 1917, p. 665, providing for indeterminate sentence, not greater than maximum nor less than minimum of the term fixed for the particular offense, a sentence of one convicted of manslaughter to from one to ten years' imprisonment is erroneous in view of section 193, fixing a maximum imprisonment for manslaughter of ten years, but fixing no minimum term.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Charles Lee was convicted of manslaughter, and from judgment and from order denying new trial he appeals. Reversed and remanded.

See, also, 171 Pac. 958.

W. D. L. Held, of Ukiah, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. By an information filed by the district attorney of Mendocino county, defendant was charged with the crime of murder, committed on the 16th day of May, 1917, the deceased being his sister, Mary Long. The jury returned a verdict of manslaughter, and the judgment of the court was that the defendant "be punished by imprisonment in the state prison of the state of California for the term of from one to ten years." The defendant appeals from an order denying his motion for a new trial and from the judgment.

Briefly but generally stated, the facts leading up to the commission of the homicide are as follows: Defendant and his wife were living in the town of Willits in Mendocino county. On May 14, 1917, Mrs. Ed. Gravier, who lived in Round Valley, accompanied by her daughter, Hazel, went to Willits for the purpose of visiting Mrs. Lee, the wife of defendant, who was also a daughter of Mrs. Gravier. The visitors were met at the train by Mrs. Lee, and the three parties started for the defendant's house. On the way they stopped at the post office and Mrs. Lee went in to inquire for mail. When she came out she handed to Mrs. Gravier a letter addressed to Arlow Gravier, a son of Mrs. Gravier, who at the time was of the age of about 19 years. The envelope, by the dating stamp, showed that it had been mailed at "Dos R." (an abbreviation for Dos Rios) on May 12, 1917. Mrs. Gravier opened and read the letter. It commenced with the words "Dear Charley," showed a considerable degree of friendship existing between the writer and the one for whom it was intended, and was signed "Sincerely yours, Billy."

On the next morning, May 15th, there was some conversation between Mrs. Gravier and defendant about the receipt by the latter of "love letters"; defendant stating that he never received any, and Mrs. Gravier replying, "Don't be too sure." She stated that the conversation was "just in a joking way" and that she did not show defendant the letter above referred to, which was in her possession at the time, nor did she tell him that she had such a letter.

During the night of May 15th defendant was with several men in a saloon at Willits. Frank Hall, one of these men, testified that defendant told him that his wife "had got a letter that some person had wrote to him and he never got," that his mother-in-law was making trouble between him and his wife, and "he would make trouble if they didn't leave him alone." Defendant started for his home between 2 and 3 o'clock in the morning. He stopped at the home of Mr. and Mrs. Long, who were in bed, and, according to the testimony of Mr. Long, said:

> "That he would go home and show that damned old mother-in-law of his how to interfere with his business."

Defendant went out, and, shortly afterwards, Mrs. Gravier and her daughter, Hazel, went to the Long house. Mrs. Gravier there said that:

> "Charlie had the gun and was going to do some killing over there, going to kill the family."

Mrs. Long partially dressed herself and went to the defendant's house. Ten or fifteen minutes later, somewhere between 4 and 5 o'clock in the morning, Mr. Long heard shots at the Lee residence.

Mrs. Daisy Moore, who was in a house across the street from the Lee residence, heard screaming and saw two women and two children running from the house. She said that Mrs. Long came out of her house and said, "I am going over there and put a stop to that right now," and went to Mr. Lee's. Mrs. Moore testified:

> "Before ever I heard the shooting, I heard a man's voice say, 'You will open my letters, will you?' Q. And could you recognize the voice? A. Well, it sounded very much like Mr. Lee's voice. I had heard his voice before, and it sounded very much like Mr. Lee's voice. I am quite sure it was his."

Other witnesses, neighbors of the Lees, testified that they heard some one of the children cry out several times, "Don't shoot, Papa."

1. The point mainly relied upon by the defendant is that the letter referred to was erroneously admitted in evidence; that, while the district attorney, in his opening statement to the jury, stated that the letter came to defendant from a Mrs. Spencil, there is no evidence in the record as to who wrote it or that it was intended for the defendant; that, if the jury believed the letter to have been intended for defendant, and sent by a woman not his wife, its contents were highly prejudicial to defendant's case; and that the district attorney read and re-read to the jury the contents of the letter and drew "every sinister conclusion from its contents that might work to the detriment of defendant."

In view of section 4½ of article 6 of the Constitution, which authorizes the excuse of errors in the trial of cases where, after a review and consideration of the entire record of the case in hand, it cannot be said that a miscarriage of justice has resulted from any error so committed, it is requisite that the testimony should be examined and considered to determine whether the letter referred to was prejudicial, assuming for the present that it was inadmissible.

As to what occurred in the house immediately after the defendant entered it on the morning of the shooting, the testimony of Mrs. Gravier, Mrs. Lee, and Miss Hazel Gravier, who afterwards became and was at the time of the trial the wife of one Hart, shows these facts: That the defendant, upon entering the house, first went into the room occupied by Mrs. Gravier and her daughter, Hazel, and, lighting a lamp, remarked to them that he thought it was time for them to arise. He then went into the room occupied by his wife and one of the children and made a similar suggestion to them. He then took down a revolver which was hanging from the wall in the room. Mrs. Lee, addressing him, asked him in rather a loud tone of voice to give the weapon to her. Whether he voluntarily delivered the weapon to her, or she by force got it from his possession, does not clearly appear from the evidence; but at all events she obtained possession of the weapon. Lee then left the room and went to the home of his sister, Mrs. Long, the deceased. In the meantime, one Packard, who had been out all the night before with Lee, and on the morning of the shooting accompanied the latter to his home, entered the room of Mrs. Lee. Upon observing Packard in the room, Mrs. Lee screamed and ordered Packard to leave the room. The defendant shortly thereafter returned, entered the house, and in the kitchen procured a rifle which was kept there and with it went into his wife's room. Mrs. Lee then hastily left the house. Mrs. Gravier stepped from her room into the sitting room and saw the barrel of the rifle pointing towards her through the curtains from Mrs. Lee's room. She could not then see the defendant. She and her daughter, Hazel, thereupon left the house, went to Mrs. Long's residence, and Mr. Long testified, as we have seen, she told the Longs that Lee "was going to kill the whole family." Mrs. Gravier, however, testified that what she said to the Longs was that Lee had taken the gun from the wall and that she (Mrs. Gravier) was afraid that he was going to commit suicide.

We have already shown that Mrs. Long, immediately upon being told by Mrs. Gravier of the trouble at the Lee home, went to the latter place. The defendant, his daughters, Annie and Frances, the former 13 and the latter about 5 years of age, one Louis Muir, and Mrs. Long were then the only persons in the house. Annie did not appear to know how the shooting occurred, and her testimony as to that circumstance seems to have been of an evasive character, due, probably, to a desire to shield her father as much as possible at the trial, or perhaps it may have been the result of poor memory, as she intimated was the fact. At any rate, she said she saw no scuffling between her father and Mrs. Long prior to the discharge of the rifle. She said that her aunt and baby sister were standing near the door leading into the room, and her father held the rifle so that the muzzle pointed towards the floor, and that while so holding the weapon it was discharged.

Muir testified that he had, before the defendant entered the house, asked the latter for the loan of a pistol. He was waiting on the outside for the return of Lee when he heard some noise in the house and met Mrs. Lee as she was leaving the house. The latter said to him: "Look out! Charlie (referring to the defendant) has gone crazy—going to shoot somebody." Thereupon Muir entered the house and went into the room where Lee and Mrs. Long were, he said, wrestling with a rifle; each apparently endeavoring to take the weapon from the other. During the scuffle the rifle was discharged, he said, and Mrs. Long fell to the floor. Lee, addressing Mrs. Long, asked: "My God! Have I shot you?" And she replied that he had, whereupon, addressing Muir, Lee said: "My God, Louie! I have shot my sister. Go and get a doctor." Muir immediately started out to find a physician.

Lee testified that his purpose in getting the pistol was to loan it to Muir; that, when he took it from the wall, his wife requested him to give it to her and that he did so; that thereafter he told Muir that his wife refused to let him have the pistol and that Muir said that he desired the weapon for the purpose of shooting some wild animals infesting that section and insisted upon Lee loaning him a weapon; that he (Lee) then returned to the house and procured the rifle, which was then unloaded, and went into his wife's room to procure some cartridges which he kept in a bureau drawer in that room; that his sister, Mrs. Long, then came in the house and into the room where he was and, taking hold of the gun and addressing Lee, said: "Oh, Charlie! Don't do that."

"And," continued Lee, "I did not know what she meant by the remark she made, and I says, 'Do what, Mary?' I says, 'I ain't going to hurt nobody,' and she let loose of the gun; these cartridges—then I had took out ten cartridges out of the box and put the rest back in the bureau drawer, and so when she came in and grabbed hold of me with the gun my baby then grabbed me by the leg and she hollered, or something; I don't know what she did say. I couldn't swear positive what she did say. So I seen she was excited, and I picked her up and walked over and put her down on the bed; and my sister let loose of the gun. She was as calm as any one was then. She cooled off right away, and we set there and talked a few minutes—I guess three or four minutes. I was playing with the baby, and I got up and went back over, and Louie Muir was standing in the door, and I picked up these cartridges, and I pulled back the breech block to that gun and put in five cartridges. My sister was over at the bed and the baby when I left there. When I put those cartridges in, I just turned around and let this breech block down, and when I did it went off. My sister and baby must have moved over next to the door during the time my back was turned, because I never did see them until that shot was fired. When the shot went off, my sister says, 'Oh, Charlie,' and she kind of slid down the wall, and my baby run out to one side and exclaimed, 'Oh, papa.' * * * I dropped this gun against the wall and went over and grabbed my sister before she fell to the floor. She was kind of sliding down the wall, and so Louie Muir was there, and I says: 'My God! I have shot my sister. Run for a doctor.' And so he left. * * * After Muir left, my sister asked for water, said she felt sick, and I ran out to the kitchen and procured and brought to her some water."

With the assistance of Packard, above spoken of, who was in an outhouse on the Lee premises when the shot was fired, the defendant placed Mrs. Long on a bed.

As to the conversation with his companions with whom he was drinking and carousing before going to his home, the defendant denied that therein he made any threat against either his mother-in-law or his wife, or that he referred to any particular letter. One of his companions testified that, while he inferred from his conversation that the defendant was referring to his mother-in-law when speaking of his letters being tampered with, he did not mention that lady's name. The same witness testified that, in said conversation, the defendant referred only to a letter which he claimed his wife had surreptitiously "taken from his clothes."

With respect to the letter admitted in evidence, the defendant testified that he had never heard of or seen it until it was produced at the trial. Mrs. Gravier testified that she had never shown him the letter or referred to it in his presence except in the general and jocular way above referred to.

There was no testimony presented showing, or tending to show, that the defendant and Mrs. Long had ever had any differences, or that the defendant had ever threatened to inflict injury upon her. To the contrary, the defendant testified that there had always been the best of feeling existing between them.

It should be stated that two flesh wounds were produced by the cartridge from the rifle upon the left lower limb of Mrs. Long, one in the thigh and the other in the calf of the leg; that the wounds were temporarily treated by a local physician, after which she was removed to the county hospital, at Ukiah, where she received treatment by the county physician; that her death was due to an infection which developed in the wounds and caused decomposition to set in.

Mrs. Long, shortly after being shot, stated to several persons that she believed she would not recover, and on the day she was removed to Ukiah declared that she never would return alive. On all these occasions she declared that the shooting was purely accidental, and a few days before her death, after stating that she knew she was going to die, she signed the following paper, which was read to her, one of the witnesses testified, and which she herself read, so another witness declared:

"Mrs. Mary Long, being first duly sworn, deposes and says that she resides at Willits in the county of Mendocino, Cal.; that she knows Charles Lee and has known him at all the times herein mentioned; that on Wednesday morning, May 16 1917, at about the hour of about 15 to 5 o'clock she was present at the home of said Charles Lee in said Willits and said Lee at said time had in his hand a gun and threatened to commit suicide; that affiant endeavored to dissuade him from his express purpose, and she grabbed said weapon and a struggle ensued between herself and said Lee; that in said struggle said gun was discharged twice striking affiant in the leg above the knee; that at said time Frankie Lee the daughter of said Charles Lee was hanging about the knee

of affiant and said weapon discharged one or more bullets in the body of said child and of affiant. That the discharge of said weapon was wholly and entirely accidental and without any intention so far as was apparent to affiant on the part of said Lee to discharge the same.
[Signed] Mrs. Mary E. Long, Affiant."

We have thus reproduced herein a brief synoptical statement of the testimony given both for and against the defendant, and it will not be denied that, upon the facts, the case is a very close one. In fact, so far as may be judged from the face value of the testimony, a verdict of acquittal would have been equally with the verdict returned consistent and reasonable. The testimony tending to show the ugly state of mind in which the defendant was prior to returning home, and that tending to establish that he had threatened to do physical violence to his mother-in-law, together with the testimony of the neighbors that they heard loud noises and other disturbances at the home of the defendant after he had returned thereto in the early morning, and the testimony that upon entering the house he procured a weapon, which was taken from him, and then procured the weapon with which the shooting was done and loaded it with cartridges, and other circumstances of a more or less incriminating character, might justly be held to be sufficient to sustain the verdict.

On the other hand, it is very plain from the testimony that, had he desired to inflict any injury upon his wife or his mother-in-law, he could have done so, for the opportunity for such violence was present. His wife appeared to have little difficulty in getting the pistol from his possession, and his mother-in-law was still in the house when he had possession of the rifle. There is absolutely no testimony in the record, except the mere fact of the discharge of the rifle, from which it can be inferred that he intended to shoot or injure Mrs. Long. There is, indeed, no testimony except his explanatory of how the rifle came to be discharged, and he did not seem to know precisely how it occurred. It is therefore impossible to say from the record that the shooting was the result of criminal negligence, which would constitute the offense that of manslaughter, and there is no evidence to support the theory, which was advanced by the district attorney in his opening statement to the jury, that the shooting of Mrs. Long, while not intended as to her, was the result of an attempt and an intent deliberately to shoot some other person.

Of course, the object of the foregoing discussion of the testimony is not to show that the verdict, so far as the evidence is concerned, could not be upheld. Thus we have considered and briefly analyzed the proofs only to show that, as before stated, the verdict has exceedingly frail support, and that the ruling admitting the letter above referred to in evidence must be considered in view of that situation as to the testimony. To the consideration of said ruling we are now brought.

[1] The letter in question is here given in full:

"May 11th 17

"'*Dear Charley*'

"Just a few lines to let you know I haven't forgotten *My Little Papa.* I am just able to be up today & feel very weak. So please excuse this scrawl. How is every little thing & what is the latest news. How is *Son?* Remember me Kindly Your *Rival* is here with *Hydrant*..they are getting *Hogs* so you know I am in no condition for Company & do not Care to be bothered. But I had to get up just the same. They had to sleep out in the Tent & thought it a crime. Well I can not help it. I have only a small Cabin built for 2; Certain *ones* only are *welcome.* Well I hope this finds you O. K. & take good of yourself & don't hit the *jug* too much & you will feel better. Hope you answer this so I will know if it reached you without trouble. As you have had enough. And I don't want to cause you any more. Can't write you much as I am too weak Must go back to bed. So I must close with lots of love

"Sincerely Yours *'Billy.'*

"Address ℅ 'Idlewylde Ranch'

"Haven't seen Road house since Tuesday. Have a lot to tell *U.* Write soon.

"Do you know of any one has a good collie Puppy to give away. Just heard you had split the blankets. Is that true?"

We think that there was absolutely no legal foundation whatever laid for the admission of that letter in evidence. We search the record in vain to find that it was in any measure or degree connected with the defendant, or that the defendant was connected with it. There is no evidence showing who wrote the letter, or whether the writer of it was a male or female, and, if the latter, whether it was written by the party named by the district attorney as its author in his opening statement. It is true that, whereas the envelope containing the letter was addressed to "Arlow Gravier," the writer in the letter itself addressed the party for whom it was intended as "Charley," the first name of the defendant, and that Mrs. Gravier testified that her son, Arlow, was not known, or, so far as she knew, ever addressed as "Charley." It is also true that the defendant stated, on cross-examination, that he thought he recognized the handwriting of the letter, although declaring in the same connection that he knew no person known as or calling him or herself "Billy." But these circumstances fall far short of showing that the letter was intended for the defendant. It is not at all improbable, so far as the record goes, that the author of the letter and Arlow Gravier might have had an understanding between themselves that thus he or she, as the case is, should address his or her letters to him, or, so far as the record throws light upon the matter, it would not be an improbable theory that the writer of the letter was accustomed to addressing him as "Charley." In any event, there is not, as stated, any testimony of any character in the record showing that the letter was intended for the defendant. There might have been a suspicion in the minds of Mrs. Gravier and Mrs. Lee that the letter was intended for the defendant. There probably was, as we infer from what Mrs. Gravier said to the defendant after receiving the letter when jokingly speaking of whether he (defendant) had ever received love letters, she having testified that, while she had the letter in her pocket, he said he had never received love letters, and she replied, jokingly, "not to be too sure about that." But even this does not connect the defendant with this particular letter. Furthermore, as has been shown, there is no testimony tending to show that the defendant had any knowledge of the existence of the letter in question until it was produced at the trial. On the contrary, the testimony of both Mrs. Gravier and himself shows that he had no such knowledge until the trial, and theirs is the only testimony in the record upon that proposition.

[2] It follows that the letter was clearly inadmissible, and that it was highly prejudicial there can be little, if any, doubt.

Readily can it be understood how a jury of laymen—generally made up of the most intelligent and respectable citizens of a county—would bitterly resent the conduct of a man of family in maintaining such relations with a female not his wife, as the language of the letter in question as interpreted in his argument by the district attorney very clearly indicates existed between the writer of said letter and the person for whom it was intended. We think that it can be laid down as a proposition hardly admitting of dispute that, in a close case upon the facts, such a letter, where, as here, the defendant was a married man and has a family of young children, would move the scales against him. And that the jury in this case regarded the letter as having been written by a female and intended for the defendant is undoubtedly true, since it was admitted in evidence avowedly upon that theory, and since, furthermore, the district attorney, both in his opening statement and closing argument, declared that the letter was written by some woman and intended for the defendant; and that the district attorney regarded the letter as a singularly important circumstance strongly supporting the theory of guilt is also an unquestionable proposition, for he not only repeatedly referred to and laid emphasis upon the fact in his closing argument, but read and analyzed the language of the letter before the jury and so interpreted certain rather mysterious or ambiguous phrases thereof as to show that the letter was intended not for an unmarried but for a married man having domestic trouble, and drew the inference from the language as he interpreted it and declared that the letter could not have been intended for Arlow Gravier, an unmarried youth, but for the defendant.

[3] The argument and the inferences referred to were, in our opinion, wholly unwarranted, and were so because, as before stated, there was no testimony, except such as might only have generated a mere suspicion, showing that the defendant was the party for whom the letter was intended.

Moreover, as the purpose of the introduction in evidence of any such letter was to show motive for the alleged crime of the accused, the letter in question was wholly out of place in this record, inasmuch as it was not shown that the defendant knew of its existence until the trial.

[4] Our conclusion is that the error considered is beyond the saving grace of section 4½ of article 6 of the Constitution, and that for said error the cause must be reversed. But, in view of a probable retrial of the case, the following suggestions should be made: The judgment pronounced in this case is imprisonment in the state prison for from one to ten years. This judgment was undoubtedly pronounced in purported obedience to section 1168 of the Penal Code, added to said Code by the Legislature of 1917 (Stats. 1917, p. 665). Said section expressly provides that the court, in imposing sentence, where the imprisonment is to be in any reformatory or state prison of the state, shall not fix the term or duration of the period of imprisonment, "provided, that the period of such confinement shall not exceed the maximum or be less than the minimum term of imprisonment provided by law for the public offense of which such person was convicted."

The penalty for manslaughter, of which the defendant was convicted, is "imprisonment in the state prison not exceeding ten years." Pen. Code, § 193. It will be observed that the punishment may be for any term less than ten years; it may be for a month or even one day. The judgment in this case, therefore, although in our opinion not void, is nevertheless erroneous, inasmuch as it fixes a minimum penalty. Although not necessary to be decided here, it would seem from the language of the section that it was contemplated that a judgment of sentence should merely be that the defendant be confined in one of the state prisons, without fixing or naming either the minimum or maximum penalty for the offense of which he was convicted. Of course, these observations are ventured upon the assumption that the new section in question is consistent in all respects with the provisions of the Constitution having a bearing upon the matter of penal punishment.

Judgment and order reversed and cause remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

36 Cal. App. 370

DUNCAN v. TOM POSTE, Inc., et al. (Civ. 2126.)

(District Court of Appeal, Second District, California. Feb. 23, 1918.)

1. Landlord and Tenant 🔑231(6)—Rent—Assignment—Sufficiency of Evidence.

In an assignee's action for delinquent rent due on a lease of realty, evidence *held* sufficient to support a finding that the assignment of the rent had been made to plaintiff.

2. Costs 🔑260(1) — Frivolous Appeal — Damages.

It appearing that the appeal is without merit, and was made for delay, judgment will be affirmed, and a sum as damages will be assessed.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Boaz Duncan against Tom Poste, Incorporated, a corporation, and Tom Poste, John Poste, and M. Carrie Hieronymus, as trustees of John Poste, Incorporated. From a judgment for plaintiff, defendants appeal. Affirmed.

Fred W. Heatherly, of Los Angeles, for appellants. Valentine & Newby, of Los Angeles, for respondent.

PER CURIAM. The defendants were indebted to the plaintiff's assignors for delinquent rent due upon a lease of real property. The complaint alleged an assignment of said claim to the plaintiff, and this allegation was not denied by the answer; nevertheless the plaintiff at the trial introduced evidence of such assignment.

[1] The only point urged in support of the appeal is under a specification of insufficiency of the evidence to support a finding in favor of the plaintiff based upon this evidence. Appellant insists that as the plaintiff at the trial assumed that evidence of the assignment was necessary, the defendants thereby became entitled to have the case tried as if the assignment had been denied. Assuming for the purposes of the argument that the question was at issue, we nevertheless find in the record ample evidence to support the finding. It is true that the plaintiff, who had lost the written assignment, testified that the words thereof were: "For value, I hereby assign to Boaz Duncan all my right, title and interest to the within lease." Plaintiff's assignors were partners, and the assignment was made by one of the partners, L. M. Holman, who testified that before the commencement of this action he assigned in writing on the back of the lease all of the claims of himself and his partner to all of the rent due from the defendant corporation. The defendants other than the corporation were its directors, and have become its trustees after the forfeiture of its charter.

[2] It appearing to the court that the appeal is without merit and was made for delay, the judgment is affirmed, and there is added the sum of $50 damages, together with the costs.

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36 Cal. App. 413

MORRIS v. JUDKINS et al. (Civ. 2313.)

(District Court of Appeal, First District, California. Feb. 28, 1918.)

1. Action 🔑48(1)—Joinder of Causes — Quieting Title—Mandamus.

Under Code Civ. Proc. § 427, subd. 8, as to joinder of causes arising out of the same transaction, the purchaser at a commissioner's sale may join his causes to quiet title to the land and to compel the commissioner to make a new deed conveying all of the land which the original deed failed to do, since both causes arose out of the same transaction.

2. Quieting Title 🔑30(3) — Necessary Parties.

In suit to quiet title and to require commissioner to make new deed conveying entire interest purchased by plaintiff at commissioner's sale, the commissioner was not a necessary party to the title quieting branch of the case, so that if he was merely named as an individual there was no defect of parties.

3. Quieting Title 🔑15—Defenses.

Under complaint alleging that plaintiff purchased at commissioner's sale and received a commissioner's deed conveying only part of the property, the fact that plaintiff was the legal owner of the land actually conveyed entitled him to maintain an action to quiet title against the former owners, and they could not raise any defenses existing in favor of the commissioner as to that branch of the case seeking to compel him to make a new deed conveying all the land.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by W. B. Morris against T. C. Judkins and others. Judgment for defendants, and plaintiff appeals. Reversed.

Ernest K. Little, of San Francisco, for appellant. S. W. Molkenbuhr and Thos. W. Firby, both of San Francisco, for respondents.

BEASLY, Judge pro tem. The plaintiff purchased the property involved herein at a commissioner's sale under a judgment foreclosing certain mechanics' liens thereon. The defendant Lanktree, being the commissioner appointed by the court to convey the property to the plaintiff as purchaser at the sale, delivered a certificate of sale to him describing the whole property, and, no redemption having been effected, Lanktree subsequently executed a commissioner's deed to Morris in which, however, only a part of the land sold to him was described or conveyed, and Lanktree has refused and neglected to include the remainder of the property in his deed. Judkins and Saxton, the other defendants here, were the defendants in the foreclosure suit and the former owners of the property. In this action Lanktree is not named in the title as commissioner, but individually; that is to say, he is denominated simply "J. B. Lanktree." In the body of the complaint, however, it is alleged that Lanktree "as commissioner" sold the property and executed the certificate of sale and the deed to the part of the property hereinbefore mentioned. The complaint also alleges:

"That the defendants Judkins and Saxton claim to be the owners of said premises and are in possession thereof, and have heretofore refused and still refuse to deliver the possession thereof to the plaintiff."

The relief asked against Judkins and Saxton is the usual relief demanded in an action to quiet title, including an injunction forbidding them to assert any claim to the property adverse to plaintiff, and that the plaintiff recover possession of the property and the amount of certain rents; and as against Lanktree that he be compelled "as commissioner as aforesaid" to execute a deed conveying the entire property to plaintiff.

These are in condensed form all the allegations of the complaint in this action.

Elaborate separate demurrers, identical, however, in form and substance, were filed to this complaint by Judkins and Saxton raising many questions. These demurrers were sustained without the ground on which they were sustained being stated, and, plaintiff failing to amend, judgment was entered against him in favor of Judkins and Saxton. Lanktree did not appear, and the judgment does not mention him. Three only of the numerous grounds of demurrer relied upon in the lower court are insisted upon in the respondents' brief.

[1] The first of these is that several causes of action were improperly united in the complaint, namely, a proceeding in mandamus against an officer of the court with an alleged cause of action to quiet title. Conceding, as counsel for the respondents contend, that the cause of action attempted to be stated against Lanktree is mandamus, it is not improperly united in this case with the action to quiet title against Judkins and Saxton. The plaintiff may unite several causes of action in the same complaint where they are all predicated upon claims arising out of the same transaction, or transactions connected with the same subject of action. Code Civ. Proc. § 427, subd. 8. The claim of plaintiff to have his title quieted against Judkins and Saxton, and to have a writ of mandate against Lanktree to compel the execution of a deed to the entire property, however lamely alleged in the complaint, arises out of transactions connected with the same subject of action, namely, the same real estate. The real estate is the subject-matter concerning which both claims are asserted. As illustrating this proposition, see McArthur v. Moffett, 143 Wis. 564, 128 N. W. 445, 33 L. R. A. (N. S.) 264. The connection between Lanktree on the one hand, and Judkins and Saxton on the other, is very close. Lanktree was the commissioner appointed by the court to convey the title of Judkins and Saxton to the plaintiff. The policy of courts of equity to adjudicate in one action so far as possible all claims between the same parties concerning one subject-matter authorized this joinder, and this is one feature of equity jurisprudence that is embodied in the section of the Code of Civil Procedure above cited.

[2] The second ground of demurrer insisted upon is that there is a defect of parties defendant, in that Lanktree as commissioner has not been joined as defendant. Conceding that Lanktree is not sufficiently charged as commissioner, and that he was not therefore strictly speaking joined as commissioner in this action, and that he was a proper party defendant as such, still he was not a necessary party. Plaintiff might have proceeded without him to have his title quieted as to the part of the property to which he held title, namely, that portion described in the deed already made by Lanktree as commissioner. Indeed, it does not clearly appear why the relief sought against Lanktree might not have been obtained by a simple motion or citation in the original foreclosure case directed to having him ordered by the court to execute a proper deed if the one already executed by him is not in accordance with the judgment of the court in that case. Therefore there is no defect of parties in this respect.

[3] The third ground of demurrer urged by the respondents in support of the judgment is that the amended complaint fails to state a cause of action against any of the defendants, and especially against the respondents Judkins and Saxton, and in this behalf it is contended that the plaintiff cannot quiet title against the respondents until he has a deed to the entire property; in other words, that he, being an equitable owner only, cannot quiet this title against Judkins and Saxton, who, it is claimed, are still the legal owners. But conceding this proposition as a general statement of the law (but not so deciding), it does not apply here because the plaintiff Morris is the legal owner of that portion of the property described in the deed executed by the commissioner, and so far as that portion of the property is concerned at least a cause of action is stated in this complaint against the defendants Judkins and Saxton. And objections to the sufficiency of the complaint as against Lanktree cannot be raised by his codefendants; in this particular case, at least, those objections can only be taken advantage of by Lanktree himself.

These are the only essential points made by respondents in support of the action of the trial court in sustaining their demurrer, and, our conclusion being adverse to their contentions, the judgment must be reversed. We are constrained to add that the trial court was probably misled in this matter by a failure of counsel for plaintiff to observe certain obvious conventions of pleading which, while not, as it happens, absolutely necessary in this case to the statement of his cause of action, have for so long been generally followed by pleaders that they might with advantage have been observed.

For the reasons above set forth, the judgment is reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

36 Cal. App. 391

GEORGE J. BIRKEL CO. v. CURTET et al. (Civ. 2092.)

(District Court of Appeal, Second District, California. Feb. 26, 1918.)

EVIDENCE 🔑441(9)—PAROL EVIDENCE VARYING WRITING—ADMISSIBILITY.

Where an agent represented a musical instrument to have certain qualities, but the written contract contained no such representations, and a separate clause separately signed stated that the seller would not be bound by any representations or agreement not appearing in the contract, parol evidence of the agent's representations was not admissible.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the George J. Birkel Company against L. Curtet and another. Judgment for plaintiff, and Curtet appeals. Affirmed.

F. McD. Spencer and Thomson & Spencer, all of Los Angeles, for appellant. E. S. Williams, of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment entered in favor of plaintiff and against the appellant Curtet. Plaintiff sued to recover a sum of money alleged in its complaint to be a balance due on a contract for the sale of a musical instrument. The contract was expressed in writing, the main portions of which set forth the terms of sale and a description of the instrument. Attached to this contract, and as a separate paragraph thereof, was the following:

> "I have read the foregoing contract and fully understand that George J. Birkel Company, or its assigns, will not be bound by any representation or agreement other than appears herein."

The signatures of appellant and the other defendant were attached both to this paragraph and to the main contract. Execution of the contract was admitted, the appellant resting his defense upon two grounds, to wit: First, that there was an antecedent warranty as to the condition of the instrument sold and as to the manner in which it would operate; second, that the consent of the defendants to the execution of the contract was induced by representations made by plaintiff's agent that the instrument would produce satisfactory music and was in good condition of repair. The facts constituting the alleged warranty and those relied upon to sustain the defense of fraud are the same. It was further alleged in the answer that in November, 1914, which was more than one year after the making of the contract and the delivery of the instrument to the defendants, defendants rescinded the contract on the alleged ground of fraud, by restoring the instrument to the plaintiff and giving notice of rescission. As excusing the delay in making the alleged rescission, it was further alleged that defendants had seasonably notified the plaintiff of the failure of the instrument to operate in the manner as represented and warranted, and that the plaintiff undertook to repair the same and assured the defendants that the defects could be remedied. The case came on for trial; whereupon the plaintiff made proof of the condition of the account which it held against the defendants and the amount due thereon, and rested. Appellant then offered evidence to sustain the defenses of alleged warranty and fraud; whereupon the plaintiff objected to any such evidence being received, upon the ground that the contract had been reduced to writing and was presumed to contain all the terms agreed upon. This objection was sustained, as was objection also to the testimony offered in defense to show what had become of the instrument. It may be here noted, for consideration in connection with the latter offer, that it was not pleaded by the defendants that acquiescence had been made by the plaintiff in the attempted rescission of sale. As opposed to any such situation, the plaintiff showed from the files in this case that an attachment had been levied upon the instrument at plaintiff's demand, and that the sheriff had taken the same into possession under the writ.

We think the court was right in sustaining the objection to the testimony offered by the appellant. The plaintiff not only by its written contract did not make any warranty as to the condition of or the manner in which the instrument which was the subject of the sale, would perform, but expressly obtained the written assent of appellant to a waiver of all representations and agreements other than those appearing in the contract. This condition was not merely a general one obscured by the verbiage of descriptive terms, but was pointed and special and attached as a distinct clause after the main body of the contract. While attached to, it was separate from the general terms of the contract and was separately signed by both defendants who were the vendees under the contract. In the alleged defense of fraud no ground is alleged tending to show that the appellant did not sign this added condition with full knowledge of its force and effect. The situation would then be this: The defendants believing that the instrument was of such a character and condition as might have been represented to them, signed the main contract. Up to that point we might say, if sufficient facts were shown, that they would be entitled to rescind for alleged fraudulent representations. However, they, with full knowledge, as we must presume, of the effect of such a condition, signed separately an express waiver of all right to complain of any misrepresentations which they now insist were made. To our minds, the case is so plain that no authorities need be cited to show that the defenses alleged in this case, under the admitted conditions of the contract, cannot be maintained. In our opinion, the trial judge properly sustained the objections to the offered testimony and the judgment entered is without error.

The judgment is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

86 Cal. App. 389

PARTRIDGE v. CITY OF RICHMOND.
(Civ. 2296.)

(District Court of Appeal, First District, California. Feb. 25, 1918. Rehearing Denied by Supreme Court April 25, 1918.)

1. Municipal Corporations 🔑385(4) — Changing Grade of Street—Damages to Abutting Owner—Liability.

The owner of a lot, fronting on a street for which an official grade is established, to which the street is graded to the lot owner's damage, is entitled to recover damages against the city, though when her grantor dedicated the street he knew that its natural grade was so steep as to render it impractical and inaccessible to teams and vehicles, since neither the city nor plaintiff's grantor could have known at the time of dedication, nor could plaintiff have known at the time of her purchase and the erection of her house, what grading would be necessary to make the street reasonably fit for its intended public use.

2. Dedication 🔑31—Streets—Acceptance.

A city was not compelled to accept dedication of a street by a private owner, and, if it did so, it took the advantages yoked with the burdens, and is liable to pay damages to an abutting owner injured by establishment of an official grade.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Martha Partridge, widow, against the City of Richmond, a municipal corporation. From a judgment for plaintiff, defendant apeals. Affirmed.

D. J. Hall, of Richmond, for appellant. Donald Horne and Dunn, White & Aiken, all of Oakland, for respondent.

BEASLY, Judge pro tem. The plaintiff owned a lot fronting on Montana street in the city of Richmond. Her grantor had dedicated Montana street in front of this lot as a public street, and the dedication had been accepted by the city of Richmond. At the time of the dedication no official grade had been established on this street. After the plaintiff had acquired the lot and built a house thereon, the city of Richmond established an official grade and graded the street to it, and, as the jury found, this resulted in damage to plaintiff's said property in the sum of $500.

The grade established being unquestionably reasonable and necessary to make the street available for the purpose for which it was dedicated, it is contended that the plaintiff is not entitled to recover damages for the bringing of the street to the first official grade.

[1, 2] The point is decided in Eachus v. City of Los Angeles, 130 Cal. 492, 62 Pac. 829, 80 Am. St. Rep. 147, and Eachus v. Los Angeles Railway Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149, unless the plaintiff is estopped from claiming damages by reason of the fact that her grantor dedicated the street. The appellant argues that respondent's grantor made this dedication knowing that the natural grade of Montana street was by reason of steepness, impracticable and inaccessible to teams and vehicles, and that plaintiff and her grantor knew at all times before the actual grading was ordered that it was necessary to grade the street to the official grade in order to make it accessible for the purpose for which it was dedicated. But this is not so, for neither the city nor plaintiff's grantor could know at the time of the dedication of the street, nor could the plaintiff know at the time of her purchase and the erection of her house what grading would be necessary to make the street reasonably fit for the public use for which it was intended. In these days of changing methods of constructing and grading streets no one may forecast the future grade of a public street, or the amount of injury which will be done to property by the establishment of the first official grade thereon. The city was not compelled to accept the dedication of this street; and, if it did so, it took the advantages yoked with the burdens.

There is nothing contrary to this view in Bancroft v. City of San Diego, 120 Cal. 432, 52 Pac. 712.

The evidence sustains the finding of $500 damages.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

36 Cal. App. 352

HUNTINGTON v. VAVRA. (Civ. 1973.)

(District Court of Appeal, Second District, California. Feb. 21, 1918.)

1. Trial 🔑391—Findings of Fact—When Necessary.

Where the issue whether plaintiff, riding motorcycle, was contributorily negligent in collision with defendant's automobile was presented by evidence both pro and con, the court was required to make a distinct finding on such issue.

2. Trial 🔑404(1) — Findings of Fact — When Necessary.

In action for injuries in collision between motorcycle and automobile, finding that plaintiff was unable to avoid the collision, and that defendant's acts were the proximate cause of the injuries, does not inferentially determine the question of plaintiff's contributory negligence.

3. Appeal and Error 🔑1071(6)—Prejudicial Error.

The right to have a material issue presented by the pleadings in a cause determined by a finding of the court is one important to the parties to a suit, and the failure to make such a finding results in prejudicial error, entitling the complaining suitor to reversal.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by J. M. Huntington against A. Stephen Vavra. Judgment for plaintiff, and defendant appeals. Reversed.

Edward G. Kuster, Gilbert A. McElroy, Guy E. Maurice, and Clarence E. Fleming, all of Los Angeles, for appellant. William A. Spill, of Pasadena, for respondent.

JAMES, J. Defendant appeals from a judgment entered against him. Recovery was had in the lower court upon a cause of action charging that defendant had negligently operated an automobile on a public highway, and thereby caused a collision to occur between the automobile and a motorcycle upon which plaintiff was riding. In the answer filed the negligent acts charged against the defendant were specifically denied, and the affirmative defense was made that the accident was proximately caused by the plaintiff's own negligence. This defense of contributory negligence was alleged first in general terms, and it was then specified:

> "That one of said acts of negligence aforesaid on the part of plaintiff is that plaintiff at said time and place drove said motorcycle at a high and unlawful rate of speed, to wit, between 35 and 40 miles per hour."

Lincoln avenue in the city of Pasadena is a street having a clear roadway width of about 55 feet. Its direction is generally north and south. Entering the westerly side of this street and at an angle bearing to the north is Canada avenue, a street 30 feet in width. At the time of the accident, it being after nightfall, the defendant, operating an automobile, was traveling northerly along Lincoln avenue below the point where Canada avenue enters Lincoln. At the same time plaintiff, riding on a motorcycle, was traveling southerly on Lincoln avenue on the right-hand side of that street and north of the point where Canada avenue enters the first-named thoroughfare. In other words, the automobile and motorcycle were traveling in opposite directions, each in its lawful place on the right-hand side of the street and both approaching the intersection of Lincoln avenue with Canada avenue. Defendant resided at a point on Canada avenue westerly of Lincoln, and when he reached the point of intersection of the two streets made the turn to enter Canada avenue westerly. The motorcycle of the plaintiff traveling, as before noted, south on the westerly side of Lincoln avenue, failed to clear the automobile when the same had advanced across the westerly side of Lincoln avenue, with the result that a collision occurred by reason of which the motorcycle was badly damaged and plaintiff suffered some physical injuries. No point seems to be seriously advanced that there was not sufficient evidence to warrant the court in finding, as it did, that the defendant negligently and without warning turned his automobile across the roadway in front of the motorcycle of the plaintiff, as charged in the complaint. The chief point made by appellant is that the court committed prejudicial error in failing to find upon a material issue proposed by the answer, to wit, as to the contributory negligence charged against the plaintiff. Appellant has set forth in the brief sufficient of the testimony to show that there was evidence before the court respecting the rate of speed at which plaintiff was traveling at the time he sufferer his injuries, indicating that he was traveling at a speed in excess of the maximum rate provided by law. Motor Vehicle Act of 1913 (St. 1913, p. 649), § 22, subd. "b." There was also evidence to the contrary. Hence it appears that the case is not one where, assuming an absence of finding upon the question, the court either will presume that there was no evidence to support the issue, or that the evidence without conflict negatived the plea of contributory negligence, such as was held in Roberts v. Hall, 147 Cal. 434, 82 Pac. 66; Callahan v. James, 141 Cal. 291, 74 Pac. 853; Klokke v. Escailler, 124 Cal. 297, 56 Pac. 1113.

[1] There being a material issue presented and evidence both pro and con affecting the facts concerned in the issue, the court was required to make a distinct finding upon the matter. Tucker v. United Railroads et al., 171 Cal. 702, 154 Pac. 835.

[2] Counsel for respondent argues that, while no specific finding is made as to the issue of contributory negligence, the facts in the findings made by the court are inferentially determined adversely to the defendant's plea. We have examined with much care the findings as made by the court and are not prepared to agree that the facts are determined as to the issue of contributory negligence at all. The findings generally recite the specifications made by the complaint affecting the negligent conduct of the defendant. In the last paragraph of the findings it is stated by the court "that the plaintiff was unable to avoid said collision," and "that the acts of the defendant aforesaid were the direct and proximate cause of the said injuries and damage and all of them. * * *" These are the two chief clauses to be found in the findings and to which our attention is urged by respondent as inferentially determining the issues referred to. The fact that the plaintiff may have been unable to avoid the collision would be wholly consistent with the fact also that he may have been traveling on his motorcycle at an unlawful and negligent rate of speed, and so caused himself to be placed in such a situation that he was "unable to avoid the collision." As to the find-

ing that the acts of the defendant were the "direct and proximate cause of the said injuries and damage and all of them," it may well have been that the plaintiff was guilty of acts which contributed proximately to cause the injurious consequences which resulted.

[3] The right to have a material issue presented by the pleadings in a cause determined by a finding of the court is one important to the parties to a suit, and the failure to make such a finding results in prejudicial error, entitling the complaining suitor to reversal.

For the reasons given, the judgment appealed from is reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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36 Cal. App. 372

GREENE v. LOCKE-PADDON CO. et al.

(Civ. 2315.)

(District Court of Appeal, First District, California. Feb. 23, 1918. Rehearing Denied by Supreme Court April 24, 1918.)

1. Contracts ⚷270(1) — Rescission — Laches.

One having a right to rescind a contract must make the offer promptly upon discovering the facts entitling him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind under Civ. Code, § 1691.

2. Contracts ⚷270(1) — Rescission — Knowledge of Facts—Laches.

In such case, notice of facts and circumstances which would put an ordinarily prudent and intelligent man on inquiry is equivalent to knowledge of all the facts which a reasonably diligent inquiry would disclose.

3. Vendor and Purchaser ⚷119—Rescission—Laches.

Where the purchaser of land was told a number of times by his tenants as to character of soil and continued to make payments for 20 months, and, after an examination by himself, attempted for a month to sell before offering to rescind, he was guilty of laches.

4. Evidence ⚷317(10)—Hearsay.

Testimony of a purchaser of land attempting to rescind, as to what a soil expert told him concerning the land, was hearsay.

Appeal from Superior Court, Alameda County; N. D. Arnot, Judge.

Action by George A. Greene against the Locke-Paddon Company and others. Judgment for plaintiff, and defendants appeal. Reversed.

Norman A. Eisner, of San Francisco, for appellants. J. C. Murray and H. H. McPike, both of San Francisco, for respondent.

KERRIGAN, J. This is an appeal by defendants in an action brought by the plaintiff to rescind a contract of purchase of real property on the ground of fraudulent misrepresentations.

At and prior to the month of January, 1913, the Locke-Paddon Company was a corporation engaged in the real estate business in Alameda, Solano, and other counties. During that month, according to the findings of the trial court, the Locke-Paddon Company, through one of its agents, fraudulently induced the plaintiff to purchase the land described in the complaint. This finding being conclusive here, we are at once led to a consideration of the main point in the case, namely, whether the plaintiff's right of action was barred by laches.

As before stated, plaintiff and the Locke-Paddon Company entered into a contract for the sale and purchase of certain land in the month of January, 1913. Notice of rescission of this contract was given by the plaintiff in September, 1914, one year and eight months after the execution of the contract, during which time the plaintiff was in possession of the land. A consideration of the evidence in this case constrains us to hold that the plaintiff's right of rescission was barred by his laches.

According to his own testimony, within two months after the purchase his brother, who investigated the land for him at his request, reported that he had purchased "a gravel pit." About the time of this report by his brother, the plaintiff learned from a man with whom he had agreed to farm the land in question on shares (it having been purchased as agricultural land of good quality) that it was too hard to cultivate, and that he had "plowed around it once and had to give it up." Although plaintiff was an experienced farmer and familiar with the occurrence of hardpan in soil, still he made no inquiries concerning the reason of the failure of his associate to proceed with the cultivation of the land, concluding, he stated, that following a dry winter the land was too hard to plow. The next rainy season having arrived, the plaintiff succeeded in effecting an arrangement to have the land farmed on shares; but the result was unsatisfactory, the crop taken off of the 13 acres being but 1 ton of hay and 16 sacks of barley. In June of 1914, the plaintiff for the first time personally examined the land, although he lived within less than half a day's journey of it by railroad, which he could have taken at an expense of $3. In the following month the plaintiff wrote to Locke-Paddon Company, asking that company to sell the land for him for $1,000, and saying that he was not in a position to live on the land and work it himself, and that he was therefore willing to incur the loss which he would sustain by selling it at that price, provided a quick sale could be made. No sale of the land having been effected under this invitation, he caused a further examination of it to be made; and then learning, as he stated, that the land was worth but $50, and not $170, per acre, as claimed by the vendor at the time of the sale, and that it was not fit for the purposes represented, he attempted to rescind the contract.

[1, 2] One having a right to rescind a contract must make the offer promptly upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind. Civ. Code, § 1691. And notice of facts and circumstances which would put an ordinarily prudent and intelligent man on inquiry is, in the eye of the law, equivalent to knowledge of all of the facts which a reasonably diligent inquiry would disclose. Garstang v. Skinner, 165 Cal. 721, 134 Pac. 329; Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 Pac. 809.

[3] As shown by our references to the evidence in the case, the plaintiff was repeatedly put upon notice as to the inferior character of the land, yet for nearly two years made no attempt to rescind. The land was at all times open and accessible to inspection, and although often warned as shown by his own testimony, concerning the nature of the soil he took no steps to assert his rights, but, on the contrary, farmed and rented and tried to sell the land, and during a period of about two years continued to make the periodical payments provided for in his contract of purchase; and in July, a month after he personally inspected the land, it appears that he affirmed the contract by trying to sell the farm. Applying the rule of law as established by the Code and the authorities on the subject of the right of rescission and the necessity for its prompt exercise, we think, upon a review of the evidence, that it results from it that the plaintiff had lost his right to rescind the contract by his delay in pursuing with reasonable diligence a proper inquiry into the character of the land bought by him, after having been, as we conceive he was, put upon inquiry, and by his delay in asserting his right after obtaining the knowledge which his tardy investigation led to.

[4] The testimony of plaintiff as to what the soil expert told him concerning the character of the land was material, but hearsay, and clearly inadmissible.

The conclusion we have reached on the main point in the case renders unnecessary a discussion of other points made in the briefs, although, as the case must be reversed and remanded for a new trial, it may not be amiss to say that we do not quite understand, in view of the present condition of the record, how the court was able to find in favor of the plaintiff as against the defendants W. L. Adamski and Mary Adamski, purchasers of the land from the Locke-Paddon Company after the contract with the plaintiff was made.

The judgment is reversed.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

36 Cal. App. 410

INGLE MFG. CO. v. SCALES. (Civ. 2105.)

(District Court of Appeal, Second District, California. Feb. 28, 1918.)

1. Assignments 🔑119—Collection—Right to Sue.

A mere assignment for collection, when sufficient in form to vest the legal title in the assignee, authorizes him to prosecute the action.

2. Assignments 🔑119—Rights of Action—Validity.

Where a claim has been assigned for the purpose of having it included in a suit to be brought by the assignee upon other demands, and so avoid the trouble and expense of a separate action, the title passes to the transferee, and he may maintain the action.

3. Assignments 🔑126—Rights of Action—Validity—Defenses.

The plea of ultra vires, as applied to plaintiff's right to receive an assignment of the assignor's interest in the contract sued upon, is not available to the defendant, who owes the debt.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the Ingle Manufacturing Company against J. H. Scales. From a portion of the judgment for plaintiff, defendant appeals. Affirmed.

Joel W. West, of San Diego, and J. C. Needham, of Modesto, for appellant. Hendee, Rodabaugh & Mark, of San Diego, for respondent.

CONREY, P. J. The defendant appeals from that part of the judgment which was based upon the third cause of action set out in the complaint. This cause of action was based upon a contract of the defendant to pay to one Robert Deyo a commission for services rendered in procuring an exchange of real property between defendant Scales and another person. As to this cause of action plaintiff sued as assignee of Deyo. Appellant contends that the evidence was not sufficient to prove an assignment of Deyo's right to the commission, that no consideration for the assignment was proved, and that the plaintiff had no right to receive the assignment.

The third point is based upon the limitations contained in plaintiff's articles of incorporation expressing the purposes of its creation, which purposes did not include the business of agency for transfers of real property or the business of collecting claims for other persons. The instrument of assignment signed by Deyo purported to transfer to plaintiff "all my right, title, and interest in and to a certain agreement for the exchange of real property, executed on the 28th day of May, 1915, by W. A. Bolton, and accepted on the 29th day of June, 1915, by J. H. Scales, in which said agreement I am named as the agent for each of said parties for the exchange of the properties described in said agreement." The exchange agreement between Bolton and Scales bore the dates May 20, 1915, and June 4, 1915. The

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

dates in the contract are thus shown to be different from the dates in the assignment. It was, however, shown by the testimony of Deyo that at the time of the assignment the said contract was the only written agreement or contract that he had with Scales. By the terms of that contract Scales agreed that on the making of the exchange he would pay to Deyo, "as per separate agreement, commission for such services," etc. The amount of this commission was proven by parol. No objection is urged that the evidence determining this amount was only in parol. At least the agent was entitled, under the writing alone, to a reasonable compensation for his services. Muncy v. Thompson, 26 Cal. App. 634, 147 Pac. 1178. Appellant does not rely upon any contention that the amount of the commission as allowed was not proved to be reasonable, and there is evidence tending to show that it was a fair and reasonable amount for the services rendered.

[1, 2] There is some evidence tending to show a valuable consideration for the assignment of the claim here in question. Moreover, a mere assignment for collection, when sufficient in form to vest the legal title in the assignee, authorizes him to prosecute the action. Where a claim has been assigned for the purpose of having it included in a suit to be brought by the assignee upon other demands, and so avoid the trouble and expense of a separate action, the title passes to the transferee, and he may maintain the action. Hopkins v. Contra Costa County, 106 Cal. 566, 572, 39 Pac. 933; Kelley v. Hampton, 22 Cal. App. 68, 133 Pac. 339. That was the case here.

[3] The plea of ultra vires, as applied to plaintiff's right to receive an assignment of the assignor's interest in the contract sued upon, is not available to the defendant, who owes the debt. In Savings Bank of San Diego v. Barrett, 126 Cal. 413, 58 Pac. 914, the plaintiff was prosecuting the action to foreclose a mortgage made to it by the defendant. The sole consideration for that mortgage was the surrender and delivery to him by the plaintiff of another note and mortgage, which had been executed by the defendant to another person, and which had been transferred to the plaintiff. The defendant attempted to resist foreclosure upon the ground that the plaintiff was incapable of purchasing or becoming the owner of the former note and mortgage; that, notwithstanding the transfer of said note and mortgage to plaintiff, they were worthless in its hands. It was held that:

> "Whether the purchase of the mortgage in question was 'such as the purposes of the corporation required' was to be determined by its board of directors, * * * and is not open to investigation at the instance of the defendant. The plaintiff, therefore, by its purchase of the Hamilton note and mortgage, became vested with the title thereto, and with the right to enforce their obligation against the defendant."

See, also, Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 622.

The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

(36 Cal. App. 356)

NATHAN v. PORTER et al. (Civ. 2321.)

(District Court of Appeal, First District, California. Feb. 21, 1918. Rehearing Denied March 22, 1918; Denied by Supreme Court April 22, 1918.)

1. APPEAL AND ERROR 🔑2—STATUTES—MOTION FOR NEW TRIAL.

Though plaintiff had initiated his motion for new trial prior to the adoption and operation of St. 1915, p. 209, amending Code Civ. Proc. § 963, limiting the right to appeal from the judgment only, the law in effect at the time of the entry of the order denying motion for new trial must control, so that the purported appeal therefrom was in and of itself of no avail.

2. APPEAL AND ERROR 🔑873(3) — APPEAL FROM JUDGMENT—REVIEW OF MOTION FOR NEW TRIAL—STATUTE.

By direct provision of Code Civ. Proc. § 956, as amended by St. 1915, p. 328, on an appeal from a judgment, the appellate court, among other things, may review an order or motion for new trial.

3. APPEAL AND ERROR 🔑620—APPEAL BEFORE DETERMINATION OF MOTION FOR NEW TRIAL—RECORD—STATUTES.

Under Code Civ. Proc. § 963, as amended by St. 1915, p. 209, in effect August 8, 1915, which discontinued the right to appeal from an order denying new trial, Code Civ. Proc. § 956, as amended by St. 1915, p. 328, in effect August 18, 1915, relating to the scope of an appeal from a judgment, and Code Civ. Proc. § 650 et seq., as amended by St. 1915, p. 207, relating to the form and requirements of the record on which a motion for new trial may be based, where judgment was made and entered January 27, 1914, notice of appeal therefrom was served and filed May 1st, and on April 14th and 15th plaintiff served and filed his notice of intention to move for new trial which specified such motion would be made on a bill of exceptions to be thereafter prepared, and November 17, 1915, the court below entered an order denying defendant's motion for new trial, and on December 17th and 18th plaintiff gave and filed his notice of appeal from such order, under Supreme Court rule 2 (119 Pac. ix), the appeal from the judgment, though taken before determination of the motion for new trial, did not need to be accompanied by a record showing the evidence and rulings until after determination of the motion when the bill of exceptions used on hearing of the motion could be transmitted to the appellate court and in connection with the judgment roll be considered the record in support of the appeal from the judgment.

4. APPEAL AND ERROR 🔑873(3)—REVIEW—MOTION FOR NEW TRIAL—SECOND APPEAL—STATUTE.

Plaintiff was not required to wait until his motion for new trial was determined before taking an appeal from judgment against him, and Code Civ. Proc. § 939, having deprived him of right to appeal from the order denying new trial, but giving him 30 days after denial of the motion to appeal from the judgment, it is not necessary, to bring the merits of the motion for new trial before the appellate court, that he file second appeal from the judgment.

5. Appeal and Error ⚷13—Right to Appeal—Pending Appeal.

Having filed a valid appeal from the judgment against him, plaintiff was precluded from taking a second appeal while the first was pending and undetermined.

6. Appeal and Error ⚷625 — Lack of Procedure—Adoption—Statute.

Under Code Civ. Proc. § 187, though apparently no procedure is provided for transmitting to the appellate court the record used as basis for motion for new trial in case where appeal from judgment had been rightfully taken in advance of determination of motion, it is permissible, to permit case to be disposed of on merits, to adopt any suitable procedure, which, conformably to the Code, would achieve the result.

7. Appeal and Error ⚷873(3)—Review—Record.

Where the bill of exceptions used on hearing of plaintiff's motion for new trial, duly authenticated, is included in the transcript, which, by stipulation, constitutes the record on appeal from the judgment, plaintiff having rightfully appealed from the judgment which involves review of the merits of the motion for new trial, on the record the appellate court may discuss and decide an error of law occurring at the trial which plaintiff urges was prejudicial and sufficient to warrant reversal.

8. Contracts ⚷153 — Construction—Statute.

Considering and construing a contract in the light of Civ. Code, § 1641, providing that the whole of a contract is to be taken together so as to give effect to every part, if reasonably practicable, some reasonable effect, if possible, must be given not only to the contract as a whole, but as to the meaning and effect of a modifying clause.

9. Mines and Minerals ⚷79(3)—Oil Lease —Construction—"Net Proceeds."

Where an oil lease indicated that net profits were to be determined by deducting from the gross income only the royalty and operating expenses, as distinguished from capital expenses, the words "net proceeds," as used in a modifying clause, providing that after the first four years at least half of a certain 15 per cent. of the net proceeds derived from the business should be paid to the first party, meant net profits.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Net Proceeds.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Louis Nathan against Jessie G. Porter, as executrix, etc., O. Scribner, and the Arica Oil Company. From a judgment for defendants, plaintiff appeals. Reversed, and cause remanded for new trial.

Louis H. Brownstone, of San Francisco, and Alton M. Cates, of Los Angeles, for appellant. Edmund Tauszky, of San Francisco, for respondents.

LENNON, P. J. Viewing the appeal as one only from the judgment and conceding the correctness of the contention that we are foreclosed, because of a technical imperfection of the record before us, from considering the sufficiency of the evidence to support the trial court's findings of fact, nevertheless we are of the opinion that that record, consisting of the judgment roll and the bill of exceptions prepared and presented in support of the purported appeal from an order denying a new trial, will, when considered as a single record supporting the appeal from the judgment, suffice to warrant and enable a discussion and decision of the correctness of the trial court's order denying the plaintiff a new trial.

The record shows that the judgment was made and entered on the 27th day of January, 1914; that notice of appeal therefrom was served and filed on May 1, 1914; that respectively on April 14 and 15, 1914, the plaintiff served and filed his notice of intention to move for a new trial, which specified that such motion would "be made upon a bill of exceptions to be thereafter prepared" and designated as the grounds of the motion (1) the insufficiency of the evidence to justify the decision, (2) that the decision was against law, and (3) errors of law occurring at the trial; that on November 17, 1915, the court below entered an order denying the plaintiff's motion for a new trial; and that respectively on December 17 and 18, 1915, the plaintiff gave and filed his notice of appeal from the said order.

[1] Admittedly the amendment to section 963 of the Code of Civil Procedure, which discontinued the right to appeal from an order denying a new trial save in certain excepted cases of which the present case is not one, was in operation at the time when the order denying a new trial was entered and at the time when the plaintiff purported to appeal therefrom. Stats. 1915, p. 209, in effect August 8, 1915. Therefore it must be held that, even though the plaintiff had initiated his motion for a new trial prior to the adoption and operation of the law limiting his right to appeal from the judgment only, the law in effect at the time of the entry of the order denying the motion for a new trial must control, and, as a consequence, the purported appeal therefrom was, in and of itself, of no avail. Woodruff v. Colyear, 172 Cal. 440, 156 Pac. 475.

[2] Of course, that appeal cannot be considered, and, in strictness, should be dismissed; but it does not follow that a review of the merits of the motion for a new trial must fall with the attempted appeal from the order denying a new trial. The statute, section 956 of the Code of Civil Procedure, relating to the scope of an appeal from a judgment as amended contemporaneously with the amendment to the law abolishing the right to an appeal from the order denying a new trial, provides that, upon an appeal from a judgment, this court may, among other things review "any order on motion for a new

trial." Stats. 1915, p. 328, in effect August 18, 1915.

Although the record shows that the bill of exceptions, upon which the motion for a new trial was made and heard, was not filed as engrossed until August 30, 1915, still the record also shows that the bill of exceptions was prepared by counsel for plaintiff in the month of April, 1915, and settled, allowed, and approved by the trial judge on August 7, 1915, just one day in advance of the taking effect of the amendment abolishing appeals from an order denying a new trial.

[3] As we read sections 650 et seq. of the Code of Civil Procedure which were likewise contemporaneously amended (St. 1915, p. 207) and which relate to the form and requirements of the record upon which a motion for a new trial may be based, we do not understand that the right to resort to a bill of exceptions in support of a motion for a new trial grounded upon errors of law occurring during the trial has been abrogated. But however that may be, the law at the time the plaintiff gave his notice of intention to move for a new trial gave him the right to rely upon a bill of exceptions to be subsequently prepared in support of the motion, and therefore, regardless of his right to appeal from the order denying the motion, the motion itself necessarily must have been heard upon the record prepared and noticed for the hearing.

Apparently the appeal from the judgment and the purported appeal from the order were taken pursuant to the provisions of the old method of appeal and may, for the purposes of this discussion, be considered as having been taken only under that method. Having been taken under that method, doubtless counsel for plaintiff assumed, as he was justified in doing, that, under rule 2 of the Supreme Court (119 Pac. ix), his appeal from the judgment, even though taken in advance of the determination of his motion for a new trial, need not be accompanied by a record showing the evidence and the rulings of the trial court until after a hearing and determination of the motion for a new trial, when, if he saw fit, the bill of exceptions used upon the hearing of the motion would be transmitted to the higher court, and there, in conjunction with the judgment roll, be considered the record in support of the appeal from the judgment.

[4, 5] Manifestly the plaintiff was not required to wait until his motion for a new trial was determined before taking an appeal from the judgment. He might take that appeal separately at any time within the time prescribed by the statute, and it will not do to say, as has been suggested, that, the law having deprived him of the right to appeal from the order denying the new trial but giving him thirty days after the denial of the motion to appeal from the judgment (Code Civ. Proc. § 939), he should, in order to bring the merits of the motion for a new trial before this court, have filed a second appeal from the judgment. Having filed, in the first instance, a valid appeal from the judgment, the plaintiff was precluded from taking a second appeal while the first was pending and undetermined. Hill v. Finnigan, 54 Cal. 311; Brown v. Plummer, 70 Cal. 337, 11 Pac. 631; Tompkins v. Montgomery, 116 Cal. 121, 47 Pac. 1006.

[6] While it is true that the law as now written apparently provides no procedure for transmitting to the appellate court the record used as the basis for a motion for a new trial in a case where an appeal from a judgment has been rightfully taken in advance of the hearing and determination of the motion, nevertheless, in the absence of such provision, it would be permissible, for the purpose of permitting the case to be disposed of on its merits rather than upon a technicality, to adopt any suitable procedure which, conformable to the spirit of the Code, would achieve the desired result. Code Civ. Proc. § 187.

[7] Thus, if in the present case the bill of exceptions used upon the hearing of the motion did not appear duly authenticated in the record before us, we would be privileged to bring it here upon a proper showing in response to a suggested diminution of the record. The bill of exceptions, however, duly authenticated by the trial judge, is included in the transcript which, by stipulation of respective counsel, constitutes the record upon appeal from the judgment. This being so and the plaintiff having rightfully appealed from the judgment which involves a review of the merits of the motion for a new trial, we have no doubt but that, upon the record before us, we may at least discuss and decide an error of law occurring at the trial which the plaintiff urges was prejudicial and therefore sufficient to warrant a reversal of the judgment.

In this connection the record shows that the trial court, over objection of plaintiff, permitted the defendants to show the expenditures of every kind and character which were made by the defendants in the operation of the oil company from the time operations commenced under the lease from the railroad company up to and including January 31, 1909. This ruling of the trial court, which in effect was a holding that any evidence of "capital expenses" incurred subsequent to the year 1906 was material, evidently was made upon the theory that the third and concluding clause of the contract in suit was meaningless and therefore could not be considered as a part of the contract. That clause is as follows:

"It is understood and agreed by and between the parties hereto that after the first four years of the first term of said lease at least one-half of the said fifteen per cent. of the net proceeds derived from said business shall be paid to said first party hereto. The foregoing clause is intended to modify clauses with which it is in conflict."

The date of the original lease was December 18, 1902. The date of the contract in suit was September 8, 1903, and the suit was filed February 26, 1912. Necessarily therefore the question of the correctness of the trial court's ruling involves a construction of the contract.

[8] Section 1641 of the Civil Code provides that:

> "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

Considering and construing the contract in the light of that Code requirement, some reasonable effect must, if possible, be given not only to the contract as a whole but as to the meaning and effect of the modifying clause as well.

[9] This may be done, we think, in keeping with what may be fairly said to be the intent of the parties, by interpreting the words "net proceeds" as used in the modifying clause to mean net profits which, as the contract sufficiently indicates, were to be determined by deducting from the gross income only the royalty and operating expenses, as distinguished and considered apart from "capital expenses." This, it is true, might or might not have resulted in the plaintiff's receiving under the 7½ per cent. allotted to him by the modifying clause as large a portion of the proceeds as he would have received under the 15 per cent. clause; but in any event the 7½ per cent. would not be dependent at all upon the costs of capitalization, but only upon the sum total of royalty and operating expenses. To hold then, as the court below did, that even after the first four years of the lease plaintiff was entitled to nothing unless not only operating expenses but also capital expenses were deducted, would nullify the purpose and intent of the modifying clause. This being so, there is, it seems to us, no escape from the conclusion that the ruling complained of was erroneous and prejudicial.

This conclusion is fortified by a reference to the defendants' answer to the original complaint wherein it was admitted that there was $1,488.48 due to the plaintiff and the method of arriving at this result, as shown by the testimony of defendants' accountant, was by deducting from the net income (that is, the amount of oil produced less the royalty to the railroad) the operating expenses (as distinguished from capital expenses) and taking 7½ per cent. of the net gain so found.

The judgment is reversed, and cause remanded for a new trial.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

36 Cal. App. 398

AMUNDSON v. SHAFER. (Civ. 2060.)

(District Court of Appeal, Second District, California. Feb. 27, 1918. Rehearing Denied April 1, 1918. Rehearing Denied by Supreme Court April 25, 1918.)

1. APPEAL AND ERROR ⊂⊃1040(10) — HARMLESS ERROR—OVERRULING DEMURRER.

In an action for unlawful detainer, that plaintiff's complaint was uncertain as to whether rent alleged to be due was due to plaintiff doing business under a fictitious name or to the company, the uncertainty not relating to substantial or material matter, did not affect or prejudice defendant, whose demurrer for uncertainty was overruled, since a compliance with Civ. Code, §§ 2466, 2468, requiring the filing of a certificate as a prerequisite to the right of a person doing business under a fictitious name to maintain an action concerning the affairs of the business, need not appear on the face of the complaint.

2. APPEAL AND ERROR ⊂⊃1040(10)—HARMLESS ERROR—OVERRULING OF DEMURRER.

A judgment will not be reversed on appeal because the trial court erroneously overruled a demurrer to the complaint on the ground of uncertainty, where the substantial rights of defendant have not been prejudiced and the cause has been tried on the merits.

3. TRIAL ⊂⊃395(8)—FINDINGS—SIGNATURE — DIRECTORY STATUTES.

Code Civ. Proc. § 634, providing that the court, where it directs a party to prepare findings, shall not sign the same prior to expiration of 5 days from service of a copy thereof on all parties, is directory only, and trial court may, whenever compliance would work injustice, disregard provision.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge Passing on Demurrer, and G. W. Nicol, Judge Trying Cause.

Action by Victoria C. Amundson against George W. Shafer. Judgment for plaintiff, and defendant appeals. Affirmed.

S. C. Schaefer, of San Pedro, for appellant. Courtney Lacey, of Los Angeles, for respondent.

WORKS, Judge pro tem. [1, 2] This is an action of unlawful detainer, in which the defendant appeals from a judgment in favor of the plaintiff. The amended complaint alleges, among other things, that the plaintiff is a married woman, but that "the matters alleged in this complaint" concern her sole and separate estate; that "the plaintiff herein is, and was during all the times herein mentioned, the sole owner and proprietress of that certain business carried on under the name of the Amundson Drug Company," in the city of Los Angeles; that the defendant has been in possession of a certain portion of a storeroom in Los Angeles "under an agreement with plaintiff for the renting thereof from month to month"; and that on August 30, 1915, "the plaintiff" notified the defendant, in writing, that from and after October 1, 1915, the terms of defendant's lease would be changed so that there would be due from him for rent upon the premises occupied by him the sum of $100 per month. A copy of the notice was attached to the pleading as an exhibit, and it was signed, "Amundson Drug Company, by Victoria C. Amundson." The amended complaint also alleges that the defendant remained in possession of the premises occupied by him from the time of service of the notice until the commencement of the action; that, on October 5, 1915, "the plaintiff" made of defendant a demand in writing for the "payment of said rent"; and that a copy of the demand is attached to the pleading as an exhibit. The demand is signed "Amundson Drug Company, by Victoria C. Amundson." It is also alleged in the amended complaint that defendant neglected and refused to comply with the demand, and that he held over after default in the payment of rent. A demurrer, both general and special, was interposed to the amended complaint. The special grounds of demurrer were, in part, that the amended complaint was uncertain because it could not be ascertained from it whether the agreement for renting was made by plaintiff in her individual capacity or in the name of the Amundson Drug Company, or whether the rent alleged to be due was due to plaintiff or to the Amundson Drug Company. The assaulted pleading is uncertain in the respects mentioned, but the uncertainty is not related to substantial or material matters. The argument of the appellant upon the question of uncertainty has behind it the contention that an individual doing business under a fictitious name must affirmatively show, in a complaint based upon a right affecting or which is the property of the business, that he has complied with the provisions of sections 2466 and 2468 of the Civil Code. Those sections require the filing and publication of a certain certificate as a prerequisite to the right to maintain actions concerning the affairs of such a business. But a compliance with their provisions need not appear upon the face of a complaint. If the fact be that the person maintaining such an action has not complied with the sections mentioned, the point may be presented as a defense by way of plea in abatement. Holden v. Mensinger, 165 Pac. 950. That being so, the appellant was not prejudiced, nor was any substantial right of his affected, by the uncertainties of the amended complaint. If he had any defense upon the merits, it could have been pleaded in his answer in the same manner, whether he regarded the amended complaint as setting up a cause of action belonging to Victoria C. Amundson, or to the Amundson Drug Company. Looking at the pleading as based upon a cause of action owned by the drug company, the appellant could have ascertained by an examination of public records whether the certificate required by law had been filed, and could either have presented, or refrained from presenting, his plea in abatement, as the showing of record might allow. He made no such defense, although he filed an answer which raised various other issues. Upon the amended complaint and upon this answer the parties went to trial on the merits. It has been decided in many cases that a judgment will not be reversed on appeal because the trial court has erroneously overruled a demurrer to the complaint on the ground of uncertainty, where the substantial rights of the defendant have not be prejudiced by the ruling and the cause has been tried on the merits. Jager v. California Bridge Co., 104 Cal. 542, 38 Pac. 413; Brown v. Ratliff, 21 Cal. App. 282, 131 Pac. 769. These authorities, and others which might be cited, control the point now under consideration. Section 634 of the Code of Civil Procedure provides:

> "In all cases where the court directs a party to prepare findings, a copy * * * shall be served upon all the parties * * * at least five days before findings shall be signed. * * * and the court shall not sign any findings therein prior to the expiration of such five days."

In this case the trial court gave a specific direction to the counsel for plaintiff to prepare the findings, a copy of the proposed findings was served upon counsel for the defendant, but the trial judge signed the findings less than five days after the service.

[3] The appellant contends that it was error, from which a reversal of the judgment must follow, for the judge to have signed the findings within the time limited by the statute. Section 634 was enacted in 1913 in its present form, but the particular question now presented by appellant has never been passed upon by the Supreme Court or Courts of Appeal, although it is mentioned in Hoffman v. Guy M. Rush Co., 27 Cal. App. 167, 149 Pac. 177. The section was adopted for the purpose of aiding the courts in the making of proper findings of fact, but for that purpose only. It could have had no higher or greater purpose. All that a party can require or expect, as to this point, in any litigation, is that the court shall make, in his case, a proper set of findings. If findings are insufficient, or are unsupported by evidence, or are defective in any other particular under the law, the injured party will be relieved, on appeal, from the effects of the error thus made manifest. So far his interest goes and no further. Section 634 is directory only. So construed it is a salutary statute. If it were to be construed as mandatory, it would often operate to work injustice. There are many cases in which a delay in the signing of findings would so operate, and perhaps chief among them are cases like the present, cases of forcible or of unlawful detainer. Trial courts are justified in disregarding the direction contained in that part of section 634 which we have quoted, when-

ever a compliance with it would work injustice to the rights of a litigant.

There are several findings which the appellant assails as not being supported by the evidence, but the contention is groundless as to all such findings.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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36 Cal. App. 384

SOUZA v. FIRST NAT. BANK OF HANFORD et al. (Civ. 2250.)

(District Court of Appeal, Second District, California. Feb. 25, 1918.)

1. TRUSTS 🔑43(1) — PERSONALTY — ESTABLISHMENT BY PAROL.

A trust in personalty may be established by parol.

2. TRUSTS 🔑44(1) — PAROL TRUST — SUFFICIENCY OF EVIDENCE.

In an action by administratrix of estate of her deceased husband to recover money which was on deposit in defendant bank at the time of the husband's death, in which action it was asserted as a defense that the money was transferred to deceased's brother, also defendant, in trust for three minor children of deceased and plaintiff, evidence *held* insufficient to show creation of a valid parol trust in money; the proportion which children were to have in the fund and the duration of the trust not being sufficiently definite.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Belle Souza, as administratrix of the estate of Jose A. Souza, deceased, against the First National Bank of Hanford and another. Judgment for defendants, and plaintiff appeals. Reversed.

Frank B. Graves, of Hanford, for appellant. H. Scott Jacobs, of Hanford, for respondents.

JAMES, J. This action was brought by Belle Souza as administratrix of the estate of her deceased husband, Jose A. Souza, to recover for the estate represented by her, money which was on deposit with the defendant bank at the time of Souza's death. At that time the money was in a savings account, and from the bank records appeared to have been payable either to Jose A. Souza, the deceased, or to John A. Souza, his brother. Defendant John A. Souza asserted in defense, and in this defense he was joined by the bank, that the money represented by the deposit had been transferred to him by his brother for the benefit of three minor children of the deceased and this plaintiff. In brief, it was asserted that a trust had been created as to the fund on deposit in the bank, with John A. Souza as trustee, for the benefit of the three minor children who were all living at the time of the death of Jose. The plaintiff asserted in her complaint that the money was a part of the community estate of herself and husband, but the evidence did not sustain that claim, and the point involved as to that issue is not here for consideration. The real question is as to whether a valid trust was created under which John A. Souza was entitled to take and hold the money, which had been the separate property of deceased, for the benefit of the minor children referred to. The evidence showed that for a number of years prior to his marriage with the plaintiff, deceased had lived with the latter, and one of the three children numbered among the minors mentioned herein was born during the time that the two persons occupied the relation of husband and wife without the sanction of a marriage ceremony. The last two children were born after the parties had entered into a legal marriage, and at the time of the death of Jose the minors were aged, respectively, 4 years, 2½ years, and 1 year. A part of the money constituting the deposit had been paid to deceased by plaintiff for work which the deceased did for her on her own property. This money, however, was paid prior to the time the marriage ceremony was performed. In about the year 1910 Jose made the deposit of about $1,200 with the defendant bank on savings account, and at the time of his death accumulated interest had augmented the original sum until the total was about $1,400. In January, 1915, Jose became very ill and was confined in a hospital at Hanford, Cal. John Souza testified that while in the hospital his brother sent for him and made a request regarding the handling of the money represented in the account which he had with the defendant bank. We will state all of the testimony referring to the matter of the creation of the alleged trust. John Souza testified that when he went to the hospital at Hanford he saw his brother and had a talk with him. When asked to state what was said by his brother Joe at that time, he replied:

> "Why, Joe was telling me that he had some money in the First National Bank; he said all the money he had he was going to give it to me to pay his bills and give it to his children; he told Bob he had some money in the Bank of Lemoore; he said he was going to fix it the same; he said he was going to turn it to me for me to pay his bills and keep the balance for the children; that's about all I remember about it."

The person referred to as "Bob" was R. V. Hall, an assistant cashier of defendant bank. Mr. Hall testified that at the suggestion of John Souza he went to the hospital to see the sick man, Joe; that Joe Souza was a Portuguese and understood little English, and that John Souza, apparently interpreting the language of Joe to witness, said that Joe was going to Oakland to consult a doctor there; that he had certain money in the First National Bank; that he wanted it fixed, if he never got back, that John was to have the money, and that the witness had replied that he would fix the deposit entries on the books of the bank so that the request could be carried out. He added that he did in fact make the change so that the money might be drawn upon the check of either Jose or John. The court made this inquiry of the witness Hall:

> "Q. Did he [Jose] say for what purpose he wanted it to go to John A. Souza? A. I can only answer that—John A. Souza told me that his brother wanted him to have the use of this money in case of his death for the support of two children or his direct heirs; his children; that the wife of Joe Souza had some other children, and he was afraid that the wife would spend this money on the other children, and he wanted his own children to have the use and benefit of this money; I then turned and asked Joe if that was correct; he said, 'Yes.'"

The witness John A. Souza, being further examined as to what was said to him by Joe at the Hanford Hospital, replied:

> "I asked Joe what he give me his money for; he said, 'I give you my money for you to pay the doctor bills and hospital bills, and keep the balance for the keep of my children, when they need it;' that's all I remember."

Antone Souza, another brother of deceased, testified:

> That in the hospital in Oakland he heard Joe Souza tell John, the brother, "to hold the money; to take the money, part of the money, and pay the bills, and hold the balance for his children."

It may be noted that Hall testified that Joe referred to two children only. Not only did the testimony of the plaintiff show that there were three minor children, as we have before stated, but the answer of both defendants specifically set forth the names and ages of three minor children of deceased. The court found that a trust had been created as to the fund here in controversy, and that the money was no part of the estate of Jose Souza, deceased. The judgment determined that John A. Souza was entitled to the possession of the money, conditioned upon his executing a bond to the state of California in the sum of $2,800 to insure the faithful execution of the trust. That part of the judgment determining the trust and the character and purpose of it is as follows:

> "That defendant John A. Souza do have and recover judgment against plaintiff and against defendant First National Bank of Hanford, adjudging and decreeing that said defendant John A. Souza is the owner and entitled to the possession of all the money mentioned in the complaint and findings in said action, amounting to $1,398.38, in trust for the use and benefit of the minor children of Jose A. Souza, deceased, to wit, Edward Souza, Mary A. Souza and Josephine E. L. Souza. * * *"

[1] Appellant very earnestly contends that the evidence was insufficient to show the creation of a valid trust as to this money. That a trust as to personal property may be established by parol is well settled. Roach v. Caraffa, 85 Cal. 436, 25 Pac. 22; Silvey et al v. Hodgdon et al., 52 Cal. 363; Cahlan v. Bank of Lassen County, 11 Cal. App. 533, 105 Pac. 765; Hellman v. McWilliams, 70 Cal. 449, 11 Pac. 659; Booth et al. v. Oakland Bank of Savings et al., 122 Cal. 19, 54 Pac. 370. The case last cited and the case of Hellman v. McWilliams, supra, are also authority to the point that where the trustor retains the right to check against a deposit which is made the subject of a trust agreement, the transfer may, nevertheless, be effectual as to the trustee. The real difficulty we encounter in this case is to find that the particular purpose, the proportion of interest which the minors were to have in the trust fund, and the duration of the trust, were made sufficiently definite by the expressions of the trustor. The evidence as to the declarations made by Jose Souza shows that nothing was said by the latter as to how long the brother John was to retain the fund, nor as to how it should be applied on behalf of the minors. We have already noted that, according to the testimony of Hall, only two children were mentioned by Jose as being those whom he wished to have the benefit of the money; but we may well assume that the court was correct in concluding that the intention was that the money should be held for the benefit of the three minor children who were shown to be in existence at the death of Jose and at the time of the creation of the alleged trust. It may be that the intention of Jose was that the fund should be used for the benefit of the children during their minority, and any residue that remained should be divided equally between them upon the youngest becoming of age; it may be that his intention was that the minors should have the right to the money immediately upon his death, through the medium of his brother John in some sort of guardian capacity. The very fact that these speculations suggest themselves as defining the possible intent that Jose Souza had in mind at the time he gave his directions to John at once illustrates the uncertainty which would attend the administration of the alleged trust. In Wittfield v. Forster, 124 Cal. 418, 57 Pac. 219, our Supreme Court was considering the question of the validity of an alleged trust which was attempted to be created, where the trustor executed a document in writing, stating that he conveyed to one Foster, "as trustee in trust for San Diego Lodge No. 35, Free and Accepted Masons, of the State of California, all the property I now own, both real and personal. * * *" In determining that the trust so attempted to be created was void for uncertainty, the court first quoted from Pomeroy's Equity Jurisprudence as follows:

> "The declaration of trust, whether written or oral, must be reasonably certain in its material terms; and this requisite of certainty includes the subject-matter of property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interest which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general, or equivocal that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail."

And applying the rule of essentials, as stated by the text-writer, to the trust there being considered, the court said:

> "The duration of the estate attempted to be granted to the trustee, the nature and quantity of interest which the beneficiaries are to have, and the manner in which the trust is to be performed, are all left undeclared and without any reasonable certainty. * * * And this uncertainty also makes the attempted trust as to the personal property void."

We also cite, as in part applicable, the decision in the case of Barker v. Hurley, 132 Cal. 21, 63 Pac. 1071, 64 Pac. 480.

[2] In our opinion, the evidence was insufficient to show the creation of a valid trust as to the money in controversy.

The judgment is therefore reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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36 Cal. App. 406

BENTON v. HUNT, County Treasurer (LYONS, Intervener). (Civ. 2485.)

(District Court of Appeal, Second District, California. Feb. 27, 1918. Rehearing Denied by Supreme Court April 25, 1918.)

OFFICERS 🔑55(1) — VACANCIES — ABSENCE FROM STATE—"INCUMBENT."

Where judgment was against one who was appointed to and qualified for office, in an action to remove another from such office, and the former took an appeal which was decided in his favor, he was not an "incumbent" of such office pending the appeal within Pol. Code, § 996, subd. 6, providing that absence of incumbent from the state shall render the office vacant; the other being the incumbent under such act, as well as under section 936 as to compensation during proceedings to contest title to office.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Incumbent.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by R. P. Benton to enjoin John N. Hunt, as County Treasurer of the County of Los Angeles, State of California, from paying a warrant issued to David B. Lyons for salary as county registrar of voters. David B. Lyons intervened and asked for a peremptory writ of mandate requiring the treasurer to pay. Judgment for the intervener, and the plaintiff and defendant appeal. Affirmed.

A. J. Hill, County Counsel, and Robert B. Murphey, Deputy County Counsel, both of Los Angeles, for appellant Hunt. George L. Greer, of Los Angeles, for appellant Benton. J. Wiseman Macdonald and John Beardsley, both of Los Angeles, for respondent Lyons.

CONREY, P. J. This action was commenced by R. P. Benton, a resident citizen and taxpayer of the county of Los Angeles, to enjoin the defendant, county treasurer, from paying a certain warrant issued to David B. Lyons purporting to be drawn on account of salary due to Lyons as county registrar of voters for a portion of the month of May, 1917. Lyons intervened in this action and asked for a peremptory writ of mandate requiring Hunt to pay the amount called for by the warrant. The plaintiff and the defendant have appealed from the judgment, which was in favor of the intervener. The appeals present substantially one and the same question of law, and the facts are admitted to be those set forth in the findings of fact made by the court below.

On August 10, 1915, intervener was duly appointed registrar of voters of Los Angeles county, and on August 11, 1915, he duly qualified by taking his oath of office according to law. For some time prior thereto and until that time, one Thomas McAleer was the registrar of voters of said county. After qualifying, as above stated, intervener demanded possession of the office from McAleer, which demand was refused. Thereupon proceedings in quo warranto were commenced against McAleer by the people on the relation of Lyons to oust McAleer from the office. On January 20, 1916, by judgment of the superior court, it was determined that Lyons was not entitled to said office, and that McAleer was entitled thereto. An appeal was taken to this court from that judgment. On March 1, 1917, the judgment was reversed, and on March 31, 1917, the judgment of this court became final. People v. McAleer, 33 Cal. App. 135, 164 Pac. 425. Thereafter, on May 3, 1917, judgment was entered in the superior court in favor of Lyons who, on the following day, was let into possession of the office and he held the same and performed the duties thereof during the month of May, 1917, and thereafter. From May 21, 1916, to March 21, 1917, Lyons absented himself from the state of California without obtaining the consent of the board of supervisors of the county of Los Angeles or of the Legislature of the state of California, and his absence was not upon business of his office, nor upon business for the state of California, nor for the county of Los Angeles. It is contended by appellants that by reason of such absence of Lyons from the state, being for a period of more than 60 days, the office became vacant, and that therefore he is not entitled to said warrant, and is not entitled to payment thereof.

Section 996 of the Political Code declares that an office becomes vacant on the happening of either one of certain stated events; one of which is the absence of the incumbent from the state without permission of the Legislature beyond the period allowed by law. Section 4313 of that Code reads as follows:

> "A county or township officer shall in no case absent himself from the state for a period of more than sixty days in any one year, and for no period without the consent of the board of supervisors of the county, except when on business for the state: Provided, that in case of illness or urgent necessity, the board of supervisors may, on a proper showing of such illness or urgent necessity, extend the time herein limited, for the absence of any such officer, not to exceed six months."

Section 936 of the same Code reads as follows:

> "When the title of the incumbent of any office in this state is contested by proceedings instituted in any court for that purpose, no warrant can thereafter be drawn or paid for any part of his salary until such proceedings have been finally determined: Provided, however, that this section shall not be construed to apply to any party to a contest or proceeding now pending or hereafter instituted who holds the certificate of election or commission of office and discharges the duties of the office; but such party shall receive the salary of such office, the same as if no such contest or proceeding was pending."

In construing some of the subdivisions of section 996 it has been held that the incumbent of the office, within the meaning of those subdivisions, is not necessarily a person who has actually entered into possession of the office. Illustrations are found in cases where one elected to the office died before the beginning of the term for which he was elected; or where he neglected to file his official oath or bond within the time prescribed by law. There are other cases where vacancy of the office has been declared and enforced on account of the absence of the office holder from the state without legal permission, beyond the period allowed by law. The latter, however, are only instances in which the absentee was both the de jure and the actual incumbent of the office. The precise question presented in the present action is without precedent in any case of which we are aware.

As was said by the Supreme Court in Bannerman v. Boyle, 160 Cal. 197, 116 Pac. 732:

> "In construing an ambiguous statute, the evil to be cured and the object to be accomplished are proper matters for consideration, and often point clearly to the true meaning and application of the act."

Manifestly the object of the statute which vacates an office because of the incumbent's absence from the state without the consent required and beyond the period provided by law is that the duties of the office shall be performed by the incumbent, and shall not be neglected by reason of his unlawful absence. The proviso set forth in section 936 was added thereto by amendment in the year 1891. Prior thereto an incumbent of the office was not entitled to the payment of any part of his salary during the pendency of proceedings of contest directed against his title to the office. Apparently being of the opinion that the public interest would be better protected by a different rule, the Legislature then made the amendment under which any party to a contest of such office "who holds the certificate of election or commission of office and discharges the duties of the office" is not prohibited from receiving the salary thereof during the pendency of the contest proceedings. While the quo warranto proceedings against McAleer was pending, he was the party entitled to the salary because he came within the description stated in section 936, and he was "the incumbent" of the office within the meaning of that section.

To arrive at the true meaning of subdivision 6 of section 996, as applied to the facts of this case, it must be read together with section 936. Notwithstanding the final determination that McAleer was not entitled to the office, he remained in a qualified sense the incumbent thereof under section 936, and was so far recognized as the occupant of the office that he was lawfully permitted to collect the salary thereof so long as he discharged the duties of the office, but not beyond the period of pendency of that litigation.

The superior court had determined that Lyons was not entitled to the office, but he was prosecuting his appeal from that judgment, and did not at any time abandon his claim to the office. As found by the court below, intervener during his absence kept in constant communication with his attorneys, and held himself in readiness to return to Los Angeles whenever he should be notified of a decision of the appeal, or that his presence in Los Angeles was necessary; and he would not have left the state of California had not the superior court decided that he had no title to the office of registrar of voters. He actually did return to Los Angeles county before any judgment in the quo warranto proceedings was entered in his favor in the superior court, and before the final determination of his appeal. It is our opinion that the absence of Lyons from the state of California for the time and under the circumstances shown in this case was not the absence of an incumbent within the meaning of the law, and did not cause the office to become vacant.

The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

36 Cal. App. 394

HOLMES v. SNOW MOUNTAIN WATER & POWER CO. (Civ. 1812.)

(District Court of Appeal, First District, California. Feb. 26, 1918. Rehearing Denied by Supreme Court April 25, 1918.)

1. Appeal and Error ⇐1171(6)—Reversal—Grounds.

A case will not be reversed for mere failure to leave to the jury the bringing in of a verdict for nominal damages.

2. Estoppel ⇐93(7) — Injunction—Laches—Diversion of Water.

Where plaintiff's predecessor stood by while defendant water and power company expended over a million dollars in the erection of its dam, tunnel and plant, and even assisted in some ways in the work by furnishing commodities which defendant needed in the prosecution of its enterprise and sold part of the land to defendant for a dam site, all of which plaintiff knew when he purchased the land while defendant was in the midst of building the dam to divert water of the river, the right to injunction is barred by the intervention of the public in-

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⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes terests; plaintiff having waited four years after the public use began, and until thousands of people have become dependent on it for light and power and necessary water for irrigation.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by S. O. Holmes against the Snow Mountain Water & Power Company. Judgment for defendant, and plaintiff appeals. Affirmed.

R. M. F. Soto, of San Francisco, for appellant. Thomas & Thomas, of Ukiah, and Pillsbury, Madison & Sutro, of San Francisco, for respondent.

BEASLY, Judge pro tem. In the year 1908 the Snow Mountain Water & Power Company completed a dam on Eel river, in Mendocino county, by which it impounded and diverted a large part of the stream through a tunnel from the watershed of the Eel river to that of Russian river; none of the water being ever permitted to return to the Eel river watershed. The plaintiff, Holmes, owns land on both sides of Eel river about 200 feet below defendant's dam. The bluffs of the river on plaintiff's land are from 40 to 60 feet high; the land itself is broken, and while some acres of it were cultivated to crops, and some other parts of it set to fruit trees, and other portions were capable of being cleared, cultivated, and also irrigated, none of the water of Eel river had ever been used at any time to irrigate any part of plaintiff's land, nor does plaintiff appear to have been at any time previous to the trial in a position to use the river water for irrigation. About four years after the completion of the defendant's dam and the beginning of the diversion of water, plaintiff began this action, in which he asks that the company be enjoined from continuing to divert the water of Eel river, and also asks damages in the sum of $5,000 which he claims to have already suffered on account of the diversion of the water, and $25,000 which he claims he will suffer in the future if the diversion is continued.

By the answer of the defendant it appears that the latter is a public service corporation; that the impounded water is used to generate electricity, which is sold to people in Mendocino and Sonoma counties, and is also, after being run through defendant's power plant, used for irrigation in various portions of the upper Russian river valley. These facts do not appear in plaintiff's complaint, the plaintiff proceeding by that instrument against the defendant as if the latter was simply a private corporation trespassing upon his property rights by diverting the water from the river which flows through his property.

The plaintiff in his brief abandons, if he ever asserted, any right to either damages or injunction by reason of the diversion of the flood waters of the stream, saying therein that he is not claiming the flood waters of the Eel river. This narrows considerably the questions involved in this case. The evidence shows that of the 240 cubic feet per second of water which the defendant diverts all but 10 cubic feet per second is impounded winter flood water; that the winter flow of the river is about 50,000 cubic feet per second, which the dam accumulates in a two-mile reservoir for use in the dry season; that the natural flow during the dry season is but 10 cubic feet per second, thus reducing the amount of water impounded after subtracting the impounded flood water.

The decree which the court entered secured to plaintiff two second feet thereof, leaving to the defendant the right to impound eight second feet of the ten—the normal flow of the river at times when not in flood. The evidence showed, and the court found, that these two second feet were ample for all purposes of plaintiff; and, indeed, it is plain that this amount was a superabundance for his needs; and it is also found that the remaining eight second feet as well as the flood waters were waste waters; that no part of the water of Eel river is ever used for irrigation; that the defendant has never diverted any of the water of Eel river other than the waste waters thereof, and only such of the waste waters as had been at all times in the past and ever will be at all times in the future incapable of any reasonable or practical use in connection with the lands of plaintiff described in the complaint, or any part thereof; and that the plaintiff has never been and never will be damaged in any way by reason of any of the acts of the defendant complained of.

At the beginning of the trial the court impaneled a jury, and when the plaintiff rested his case discharged this jury from further consideration of the case. The only purpose for which the jury could have been impaneled was for the assessment of plaintiff's damages. The plaintiff contends that the dismissal of the jury practically amounted to a nonsuit; and that, as he had established his claim for damages, the case should be reversed for this reason.

[1] The evidence introduced by plaintiff to support his claim for damages consisted in the statements of five different witnesses to the effect that the arable land of plaintiff without irrigation was worth from $5 to $10 an acre, and that with irrigation it would be worth from $75 to $150 an acre; but the strength of this testimony vanishes when considered in the light of the foregoing facts, namely, that the amount of water left by defendant in the river was ample for plaintiff's uses, that plaintiff had never at any time used any of the water of Eel river for irrigation, and could not possibly use more than that supplied by the two second feet still permitted to run, and that there is no

evidence that the plaintiff had been injured in any way by the diversion of the water through destruction of his crops or failure to grow crops. Under the facts of this case, no injury could be done plaintiff by the diversion of that portion of the water of this stream which he could not possibly use, leaving to him a sufficient flow of the stream for all his possible present and future needs. Miller v. Bay Cities Water Co., 157 Cal. 256, 107 Pac. 115, 21 L. R. A. (N. S.) 772; Cohen v. La Canada W. Co., 151 Cal. 680, 91 Pac. 584, 11 L. R. A. (N. S.) 752; San Joaquin v. Fresno Flume Co., 158 Cal. 626, 112 Pac. 182, 35 L. R. A. (N. S.) 832; Stratton v. Mt. Hermon, etc., 216 Mass. 83, 103 N. E. 87, 49 L. R. A. (N. S.) 57, Ann. Cas. 1915A, 768. We infer that the plaintiff recognizes this situation, although he does not expressly say so, for the reason that he argues very earnestly that in the condition of the record he was entitled to at least nominal damages under his case made in chief, and that it was error on the part of the court to dismiss the jury. But conceding that it is so, this court would not reverse this case for a mere failure to leave it to the jury to bring in a verdict for nominal damages.

[2] The plaintiff's predecessor in interest stood by while $1,300,000 of the defendant's money was being expended in the erection of its dam, tunnel and plant. He even assisted in some ways in the work by furnishing commodities which the defendant needed in the prosecution of its enterprise, and he sold part of his land to the defendant for a dam site. All this the plaintiff knew when he purchased the land, which he did while the defendant was in the midst of its work of building the dam and preparing to divert the waters of the river. It is impossible that he did not know that the purpose of this enterprise was for a public use, that the defendant was about to inaugurate a public service, and that the waters of the river when diverted would be used for the purposes to which it was afterwards put. In view of these facts, and of the fact that he waited four years after the public use began, and until thousands of people had become dependent upon it for light and power and necessary water for irrigation, his right to an injunction is barred by this intervening of the public interest. Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; Miller & Lux v. Enterprise Co., 169 Cal. 415, 147 Pac. 567; Fresno, etc., Co. v. Southern Pacific Co., 135 Cal. 202, 67 Pac. 773; Southern Cal. Ry. Co. v. Slauson, 138 Cal. 342, 71 Pac. 352, 94 Am. St. Rep. 58; Crescent Canal Co. v. Montgomery, 143 Cal. 248, 76 Pac. 1032, 65 L. R. A. 940; Newport v. Temescal Water Co., 149 Cal. 531, 87 Pac. 372; Barton v. Riverside Co., 155 Cal. 509, 101 Pac. 790; Gurnsey v. Northern Cal. Power Co., 160 Cal. 699, 117 Pac. 906, 36 L. R. A. (N. S.) 185; Burr v. Maclay, etc., Co., 160 Cal. 268, 116 Pac. 715.

This disposes of the case, and it will not be necessary therefore to notice numerous other points made by the defendant in support of his judgment.

The order denying the motion for a new trial is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(36 Cal. App. 362)

KEIPER v. PACIFIC GAS & ELECTRIC CO. et al. (Civ. 1784.)

(District Court of Appeal, Third District, California. Feb. 22, 1918. Rehearing Denied by Supreme Court April 22, 1918.)

1. Municipal Corporations 🔑705(11) — Proximate Cause—Independent Concurrent Causes.

Where an owner negligently left his automobile unattended on street car tracks and a street car was negligently run into it, catapulting it against one working at the curb of the street, the owner of the automobile was liable for the injuries.

2. Negligence 🔑83—Last Clear Chance.

Where there is no contributory negligence, the doctrine of last clear chance does not arise.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Jacob Keiper against the Pacific Gas & Electric Company, a corporation, and Albert Elkus. Judgment for plaintiff against the last-named defendant, and such defendant appeals. Affirmed.

James Alva Watt, of San Francisco, for appellant Elkus. L. T. Hatfield, of Sacramento, and Stanley Moore and John P. Coghlan, both of San Francisco, for defendants Pacific Gas & Electric Co. C. E. McLaughlin, of San Francisco, and Frank J. O'Brien, of Sacramento, for respondent.

HART, J. This is an action for damages for personal injuries. The jury returned a verdict in favor of plaintiff for $3,500 against the defendant Elkus, but not against the defendant Pacific Gas & Electric Company. Judgment was entered accordingly, from which defendant Elkus appeals.

The evidence discloses that the accident and the injury complained of occurred substantially as set forth in the complaint, as follows:

> "That about the hour of 9 o'clock a. m. on said 6th day of December, 1913, said defendant Albert Elkus, without any cause or reason for so doing, other than his desire to step across the street into a garage on K street in the city of Sacramento, left an automobile, owned and operated by him, standing unoccupied and unattended upon and across car lines owned and operated by said defendant corporation on K. street, at a point about 150 feet east of the intersection of K and Thirteenth streets in said city; that said automobile was so left standing unoccupied and unattended without first locking or making it fast, or effectively setting the brakes thereon

and stopping the motor thereof; that no emergency caused the said Elkus to leave said automobile so standing unoccupied and unattended, nor was said automobile stopped and left unattended and unoccupied for the purpose of allowing another vehicle, or pedestrian, to cross its path. That said automobile was a large Lozier, five-passenger car, the day was bright and clear, and any person approaching the place where it was standing, from any direction on K street, could, by using ordinary care and diligence, have easily seen said car so left standing on said K street as aforesaid. That while said automobile was so standing upon K street as aforesaid, plaintiff was at work near the curb line in front of his home at No. 1316 K street, and a street car owned, operated and controlled by the defendant Pacific Gas & Electric Company, a corporation, was proceeding easterly on car tracks on said K street across which said automobile was standing, and the agents and employés of said defendant corporation controlling and operating said street car could with reasonable diligence have seen said automobile standing upon said K street and across said tracks upon which said street car was running. That the said defendant Pacific Gas & Electric Company, a corporation, its agents, servants, and employés, so negligently and carelessly operated and ran said street car, proceeding easterly on said K street as aforesaid, that they failed to stop said street car or avoid a collision with said automobile, and said street car continued on its course with great speed until it ran into and struck said automobile with such force that said automobile was driven and forced from the point where it was standing to the point where said plaintiff was at work, and said automobile, so driven and forced, struck plaintiff with great violence, throwing plaintiff against an iron electrolier post, and by means thereof plaintiff was greatly injured. * * *"

The appellant demurred to the complaint on the general ground of insufficiency of facts, and on the further ground that there is a misjoinder of parties defendant. The demurrer was overruled, and the principal question submitted by this appeal arises upon the action of the court in thus disposing of the demurrer and in denying the appellant's motion for a nonsuit, the claim being that neither the complaint nor the proofs disclosed that the appellant's negligence was the proximate cause of the accident and injury complained of.

As stated, the evidence shows that the accident occurred substantially as alleged in the portion of the complaint above quoted herein, and if, therefore, the complaint states a cause of action for negligence against the appellant, then, of course the motion for a nonsuit was properly disallowed. As the consideration of the ruling on the demurrer necessarily involves a consideration of the action of the court in denying the motion for a nonsuit, it is not deemed out of place to present here a brief outline of the facts as they were established by the evidence. This may the more conveniently be done by quoting from the appellant's opening brief, which contains an accurate statement of the evidential facts, as follows:

"The accident occurred at about 9 a. m. on December 6, 1913. Defendant Elkus was driving his automobile in an easterly direction on K street, in the city of Sacramento, and after crossing Thirteenth street, brought his machine to a full stop upon and across the east-bound car tracks of the defendant Pacific Gas & Electric Company, at a point just in front of the tire store of the Fisk Rubber Company, about 150 feet east of the intersection of K and Thirteenth streets. Expecting to be but a moment about his business, he left his automobile standing where it was, and went into the Fisk store to leave orders regarding some tires and tubes. While Elkus was in the store a street car operated by the defendant Pacific Gas & Electric Company approached the intersection of K and Thirteenth streets in an easterly direction and at a good rate of speed crossed the intersecting street without stopping, crashed into the machine of defendant Elkus, catapulting it in a diagonal direction from 50 to 70 feet towards the curbing where the plaintiff Keiper was cleaning the sidewalk in front of his home. Keiper was caught between the machine and an electrolier near which he was working, and was badly crushed and bruised, sustaining a severe fracture of the right leg."

The appellant concedes that he was guilty of negligence in his act of placing his automobile upon the street car tracks and permitting it to remain standing thereon, but contends that such negligence on his part ceased the instant that the street car of his codefendant carelessly and negligently ran into and against his automobile; that his negligence was broken by the electric company's negligence, which was an independent, intervening, and the proximate cause of the damage, wholly unconnected with him. Counsel for the appellant, in their brief, declare and argue that, so far as the facts alleged in the complaint show, the automobile "would have stood upon the car tracks in the place where Mr. Elkus left it until its gasoline tank went dry and its tires rotted upon their rims, without harm or injury to the innocent bystander, unless some other cause, wholly unconnected with the defendant Elkus had intervened to cause the harm," and then, after referring to the allegations of the complaint describing the manner in which the street car jammed into and collided with the automobile, and to the allegation that the day "was bright and clear," and asserting that the defendant electric company "could with reasonable diligence have seen the automobile standing upon K street and across the tracks upon which said street car was running, concluded:

"It thus conclusively appears that without the active intervening negligence of the * * * electric company no accident or injury could have occurred to the plaintiff. The automobile was inert and harmless in the position where it stood, and was incapable of producing, or even contributing, to the happening of the accident to the plaintiff."

[1] The position of the appellant as it is thus stated is wholly devoid of merit. We are unable to reconcile with a rational view of the facts pleaded and proved the position of the appellant that, although it was negligence on his part to leave his machine standing on the street car tracks, such negligence ceased when the street car jammed into the

automobile. We cannot conceive how the proposition can logically be worked out. If it was negligence to leave and allow the automobile to remain standing on the street car tracks in the first instance, upon what logical hypothesis may it be said that that negligence did not continue until the accident and injury which the collision of the car with the automobile produced? It is true that "the automobile was inert in the position where it stood," and was itself, as it stood on the tracks, "incapable of producing, or even contributing, to the happening of the accident to the plaintiff," as counsel assert; but, with no design to be facetious, we remark that that argument implies that we are dealing here with the machine itself, and not with the act of the appellant in placing it where he had no right to place it and allowing it to remain standing, and where, as so standing, it was in a position to do harm. Indeed, one of the difficulties with which appellant is beset in this case, and which he was required to overcome if he would show himself legally immune from responsibility for the damage, lay in the very fact that the machine was allowed by him to remain inert and unattended by a driver or any other person capable of removing it from the position of danger in which it had been carelessly placed and left by the appellant. It is, of course, obviously true, as counsel declare, that but for the negligence of the defendant electric company the accident and its disastrous result would not have happened. But it is equally obvious that the damage suffered by the plaintiff would not have been produced but for the negligence of the appellant. Thus it is clear that the case as presented is essentially and peculiarly one where the injury complained of was produced by the concurrence of two separate, distinct and independent acts of negligence on the part of two separate and different persons. In other words, it is a case where the injury could not and would not have been produced by the act only of one of the two tort-feasors. In fact, quite obviously, the act of the electric company could not have occurred but for the previous act of negligence of the appellant. It required the two separate and distinct acts, operating simultaneously and concurrently, to produce the damage. Hence it cannot logicaly be said that the negligence of the appellant was not "an active, continuous, contributing cause, and therefore at least a necessary element of the proximate cause of the injury." Spear v. United Railroads, 16 Cal. App. 659, 117 Pac. 956.

In such a case both parties through whose direct joint agency the injury has been sustained are joint tort-feasors and may be sued either jointly or separately.

The rule applicable to such a case as is disclosed by this record was applied in Pastene v. Adams, 49 Cal. 87, 90, a case quite similar in its general features to the one at bar. That case answers the contention of the appellant that his negligence became passive and was overlapped by that of the electric company when its car collided with his automobile. There the defendant, a lumber company, had piled three tiers of timbers, about 12 inches square, between gangways leading to the street on which the business of the company was maintained. The piling of the timber was so carelessly done that a wagon passing through one of the gangways came in contact with one of the projecting timbers, causing the pile to fall upon the plaintiff, who was at the defendant's office to purchase lumber, with the result that his leg was severely injured. The argument was that if, as was contended was true in that case, "a subsequent and distinct cause, intervening after that for which the defendant is responsible, had ceased to act, has been productive of injury, and but for that no injury would have occurred, the defendant is not responsible." The Supreme Court, denying the soundness of that doctrine as applied to the facts of that case, said:

> "If the timbers were negligently piled by the defendant, the negligence continued until they were thrown down and (concurring with the action of Randall) was a direct and proximate cause of the injury sustained by the plaintiff."

In Tompkins v. Clay Street Railway Company, 66 Cal. 163, 4 Pac. 1165, two cars, owned by two different companies, collided at the corner of Clay and Polk streets, in the city of San Francisco. The court, replying to the contention that there was no joint liability, says:

> "In Pennsylvania, it seems to have been held that when a passenger on a carrier vehicle is injured by a collision resulting from the mutual negligence of those in charge of it and another party, the carrier alone must answer for the injury. * * * But the weight of authority is otherwise, and is to the effect that, if the negligence of the managers of both vehicles contributes to the injury, the party injured may recover from the proprietors of either or both. Wharton on Negligence, p. 395, and cases cited. Where both are sued, the plaintiff may ordinarily dismiss as to either; and, if it turn out at the trial that one was not guilty of negligence, he may, on sufficient evidence, take a verdict against the other."

But it is unnecessary to multiply herein authorities, of which there are many in this and other jurisdictions, upon a proposition so thoroughly settled in California. It is sufficient to cite the following in addition to those above considered: Barrett v. S. P. Co., 91 Cal. 303, 27 Pac. 666, 25 Am. St. Rep. 186; Doeg v. Cook, 126 Cal. 218, 58 Pac. 707, 77 Am. St. Rep. 171; Horgan v. Jones, 131 Cal. 521, 63 Pac. 835; Kimic v. S. J. & L. G., etc., Ry. Co., 156 Cal. 379, 104 Pac. 986; Muller v. Hale, 138 Cal. 165, 71 Pac. 81; Heath v. Manson, 147 Cal. 694, 82 Pac. 331; Merrill v. Los Angeles G. & E. Co., 158 Cal. 499, 111 Pac. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134; Williams v. S. F., etc., Ry. Co., 6

Cal. App. 718, 93 Pac. 122; Spear v. United Railroads, 16 Cal. App. 659, 117 Pac. 956; and many other cases and authorities unnecessary to name. But we do not understand counsel for the appellant to contend that there is not joint liability where joint or concurring separate and independent acts of negligence constitute the proximate cause of the damage. Their position is, as seen, that the negligence of the appellant was not an active contributing cause of the injury. We have, however, already shown the utter fallacy of this position, and, as further showing that that theory is wholly unsupportable, we call special attention to the case, already cited, of Spear v. United Railroads, which bears a marked similarity in all essential particulars to the case here. The case of Williams v. S. F. & N. W. Ry., cited above, is, as to the general nature of the facts, also noticeably similar to this case. In that case, the plaintiff's wife was driving an excitable horse along a public highway upon a portion of which the defendant had placed, and for a long time previously to the accident had maintained, and at the time of the accident still maintained, a woodpile. The horse became frightened at the noise made by a passing locomotive traveling over the defendant's railroad track, situated near and running parallel with the highway, and started to run. The deceased was unable to control or manage the animal, and while the horse was running at a lively rate of speed the vehicle to which the horse was attached and in which the deceased was riding collided with said woodpile, the result of the force of the impact being to throw her with such violence to the ground that she sustained fatal injuries. It was argued in that case that the placing of the obstruction in the public highway was not the proximate cause of the damage. The court said:

> "The defendant was primarily at fault in maintaining the obstruction upon the highway. * * * 'There is always * * * ground for apprehending accidents from obstructions upon highways, and any person who wrongfully places them there or aids in so doing must be held responsible for such accidents as may occur by reason of their presence.' * * * The rule is that the defendant is answerable in law for negligence proximate in causal relation to the damage; or, in order words, it is liable if the obstruction for the existence of which it is responsible was the direct cause of the accident, with its resulting damages."

So here. The appellant was confessedly primarily at fault in placing and leaving his machine in a place where it would necessarily operate as an obstruction to the passage of the cars of the electric company over and along its track; and, as above declared, the negligence involved in that wrongful act necessarily continued so long as the obstruction remained and until it had contributed to the damage which could not have occurred but for said obstruction.

[2] The suggestion that the day was clear, and that therefore the motorman of the street car could, by the exercise of ordinary diligence, have seen the automobile on the car tracks in time to have avoided the collision, is a proposition which involves the doctrine of the last clear chance or opportunity. But, while counsel for the appellant undertook to invoke that doctrine in their opening brief, they expressly abandoned that position at the oral argument, and conceded that that doctrine has no application to this case. Of course, as has often been pointed out by the cases, and as is plainly true from the very reason of the rule, the doctrine of the last clear chance necessarily implies contributory negligence in the plaintiff or the injured party. Cordiner v. Los Angeles Traction Co., 5 Cal. App. 400, 91 Pac. 436; Spear v. United Railroads, 16 Cal. App. 655, 117 Pac. 956. There is no pretense, nor could such a claim well be advanced in this case, that the plaintiff here was guilty of contributory or any negligence.

The irresistible conclusion from the facts of this case as they are alleged in the complaint, and as the appellant admits that the evidence shows them to be, is that the appellant's act was one of the procuring, active, proximate causes of the injury complained of; and that the said act involved a high degree of negligence, there can be no question, since the appellant himself testified that he was at all times aware of the fact that street cars passed over the tracks upon which he left his automobile standing at frequent intervals during the day.

It follows from the foregoing considerations that the complaint states a cause of action for negligence against the appellant, that the demurrer was therefore properly overruled, and that the disallowance of appellant's motion for a nonsuit was proper.

The court charged the jury in accordance with the theory that the appellant's negligence was an active, continuing, and contributing proximate cause of the injury. The charge in this respect is criticized and declared by the appellant to be erroneous. The above discussion and conclusion dispose of this assignment.

There are no other questions in the case requiring notice.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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36 Cal. App. 375

JESUS MARIA RANCHO v. SOUTHERN PAC. CO. (Civ. 2030.)

(District Court of Appeal, Second District, California. Feb. 25, 1918.)

1. RAILROADS 🔑443(6) — KILLING CATTLE — CONDITION OF FENCE — NOTICE — SUFFICIENCY OF EVIDENCE.

In an action against a railroad for killing cattle on its track at a point where wind-drifted sand had covered the right of way fence so that the cattle were enabled to go from plaintiff's land upon the railroad's right of way, evidence as to whether the railroad had such actual or constructive notice of the condition of the fence at the point of entry that it was chargeable with negligence for not having restored it to proper condition *held* insufficient to sustain finding for plaintiff.

2. RAILROADS ⚷412(1) — KILLING LIVE STOCK—MAINTENANCE OF FENCES—REASONABLE DILIGENCE.

A railroad is bound to use reasonable diligence in keeping its right of way fences in repair, and it need not resort to extraordinary means, such as the maintenance of a special patrol, to insure that its fences will not be broken or that they will be promptly repaired if broken.

3. RAILROADS ⚷412(4) — INJURIES TO LIVE STOCK—DUTY TO FENCE—PERFORMANCE.

Where a railroad's right of way traversed plaintiff's property where the winds shifted sand about and sometimes covered the right of way fences, permitting the passage of cattle, the exercise of reasonable diligence by the railroad to properly maintain its fences through plaintiff's property did not require resort to unusual means, the building of abnormally high fences, for instance, because of the unusual and shifting character of the surface; there being long periods of time during each year when the sand was not disturbed nor much moved.

4. RAILROADS ⚷443(6) — KILLING CATTLE — NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In an action against a railroad for killing a cow, and consequently starving her calf, which cow passed over the railroad's right of way fence by means of wind-drifted sand, evidence *held* sufficient to justify the trial court's finding that the cow was killed through the railroad's negligence.

5. RAILROADS ⚷443(2) — KILLING CATTLE — PROXIMATE CAUSE — SUFFICIENCY OF EVIDENCE.

In such action, evidence *held* to justify finding in effect that the loss of the calf was the proximate result of the railroad's negligence which resulted in death of the cow.

6. RAILROADS ⚷443(6) — KILLING CATTLE —NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In an action against a railroad for killing a heifer on its right of way, which heifer came there by passing over the right of way fence by means of a sand dune, evidence *held* sufficient to support finding of the railroad's negligence.

7. RAILROADS ⚷412(4) — DUTY TO FENCE — BLOWN SAND—STATUTE.

The duty of a railroad to maintain through plaintiff's property such fences as will keep cattle from entry upon the right of way is absolute under Civ. Code, § 485, requiring railroads to maintain good and sufficient fences, although the sand on plaintiff's property is freely blown about by the wind, even to the point of covering the fences, a condition which might be put an end to by plaintiff's setting out certain plants which grow in sand.

8. RAILROADS ⚷443(6) — KILLING CATTLE —NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In an action against a railroad for killing four cows on its right of way, which cows entered the right of way through a breach in the fence caused by the throwing down of the gate and of part of the fence proper, evidence *held* insufficient to support the finding of negligence on the part of the railroad, indicating rather that the accident resulted through giving way of part of the fence under the pressure of many cattle, though not unsuited for the task imposed upon it under ordinary conditions.

Appeal from Superior Court, Santa Barbara County; Robert M. Clarke, Judge.

Action by the Jesus Maria Rancho, a corporation, against the Southern Pacific Company, a corporation. From judgment for plaintiff, and an order denying defendant's motion for new trial, the latter appeals. Affirmed in part and reversed in part.

H. P. Starbuck and Canfield & Starbuck, all of Santa Barbara, for appellant. C. Kelley Hardenbrook, of Lompoc, for respondent.

WORKS, Judge pro tem. This is an action for damages for the loss of cattle killed by the appellant's railroad trains. The complaint sets up four causes of action. The first of these seeks to recover for the loss of two cows on January 25, 1912; the second for the loss of four cows on September 6, 1912; the third for the loss of a cow and calf on April 2, 1913; and the fourth for loss of a yearling heifer on April 28, 1913. Judgment was rendered in favor of respondent on all of the causes of action, and the appeal is from the judgment and from an order denying appellant's motion for a new trial.

While all four causes of action are based upon the alleged negligence of appellant in failing to maintain proper fences along its right of way, three of them, the first, third, and fourth, give rise to certain novel questions and, in a measure, may be considered together. The points presented under the second cause of action will be reserved for separate treatment in a later portion of the opinion.

The cattle were all killed near the Pacific Ocean, at a place where the country is composed of sand, which shifts and changes into banks and dunes at different points with the blowing of the winds. There is much evidence in the record as to the nature of these recurring mutations in the surface of the sand; suffice it to say that the changes are practically always in progress at the times when the winds blow with any great degree of force, and that they are amazingly sudden in the days and seasons when the winds blow heavily. The fences along the appellant's right of way are frequently buried by the dunes, but the points at which they are covered may change from time to time, as the winds are strong enough to bring about the change. Thus a part of the fence which is invisible on one day may be entirely freed from its covering a few days later by the prevalence of a strong wind. The three causes of action which are now under consideration arose through the claim of respondent that the cattle in question in them procured access to appellant's right of way over its fences at points where they were covered by the sand, it being asserted in the evidence that an entrance was effected in this manner from the adjoining property of the respondent, which owns the lands on either side of appellant's tracks through the country we have described.

The first contention of the appellant is that the evidence is insufficient to show negligence on its part in the matter of its duty, under section 485 of the Civil Code, to maintain fences along its right of way, no claim being made that the cattle were not actually killed by appellant's trains. There are two questions involved in this contention. The first is, Did the cattle enter the right of way in the manner claimed by the respondent? If they did, the second question is, Did the appellant have such notice, either actual or constructive, of the condition of the fence at the points of entry that it is chargeable with negligence for not having restored it to a proper condition? In determining these questions, each of the three causes of action must be considered separately.

The first cause of action arose out of an occurrence of about January 25, 1912, and involved the loss of two cows. The witness Graham testified to having found the carcasses of the cows on the right of way and to having traced their tracks backward to a point at which they passed over the fence on the surface of the sand from the west side of the appellant's railroad track. This evidence clearly disposes of the question as to the manner in which the cattle entered the right of way, but the question of notice to the appellant of the condition of the fence at the point of entry is in a very different situation. Graham began to work for respondent on January 15, 1912, ten days before the cows were killed. He testified that "in January" the fence was covered with sand at a point about 1,000 feet south of a certain crossing fence, which point he fixes as the place of entry of the cattle; but the slight effect of his very general statement as to time is entirely nullified by his testimony on cross-examination, when he is addressing himself to the same subject, "I don't know that I had seen that fence at all previous to January 25, 1912." The only other witness for plaintiff was one Walker, who resided on respondent's property from October, 1911, to the end of 1913. He testifies on this subject:

> "I particularly noticed the fence when I went there being in a very poor condition at this one particular spot about 1,000 feet south of this crossing, one-third of a mile or one-fifth of a mile, * * * covered with sand in some places. The fence was in very poor condition all the way from the point south one-fifth of a mile. * * * It was down in some places; the wire was all rusted and broken in places. * * * On the west side I think the fence was covered over with sand in places, not in many places. One particular place was covered for quite awhile. * * * I would see this fence two or three times a week; sometimes I wouldn't see it for probably two months. * * * On an average I would see it * * * once a month, * * * and the condition of the fence was the same each time I saw it up to the time they built the new fence."

One of appellant's witnesses testified that no new fence was built before 1913.

[1-3] Notwithstanding the testimony of both Graham and Walker, it is quite possible that the pile of sand by means of which the two cows crossed over the fence had been deposited by the wind but a few hours before their entry into the right of way. Graham had been on the ranch only ten days, and could not say that he had ever seen the place in question until the moment when, after finding the dead cattle, he back-tracked their course to the place of entry over the heaped-up sand. Walker's testimony is quite as far afield. The point at which he says the fence was covered may not have been the same point at which the cattle crossed it. He says it was 1,000 feet, a third of a mile, a fifth of a mile—that is, 1,000 feet, 1,760 feet, 1,056 feet—south of the crossing. Moreover, sometimes he did not see even the place he had in mind oftener than once in two months. Therefore he may not have seen it for a period of two months next preceding January 25th. It is to be noted, also, that the only statement of Walker which could possibly bear upon the present question was this:

> "The condition of the fence was the same each time I saw it up to the time they built the new fence."

It is quite certain, however, that he refers to the condition of repair of the fence itself by this language, and not to its being covered with sand. This seems to be true for two reasons: First, most of his testimony preceding the statement has to do with the bad state of the fence itself, not with the matter of sand; second, he had already said, as to sand, "The fence was covered over with sand in places, not in many places. One particular place was covered for quite a while.' If the rules of law in such an action as the present are the same as in the ordinary action for damages caused by negligence in not maintaining right of way fences, then the finding of negligence under the first cause of action is unsupported by the evidence, for the reasons stated. But the respondent contends that they are not the same. In all such cases, a railroad company is bound to use reasonable diligence in keeping its right of way fences in repair, and it need not resort to extraordinary means, such as the maintenance of a special patrol, to insure that its fences will not be broken, or that they are promptly repaired, if broken. Johnson v. Southern Pacific Co., 11 Cal. App. 278, 104 Pac. 713; Wills v. Southern Pacific Co., 31 Cal. App. 723, 161 Pac. 501. The respondent contends that the exercise of reasonable diligence by the appellant for the purpose of properly maintaining its fences through the property of respondent requires a resort to unusual means because of the unusual and shifting character of the country at that place. In other words, respondent contends that what is reasonable diligence in any case of this character depends upon the conditions present in the case. This latter statement is undoubtedly correct. It is readily perceived that conduct which might answer the call for reasonable diligence in one case, could be entirely inadequate in another. The respondent does not say that the appellant should have maintained a constant patrol, or that it should have built its fences higher, where its road passes through respondent's ranch, but the contention amounts to something like that. We might possibly agree with this position if the evidence showed that the shifting of the sands in a material degree occurred daily, or weekly, or even after intervals of longer duration; but we do not understand the evidence as going to any of those extremes. Taking the entire showing made by the record, there may be periods of long duration, during each year, when the surface of the sands is not disturbed or moved to such a degree as to render the country different, in the respects material to this controversy, from an ordinary tract of land. Under all the evidence, we must hold that the reasonable diligence required of appellant was of a similar character to that required in what we have called the ordinary fence case, and that there is no showing that the appellant did not exercise such diligence. There should have been no recovery on the first cause of action.

[4] The third cause of action was for the value of a cow and her calf. The cow was killed on or about April 2, 1913. The claim of respondent is that the calf was starved because of the loss of the cow, which was suckling it at the time, and that the appellant is therefore liable for its loss, along with that of the mother. The testimony of Graham plainly shows that the cow entered the right of way by means of a sand heap which covered the fence at a point about a thousand feet south of the crossing fence mentioned in his testimony in support of the first cause of action. He also testified:

> "To my knowledge this fence at this point had been covered with sand more or less all the time from January 25, 1912, up to April 2, 1913. By more or less I mean the sand drifts with the wind. It would be covered up sometimes deeper than it would at others. Portions of it was covered at all times."

It is true that on cross-examination he said it might have been nearly as much as 30 days before April 2d that he had last seen the sand at the point in question; but this did not entirely break down the effect of the statement above quoted from his direct examination, which showed a practically constant condition at the very point where the cow entered the right of way. His testimony was much more satisfactory upon the point than was the testimony of Walker in support of the first cause of action. The evidence was sufficient to justify the finding of the trial court that the cow was killed through the negligence of the appellant.

[5] There is a contention made by appellant as to the loss of the calf. It is asserted that the respondent should have nourished the little animal by artificial means after the death of the mother. On this point Graham testified:

> "The calf wandered away and starved and disappeared. We couldn't feed wild calves; we don't try to because a calf at that age won't eat. They are wild and afraid of everything. It was too young. It's mother's milk was what it needed."

As we have already determined, under the evidence, that the death of the mother resulted from the negligence of the appellant, this testimony of Graham is sufficient to justify the finding, in effect, that the loss of the calf was the proximate result of that negligence.

[6] The fourth cause of action was based upon the loss of a yearling heifer on or about April 28, 1913. The testimony of Graham shows that the animal crossed the fence by means of a sand dune which covered it. Speaking of the point at which the entry into the right of way was effected, Graham says:

> "The fence at that point a little previous to that time had been repaired slightly with boards and wires, but the wind had drifted the sand over the fence as before in two or three places, and it was in such a condition that cattle could pass in and out."

A little later, speaking of the point at which the heifer had entered the right of way, he said:

> "That is where I describe the fence as being covered with sand."

Some of his testimony as to the fence-sand question which we have mentioned in our treatment of the third cause of action also bore upon the fourth. The finding of negligence as to the latter cause of action is supported by the evidence.

[7] The appellant insists that the respondent has at all times had in its own hands the power to protect itself from losses such as those upon which the first, third, and fourth causes of action are based. It is asserted that we will take judicial notice of the fact that certain plants, which grow in sand, will prevent sand drifts as a result of wind action; and, as the appellant has no right to enter upon the lands of the respondent for the purpose of setting out such plants or for the purpose of preventing in any manner the sand from being cast toward its right of way, we are asked to decide that it was incumbent upon the respondent itself to set out the plants mentioned, under a doctrine quoted from Salmond on Torts, section 9, pp. 31, 33, as follows:

> "It is commonly the duty of every man to look after himself, and for injuries which he could have avoided by the use of care, he will seek redress from the law in vain. * * * It is expedient that men should be induced to take care of themselves instead of trusting to the vigilance

of others, and to secure this end the law deprives them of any remedy for accidents which they might have avoided with due care. From motives of public policy the law refuses to help those who might have helped themselves."

The principle stated can have no application here. Section 485 of the Civil Code provides that:

> "Railroad corporations must make and maintain a good and sufficient fence on both sides of their track and property"

—and they are made liable in damages, by the same section, for a failure to make or maintain such fences. For us to hold that the appellant is discharged from the operation of this statute under the facts of the present case would be for us to legislate on this subject, for such a determination would amount to a repeal of the statute pro tanto. We can relieve the appellant of the hardship of the present situation in no such manner especially as to do so, we should be compelled to shift to the respondent the burden which the statute, by its very general terms, imposes upon the appellant. The danger from these fleeting sands exists only because of the presence of the railroad through the respondent's property, and the duty of the appellant to maintain such fences, through that property, as will keep respondent's cattle from entry upon the right of way, is within both the letter and spirit of section 485, notwithstanding the migratory character of the sand.

[8] We come now to a consideration of the second cause of action, which was based upon the loss of four cows. The animals entered upon appellant's right of way through a breach in its fence caused by the throwing down of a gate and of a part of the fence proper. The question presented is whether the gate and fence gave way because of defects in the gate, or in the posts from which it opened, or whether, being in proper condition, it was thrown down by the crowding of a great number of cattle against it. The loss of the four cows occurred at night. During the day preceding, the gate, which was on a rather steep hillside, had been used for the purpose of "crossing" a band of 500 cattle from one side of the railroad track to the other. Two calves belonging to cows in the herd were left behind, and there were also cattle in pasture on the other side of the railroad tracks after the crossing of the herd. The crossed herd made a great noise bellowing, in the neighborhood of the gate, during the night, and the assumption is that they were restive and were anxious to get across the tracks to the calves or to the cattle on the other side. No one saw the cows get upon the right of way, but it is not disputed that they entered at or near the gateway. The evidence does show, however, that, on the evening before, the crossed cattle were huddled against the gate and the fence adjacent to it. The gate did not open by means of hinges, but it was suspended at the end opposite the latch end, upon crosspieces which connected two posts standing side by side. It had been closed the night before, upon the conclusion of the work of crossing the cattle.

The witness Graham testified to certain defects in the gate itself. It hung, at the latch end, in such a way that, if a slight pressure were exerted against it, it would sag open to the extent that cattle might pass through at the sagged end. There is nothing in the evidence to indicate that either of the posts at the opposite end of the gate was defective in any way, or was too small to answer the purpose of its installation. In short, the evidence contains nothing as to the condition of either of these posts at any time before the loss of the cattle. Considering Graham's testimony as to the tendency of the latch end of the gate to sag open under pressure, the situation after the cattle had been killed was most peculiar. The gate was on the ground, but the latch was unbroken, although it was "pulled out" of the fence proper. Along with the gate, the panel of fence at the end of the gate opposite its latch end was also down and one of the two posts which supported the gate at that end by means of crosspieces was broken down. It seems apparent, from this description of the condition of the fence and gate, that the entry of the cattle into the right of way was caused by the breaking of the post. Whether it was broken through the crowding of the cattle, whether that crowding was caused by a desire to recross the railroad tracks for the purpose of rejoining the calves or cattle on the other side, or whether the post gave way because of the exertion of some force upon it by a power unknown, makes very little, if any, difference. The entire catastrophe seems to have resulted through the giving way of a part of the fence which was neither defective nor unfitted for any other reason for the task imposed upon it under ordinary conditions. The appellant is not liable for damages arising in such a manner. The finding of negligence under the second cause of action is not supported by the evidence.

The total amount of the judgment was $415. It is affirmed in the amount of $115, that being the portion of the judgment arising from the third and fourth causes of action; and it is reversed as to the remainder, the sum of $300, that sum being the amount of the judgment arising from the first and second causes of action. It is also reversed as to the judgment for costs in the sum of $71.80.

We concur: CONREY, P. J.; JAMES, J.

178 Cal. 95

HAMMOND LUMBER CO. v. BRAWLEY CO-OP. BLDG. CO. et al. (L. A. 4042.)

(Supreme Court of California. April 11, 1918.)

Appeal and Error 🔑614—Record—Unauthenticated Statement.

Where the transcript contains printed matter designated by appellants as a statement of the case, but the so-called statement is not made the subject of stipulation, and is not authenticated in any manner, there is no record upon which the Supreme Court can say that error was committed as claimed in rulings on the admission and rejection of evidence.

Department 2. Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Hammond Lumber Company, a corporation, against the Brawley Co-Operative Building Company, a corporation, and the National Lumber Company, a corporation. From judgment and decree foreclosing a mortgage, defendants appeal. Judgment affirmed.

Frank Birkhauser, of Brawley, for appellants. McPherrin & Nichols, of Imperial, for respondent.

VICTOR E. SHAW, Judge pro tem. This is an appeal from a judgment and decree foreclosing a mortgage upon real estate, wherein the sole and only errors alleged to have been committed were in rulings of the court upon the admission and rejection of evidence offered.

The attorneys have stipulated as to the correctness of the judgment roll, copy of which appears in the transcript, which also contains some printed matter designated by appellants as "a statement of the case," which, no doubt, was intended as a bill of exceptions to exhibit the alleged errors of which counsel complain. This so-called statement, however, is not made the subject of stipulation, nor is it authenticated in any manner whatsoever.

Hence, there is no record upon which this court can say that error was committed as claimed by appellants.

The judgment is affirmed.

We concur: WILBUR, J.; MELVIN, J.

178 Cal. 120

ANDERSON v. WICKLIFFE et al. (L. A. 4171.)

(Supreme Court of California. April 12, 1918. Rehearing Denied May 9, 1918.)

1. Corporations 🔑432(4)—Representation by Agents—Use of Seal—Evidence of Authority.

The fact that a corporate seal was affixed to the assignment of a note and mortgage transferred by a corporation makes a prima facie showing that the officer executing the assignment had authority so to do.

2. Trial 🔑165—Nonsuit—Determination.

On motion for nonsuit, the plaintiff is entitled to the most favorable consideration of every piece of evidence tending to sustain his averments.

3. Bills and Notes 🔑316—Assignment—Consideration Between Assignees and Assignors.

In a suit for foreclosure of a note and mortgage, the existence of a consideration as between the original holder of the note and its transferee was a matter of no concern to the maker.

4. Bills and Notes 🔑318—Nonnegotiable Notes—Defenses Against Assignees.

A note secured by and assigned with a mortgage is nonnegotiable, and defenses against the holder may be set up as fully as against the original payee.

5. Contracts 🔑88—In Writing—Consideration—Presumption.

The written assignment of a note and mortgage imports a consideration under Civ. Code, § 1614, providing that a written instrument is presumptive evidence of a consideration.

Department 1. Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Suit by C. S. Anderson against G. Wickliffe and others. Judgment for defendants, motion for a new trial denied, and plaintiff appeals. Judgment and order reversed.

R. L. Horton, of Los Angeles, for appellant. Waldo M. York and G. W. Wickliffe, both of Los Angeles, for respondents.

SLOSS, J. The defendants executed a mortgage of real property to secure a promissory note made by them to Security Building Company, a corporation. The plaintiff, alleging that he was the assignee of the note and mortgage, brought this action of foreclosure. The defendants denied the assignment to plaintiff, and set up affirmative defenses, which need not be considered here. At the close of plaintiff's case, the court granted the defendants' motion for nonsuit, and judgment was entered accordingly. The plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

[1, 2] The motion for nonsuit was based on the grounds that the assignments under which plaintiff claimed had not been proven, and that there was no consideration for the alleged assignments if such there had been. The plaintiff introduced testimony that one Yeager was the secretary of Security Building Company, and offered in evidence a writing, purporting to assign to National Building Company the note and mortgage in question. Proof was made that this instrument, which bore the impress of the corporate seal of Security Building Company, was signed, in the name of said Security Building Company, by Yeager as its secretary. Subsequent assignments from National Building Company to E. M. Smith, and from Smith to the plaintiff, were also offered. All these papers were excluded on the ground that there was no proof of the authority of Yeager to execute the first of the assignments. The rulings are assigned as error. There can be no doubt that the claim is well founded. The fact that the corporate seal was affixed afforded a prima facie showing that the officer executing the paper had due authority to execute it. 10 Cyc. 1018; Thomp. Corp. § 5105; So. Cal., etc., Co. v. Bustamente, 52 Cal. 192; Scallard v. Eel R., etc., Co., 70 Cal. 144, 11 Pac. 590; Crescent City Wharf Co. v. Simpson, 77 Cal. 286, 19 Pac. 426; Andres v. Fry, 113 Cal. 124, 45 Pac. 534. If the documents offered by plaintiff had been admitted in evidence, as they should have been, there would have been no ground for a nonsuit. The prima facie proof of the secretary's authority would not have been overcome, as matter of law, by the circumstances disclosed by the record. On motion for nonsuit, the plaintiff must be given the benefit of every piece of evidence which tends to sustain his averments, and such evidence must be viewed in the light most favorable to plaintiff's claim. We need not here decide whether, if the case had been submitted on the merits without further evidence, the court might not have properly found that Yeager had no authority.

[3-5] The existence of a consideration, as between the original holder of the note and its transferee, was a matter of no concern to the maker. 29 Cyc. 1284; Ginocchio v. Amador, etc., Co., 67 Cal. 493, 8 Pac. 29. The note, being secured by mortgage, was not negotiable (Meyer v. Weber, 133 Cal. 681, 65 Pac. 1110), and the defenses set up in the answer will therefore be available against the plaintiff, as fully as they would have been against the original payee, when the defendants come to put in their case. But, apart from this, the writing itself imported a consideration (Civ. Code, § 1614), and there was, in fact, ample other evidence of consideration.

It becomes unnecessary to consider the further points made by the appellant.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

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178 Cal. 118

FOSTER v. BRANEN et al. (L. A. 4173.)

(Supreme Court of California. April 12, 1918.)

1. Judgment 🔑570(3) — Bar—Dismissal on Plaintiff's Direction.

Dismissal on plaintiff's direction does not operate as a bar to a subsequent suit.

2. Costs 🔑260(4) — Frivolous Appeals—Damages.

In a mortgage foreclosure suit, an appeal by subsequent purchasers who had answered, denying the execution of the note and mortgage, the payment of $15 for a search of title and reasonableness of attorney's fees demanded by plaintiff, and alleging estoppel by reason of three prior dismissals on plaintiff's direction *held* frivolous, within the rule calling for imposition of damages on appellants.

Department 1. Appeal from Superior Court, Los Angeles County; Curtis C. Legerton, Judge.

Suit by D. E. Foster against Helen Branen, Julia P. Warden, and another to foreclose a mortgage. Decree for plaintiff, and defendant Julia P. Warden and another appeal. Affirmed, and damages imposed on appellants.

J. Irving McKenna and Catherine A. McKenna, both of Los Angeles, for appellants. Arthur G. Stepper, of Los Angeles, for respondent.

SHAW, J. The defendants, Julia P. and C. D. Warden, appeal from the judgment.

The action was to foreclose a mortgage executed by the defendant Helen Branen upon a tract of land subsequently conveyed to the defendant Julia P. Warden. Helen Branen made no answer to the complaint. Julia P. Warden and C. D. Warden, who was interested only as the husband of Julia P. Warden, filed an answer, denying the execution of the note and mortgage sued on, denying also the payment of $15 for a search of title and the reasonableness of the sum of money demanded as attorney's fees by the plaintiff, and further alleging that the plaintiff was estopped from maintaining the action by reason of the fact that he had prosecuted three prior actions on the same mortgage and note, all of which had been dismissed.

[1] The evidence shows that the previous actions referred to were dismissed by the clerk on the direction of the plaintiff in the case. There is no merit in the claim that such a dismissal is a bar to a subsequent suit. It appears that at the time the dismissal was ordered the defendants had paid a part of the interest due on the note. There was no settlement of the cause of action, nor anything which purported to be a decision against the plaintiff on the merits of the case. No other question is presented.

[2] The appeal is frivolous, and obviously taken for delay only. The case calls for the imposition of damages, which the court fixes at the sum of $100.

It is ordered that the judgment be affirmed, and that plaintiff recover of the appellants, Julia P. and C. D. Warden, the sum of $100 as damages by the appeal, together with costs.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

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178 Cal. 107

WILLIAMS v. YOUTZ. (L. A. 4135.)

(Supreme Court of California. April 11, 1918.)

1. Corporations 🔑123(14) — Pledge of Stock—Sale.

A promissory note, giving a third party the right to call for additional security as it may deem proper, and on failure to respond forthwith the note was immediately to become due and payable, "or on the nonperformance of this promise" said payee is given full power and authority to collect the securities without demand or notice, authorized sale of stock securing such note upon default in payment thereof.

2. Pleading 🔑258(1)—Amendment—Time.

Where defendant, in an action on a promissory note, applied for permission to amend his answer on the day of the trial five months after filing his original answer to embrace matters of which he had knowledge at the time of filing such original answer, it was not error to refuse such request.

3. Evidence 🔑370(5)—Documents—Preliminary Proof.

In an action on a promissory note, it was not error to exclude an agreement between defendant and the payee's manager, whereby defendant was to be employed for a term of ten years, payment to be applied on the notes; it not appearing that such agreement was within the manager's authority and no foundation therefor having been laid.

Department 1. Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Gara Williams against J. E. Youtz. Judgment for plaintiff, and defendant appeals. Affirmed.

Harriman, Ryckman & Tuttle and Henry W. Nisbet, all of Los Angeles, for appellant. Slosson & Mitchell, of Los Angeles, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment in plaintiff's favor and from an order denying defendant's motion for a new trial. The action is one to recover a balance alleged to be due upon 11 promissory notes, each for the sum of $1,000, executed in the course of a single transaction by the plaintiff, and each secured by a pledge of certain stock. Each of said notes contained the following provision:

> "That the Merchants' & Insurers' Reporting Company has the right to call for such additional security as it may deem proper, and on failure to respond forthwith to such call this obligation shall immediately thereon become due and payable; or on the nonperformance of this promise, the said payee, its president or secretary, or assigns, is and are hereby given full power and authority to sell, assign, and deliver or collect the whole or any part of the above-named securities, or any substitute therefor, or any addition thereto, at public or private sale, at any time or times hereafter, without demand, advertisement or notice, such demand, advertisement and notice being hereby expressly waived."

The defendant failed to pay his notes at their maturity, whereupon the stock so pledged as security was sold without demand or notice and the sums realized at such sale applied upon the notes. This is an action to recover the balance still remaining due thereon.

[1] Upon the trial of the cause the defendant insisted, and here insists, that the above-quoted clause in his said notes, providing for the sale of their security without demand or notice, had reference solely to the provisions therein relative to the failure of the maker to respond to a call from the holder of the notes for additional security, and did not refer to or include any failure on the part of the maker of the note to fulfill his promise to pay the same. There is no merit in this contention. The language of the above proviso is unequivocal, and refers directly to any nonperformance of the maker's promise as embodied in the terms of his notes. The sale of the stock pledged for the performance of his said promise was therefore properly made without demand or notice in accordance with the express terms of the waiver above set forth. This precise question was determined in accordance with these views in the case of Williams v. Parker, 30

Cal. App. 71, 157 Pac. 550, arising out of this same transaction, and wherein this identical waiver was the subject of review.

[2] The appellant's next contention is that the court erred in refusing to permit the defendant to make an amendment to his answer on the day the cause was set for trial. The action was commenced on August 21, 1913. The defendant's original answer in the case was filed on October 6, 1913. The case came on for trial on March 10, 1914, more than five months after the date of the filing of defendant's original answer. In his said answer the defendant had denied specifically the averments of the plaintiff's complaint, and had also pleaded payment of the notes sued upon in full. The proposed amendment to his said answer embraced matter alleged to have occurred prior to the inception of the action or the filing of his answer therein, which matter in itself could hardly be said to constitute a defense to the action, since it related to statements of stockholders of the corporation holding said notes made generally in a stockholders' meeting of said corporation, and not embodied in any resolutions or other formal action, to the effect that they did not desire that proceedings should be taken to enforce the collection of said notes. The defendant was himself present at such meeting, and every fact and thing alleged to have occurred thereat were fully known to him at the time his original answer was filed; besides, the matters as set forth in his proposed amendment to his answer were utterly inconsistent with the averments of his original answer, to the effect that said notes had been by the defendant fully paid. Granting the correctness of the rule invoked by the appellant as to the liberality with which courts should admit pleadings to be amended, we are unable to find any abuse of discretion on the part of the trial court in refusing defendant permission to amend his answer on the day of trial as to the matters above set forth. The cases of Manha v. Union Fertilizer Co., 151 Cal. 581, 91 Pac. 393, and Todhunter v. Klemmer, 134 Cal. 60, 66 Pac. 75, are fully in point as sustaining the discretion of the trial court in refusing to allow the defendant to amend his answer, in the absence of any showing why the matters sought to be brought into it at that late date were not embraced in the original answer, or why the application to amend was not earlier made.

[3] The next contention on the part of appellant is that the trial court erred in its refusal to permit the introduction in evidence of a purported agreement between the defendant and the corporation holding his notes, providing for his employment for a term of ten years at a stated salary, which was to be applied to the payment of his notes. The agreement in question was signed by the manager of said corporation. The seal of the corporation was not attached, nor was there any showing, or attempt at showing, what the powers of the manager of the corporation were, or that he had ever been authorized by resolution or otherwise to enter into the agreement in question. The agreement itself was outside the usual course of business of like corporations, and went far beyond the ordinary powers reposed in managers of such institutions. The objection that no proper foundation had been laid for the admission of the agreement in evidence was therefore well taken, and no error was committed by the trial court in sustaining the same.

The appellant's final point that the judgment is unsupported by the findings we find upon an examination of the record entirely without merit.

Judgment and order affirmed.

We concur: SLOSS, J.; SHAW, J.

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178 Cal. 122

SHARPLESS et al. v. PANTAGES.

(L. A. 4169.)

(Supreme Court of California. April 12, 1918.)

1. THEATERS AND SHOWS 🔑6—NEGLIGENCE—PLEADING—SUFFICIENCY.

An allegation that defendant operated and conducted his theater and its carpets negligently, in that a strip of carpet was so laid that plaintiff in passing downstairs was tripped and thrown by reason of the fact that the carpet was loose and thereby she sustained injuries, was not a too general allegation of negligence.

2. THEATERS AND SHOWS 🔑6—EVIDENCE.

In action for injuries occasioned by loose carpet on stairs in theater, it was within the discretion of the court to permit a witness to testify as to the condition of the carpet two days after the accident, especially where there was evidence that there had been no change in its condition.

3. THEATERS AND SHOWS 🔑6—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Testimony of injured patron of theater that as she was going down the stairs her foot slipped because of the loose condition of the carpet, and that her fall was occasioned thereby, was sufficient to sustain a finding that theater was negligent.

4. THEATERS AND SHOWS 🔑6 — DUTY TO PATRONS—CARPETS.

It is the duty of a theater to use ordinary care to so maintain carpets on its stairs that it would be safe for persons to pass thereon in an ordinary manner.

5. TRIAL 🔑238—INSTRUCTIONS.

The court properly instructed the jury that, while they were authorized to determine the facts, they must take the law governing the same from the instructions given to them by the court, and that it was a violation of their duty to determine that the law was different from that given by the court.

6. TRIAL 🔑260(1)—INSTRUCTIONS.

The court need not give requested instructions covered by those given, or amplify unnecessarily propositions which to a jury of ordinary intelligence would be apparent from the instructions given.

7. APPEAL AND ERROR 🔑1002—FINDINGS OF FACT—CONFLICTING EVIDENCE.

Verdict of jury on conflicting evidence cannot be disturbed on appeal.

Department 1. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Susie J. Sharpless and Joseph W. Sharpless, her husband, against Alexander Pantages, doing business under the name of Pantages Circuit of Vaudeville Theaters. Judgment for plaintiffs. From the judgment, and an order denying a motion for a new trial, defendant appeals. Affirmed.

Chas. E. Barrett, of Las Vegas, Nev., and Hickcox & Crenshaw, Harry A. Hollzer, and L. D. Collings, all of Los Angeles, for appellant. George L. Greer and S. L. Carpenter, both of Los Angeles, for respondents.

SHAW, J. The defendant appeals from the judgment and from an order denying his motion for a new trial.

The action was to recover damages alleged to have been caused to the plaintiff, Susie J. Sharpless, by the negligence of the defendant. The defendant was conducting a theater in the city of Los Angeles. The negligence alleged is that the defendant operated and conducted his theater and its carpets negligently, in that one of the strips of carpet in a balcony aisle and stairs was so laid that the plaintiff in passing down said stairs was tripped and thrown by reason of the fact that the carpet was loose and thereby she sustained the injuries complained of.

[1] There is no merit in the contention that the complaint is insufficient in respect to the allegations of negligence. It is well settled that it is sufficient to charge negligence in general terms, and that, when that which is done is stated, it is sufficient to say that it was negligently done without stating the particular omission which rendered the act negligent. Stein v. United Railroads, 159 Cal. 368, 113 Pac. 663. The complaint was sufficient in this respect.

[2] It was within the discretion of the court to allow the witness Foster to testify to the condition of the carpet complained of upon an examination made by him two days after the accident occurred, especially in view of the fact that there was other evidence tending to show that there had been no change in its condition in the meantime.

It is claimed that a medical witness, in describing the injuries of the plaintiff, was permitted to magnify the same over the objection of the defendant. We do not find any merit in this contention and it is unnecessary to consider it further.

[3, 4] The contention that the motion for a nonsuit should have been granted is also without merit. The testimony of the plaintiff and other witnesses was sufficient to show that as she was going down the steps in question her foot slipped because of the loose condition of the carpet and that her fall was occasioned thereby. It being the duty of the defendant to use ordinary care to maintain the carpet upon the steps in such condition that it would be safe for persons to pass thereon in an ordinary manner, the fact that the plaintiff's foot slipped as she stepped upon the carpet is some evidence tending to show that defendant had failed to do so and it is sufficient to sustain the decision upon the motion for a nonsuit.

[5] The court properly instructed the jury that while they were authorized to determine the facts involved in the case from the evidence, they must take the law governing the same from the instructions given to them by the court, and that it was a violation of their duty to determine that the law was different from that given by the court. This proposition has been so often decided and is so well established that we deem it unnecessary to discuss it further or cite authorities in its support. Some complaint is made that the instructions state to the jury as a matter of law that the defendant was guilty of negligence. We have examined the instructions throughout and find no basis for that objection.

[6] The defendant asserts that the court erred in refusing to give a number of instructions asked by the defendant. We have examined the instructions given with reference to the instructions asked and refused and find that in each instance the subject of the instructions refused was sufficiently covered by those given. It should be unnecessary to say that there is no law requiring the court to repeat an instruction once given or to amplify unnecessarily upon propositions which to a jury of ordinary intelligence would be apparent from the instructions given.

[7] The most that can be said in favor of the defendant with respect to the sufficiency of the evidence to sustain the verdict is that there was some conflict upon some points therein. In such a case the verdict of the jury cannot be disturbed by the court on appeal.

Other rulings are complained of, but we deem them so trivial that they do not deserve consideration. We find no merit in the appeal.

The judgment and order are affirmed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

178 Cal. 114

In re O'HARE'S ESTATE. (L. A. 5400.)

(Supreme Court of California. April 11, 1918.)

APPEAL AND ERROR 🔑907(3)—REVIEW—ASSUMPTION AS TO PROOF—ABSENCE OF EXCEPTIONS.

On appeal by the executrix from decree of distribution, the record, which contained no bill of exceptions, could not support any one of the contentions of fact that a brother of testator, named in the residuary clause of the will as a nephew, could not be the brother of that name to whom a specific legacy was given, etc., the Supreme Court being bound to assume that there was a showing that no nephew of the brother's name ever existed, and that the circumstances proved the brother to be the one intended.

Department 2. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Martin O'Hare, deceased. From decree of distribution, Margaret O'Hare, the executrix, appeals in several capacities. Affirmed.

E. S. Janes, of Los Angeles, for appellant. Stewart & Stewart, of Los Angeles, for respondent.

MELVIN, J. Margaret O'Hare, the executrix, appeals in several capacities from a decree of distribution which, among other provisions, gives to Michael O'Hare, brother of testator, in addition to a legacy of $500, one-fourth of the residue of the estate; and to the children of Martin O'Hare, a deceased nephew, his share under the will.

Appellant's counsel made two motions: One, under section 473, Code of Civil Procedure, was to be permitted to file a bill of exceptions as he, not realizing that his notice of appeal was a waiver of his right to a notice of decision, had allowed his time to file a bill of exceptions to pass, while awaiting such notice of decision. The motion was denied. The other motion was one to amend and substitute a judgment and decree for the one entered. It also was denied. There is, therefore, no record to support the objections made by appellant.

There appears in the transcript, however, that which purports to be a copy of the will. It contains the following provisions, among others:

> "I give and bequeath to my brother, Michael O'Hare (also spelled O'Hcher in Ireland), residing at Inchaboy, Postoffice, Gort, County Galaway, Ireland, the sum of five hundred dollars. * * *
>
> "All the rest, residue and remainder of my said estate I give, devise and bequeath to my said nieces, Mary Reilly and Bridget O'Hare, and my nephews, Martin O'Hare, John O'Hare and Michael O'Hare, share and share alike."

Specifically the part of the decree to which appellant objects is as follows:

> "The court finds that the brother, Michael O'Hare, is entitled, in addition to the $500 money legacy bequeathed to him, to one-fourth of the residue of said estate; and the court finds that John O'Hare, Mary A. O'Hare, Joseph O'Hare and Catherine O'Hare, the four children of and all of the children of Martin O'Hare, deceased nephew of decedent, are entitled to take of said estate the share to which their father, the said nephew, Martin O'Hare, would have been entitled, if living, to wit, a general legacy of $1,000 and one-fourth of the residue of said estate, after the other general legacies are paid."

It is contended that Michael O'Hare, named in the residuary clause, cannot be the brother of that name to whom a specific legacy was given; that Martin O'Hare died before the will was made and executed, and that, therefore, his descendants could not rightfully take his portion under the will; that these children are not in any event entitled to their father's share "as though they were adults" (they being minors); and that the lower court erred in determining that the bequest to John O'Hare, who died in infancy without lineal descendants, should be distributed to the other residuary legatees. Not one of these contentions is or could be supported by the record before us. We must assume that the proof before the court was ample to uphold its conclusions. For instance, we are bound to assume that there was a showing that no nephew named Michael O'Hare ever existed, and that the surrounding circumstances proved the brother Michael to be the one intended. Upon his failure to get a bill of exceptions counsel for appellant must have known that there was no chance of success because no proof of the supposed facts supporting his contentions could be brought before this court.

Judgment affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

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178 Cal. 125

SWEINHART v. PLANT INV. CO. et al.

(L. A. 4161.)

(Supreme Court of California. April 12, 1918.)

1. WILLS 🔑601(1)—DEVISE OF ABSOLUTE ESTATE—POWER OF SALE—LIMITATION OVER.

Where absolute property in an estate is devised, or where an unrestrained power of sale is given to devisees, a limitation over to another is void as inconsistent with the first estate.

2. EXECUTORS AND ADMINISTRATORS 🔑315(6)—DECREE OF DISTRIBUTION — COLLATERAL ATTACK.

Validity of decree of distribution of testator's estate establishing a trust in realty in favor of testator's children and their heirs is not open to attack in suit to partition the realty involved by the devisee of one of the devisee children, the decree distributing the estate, and establishing the trust being an adjudication of the trust's validity and the rights of the children in the property.

3. WILLS 🔑5—PROPERTY SUBJECT OF DISPOSITION.

Where decree of distribution of testator's estate distributed the whole of the realty to children, share and share alike, in trust to use the profits for life, or until such a time after ten years from testator's death as all his children or the survivors and the heirs of the body of decedents should mutually agree in writing to sell the realty and divide the proceeds, when that should be done, and the proceeds divided equally among the children and the heirs of the body of decedents, etc., and provided that, if there was no agreement to sell, then, on the death of all of the children, the realty or proceeds should be divided among the heirs of their bodies, etc., and there was never any agreement to dispose of the realty during the life of one of testator's sons, such son's wife never acquired any interest in it, though her husband devised to her.

Department 2. Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Minerva Sweinhart against the Plant Investment Company, a corporation, and L. P. Tweedy and others. From an adverse judgment, plaintiff appeals. Affirmed.

Hartley Shaw, of Los Angeles, for appellant. Anderson & Anderson, of Los Angeles, for respondent.

MELVIN, J. Plaintiff, here appealing from an adverse judgment, sued unsuccessfully to partition certain real property asserting that she is the owner of an undivided eighth of the realty involved, claiming as the devisee of her deceased husband, Roger Plant, Jr., who survived his father, Roger Plant, Sr., by more than ten years. The younger Roger Plant died childless, and by his will all of his property went to his widow, who is the plaintiff here. She has married since his death.

The sole question involved is the proper construction of the decree of distribution in the estate of Roger Plant, Sr., by which the whole of the real property is distributed as follows:

> "To said William Plant, Susan Plant Tweedy, Roger Plant, Henry Plant, Phoebe Plant, David Walter Plant, George Washington Plant, Richmond Plant and Charles Plant, said children of deceased, all of whom are over 21 years old, the said real property is hereby distributed share and share alike, but in trust nevertheless, they to use the net rents and profits during their lives, or until such a time after ten years from the date of the death of said Roger Plant as that all of his said children, or in case any of them shall be dead, then all said children then surviving and the heirs of the body of said deceased children, shall mutually agree in writing to sell said real property and divide the proceeds, when the same shall be sold and the proceeds divided equally among said children and in the event any of said children are dead, the heirs of the body of said deceased child or children shall succeed to the interest of their parent in equal proportions, and if they shall not agree in writing to sell said realty as aforesaid, then on the death of all of said children, said real property or the proceeds thereof shall be divided among the heirs of the body of said children, each child's children to be entitled to share equally in the portions of its parent, and if any of said children shall die prior to distribution without issue, then the portion of such deceased child shall be equally divided among the surviving children and the heirs of the body of any deceased child, each deceased child's heirs to share equally in their deceased parent's portion of said child dying without issue."

Plaintiff's contention is that the distributees under this decree took an estate in fee simple absolute either at the date of the entry of the decree or ten years later, and that the trust provisions are repugnant to this estate. In this behalf her counsel cites many authorities to the effect that where an absolute property in the estate is devised, or where an unrestrained power of sale is given, a limitation over to another is void as inconsistent with the first estate.

[1] Unquestionably that is the rule, but an examination of the trust clause of the decree here involved reveals the fact that there is no unrestrained power of disposition conferred.

[2, 3] The validity of the decree establishing the trust is not open to attack in this suit. Goldtree v. Allison, 119 Cal. 344, 51 Pac. 561. By the terms of that part of the decree none of the property could be sold without the written agreement of the surviving children of the testator and heirs of the body of those original distributees who had died. Before such division by agreement the interest of each distributee would, upon his death, pass to the heirs of his body or in default of any to the survivors of the trustees. Such limitation upon the power of alienation may not be questioned by plaintiff, and under the terms of the trust, as there never was any agreement to dispose of the property during her husband's life, she never acquired any interest in it. A very similar trust has been upheld by the Supreme Court of Missouri. Dougal v. Fryer, 3 Mo. 40, 22 Am. Dec. 458.

The judgment is affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

178 Cal. 96

BRESEE v. DUNN et al. (L. A. 4132.)

(Supreme Court of California. April 11, 1918.)

1. Pleading 🔑8(8)—Conclusions.

Allegation that "said building restrictions upon said lots have been faithfully observed" is a mere conclusion.

2. Covenants 🔑51(2)—Building Restrictions—Enforcement.

Courts are slow to declare the existence of building restrictions, unless it clearly appears from the conveyances, not only that a general scheme of improvement is comtemplated, but also, if a grantee of the original covenantee seeks to enforce the restrictions, that it is not a mere personal covenant but passes with the land.

3. Covenants 🔑114(1) — Violation of Building Restrictions—Pleading.

In action to enjoin construction of a house in violation of building restrictions, the complaint was demurrable, where it failed to show that there was any reversion left in the original covenantee or that any penalty attached to disobedience of the restriction.

4. Covenants 🔑57—Personal Covenants Not Passing with Realty.

Where the fee is passed to the covenantor and no reversion left in the covenantee, there is no privity of estate or tenure between the parties, and the burden of the covenant, though imposed upon the land conveyed, is solely for the personal benefit of the covenantee, not passing with the realty to his grantee.

5. Covenants 🔑51(2) — Construction — Marks of Punctuation.

A reasonable construction of a deed containing a negative covenant that no building should be placed less than 35 feet from front line; and that no fence should be erected in front of the front line of any building "within five years from the date" of the deed—is, although the two parts of the sentence are separated by a semicolon, to apply the time limit to both, the authorities indicating a tendency on the part of the courts to read a restriction expressed in a deed as a whole, disregarding at times even the strict rules of punctuation.

6. COVENANTS 🔑69(2) — CONSTRUCTION — BUILDING RESTRICTIONS.

Conveyance to plaintiff's predecessor contained covenant that no buildings should be placed upon the premises less than 35 feet from the front line, that no building to be used as a dwelling should be erected upon said premises within five years from the date of deed which cost less than $2,500, and that no fence should be erected in front of the front line of any building erected upon the premises. Conveyance of other lots fronting on the same street omitted covenant as to cost, and the inhibition regarding fences was followed by the words "within five years from the date of this deed." *Held*, that the variation in the deeds indicated that the grantor was merely seeking to put a personal covenant in each deed terminable as to all its parts after five years.

Department 2. Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by P. W. Bresee against R. J. Dunn and others. From judgment following an order sustaining general demurrer to amended complaint, plaintiff appeals. Affirmed.

Williams, Goudge & Chandler, of Los Angeles, for appellant. James, Smith & McCarthy and Hammack & Hammack, all of Los Angeles, for respondents.

MELVIN, J. Judgment followed an order sustaining a general demurrer to the amended complaint. From said judgment plaintiff appeals.

The action was one whereby plaintiff sought to enjoin defendants from constructing a house on their property in alleged violation of a certain building restriction. The complaint avers substantially the following facts:

In October, 1901, Prudential Improvement Company, owner of a block of land in the city of Los Angeles, bounded by West Adams, Anita, Normandie, and Twenty-Seventh streets, caused said land to be resubdivided and filed for record a plat showing the division thereof into lots, of which there were 21 of substantially uniform size. It was and ever since has been (according to the complaint) the intention and plan of the owners that the tract should be occupied only by residences so erected that those fronting on West Adams street should be not less than 35 feet from the front line of the property and those fronting on Normandie and Anita streets not less than 25 feet. It is further alleged that the owner of the property "in conveying the same did so restrict said property by express provisions contained in the respective conveyances of said lots." In November, 1901, Prudential Improvement Company conveyed lot 2, one of the five lots fronting on West Adams street, to one Kennedy, and it is alleged in the complaint that:

> The deed "for the benefit of the purchaser of said lot and for the benefit of the purchasers of the remaining lots of said tract, and the administrators, executors, heirs and assigns of each of them, and particularly of those lots fronting on West Adams street, contained the following covenants and restrictions: 'That no building or buildings shall be erected, constructed or placed upon the premises hereby conveyed, the front line of which shall be less than thirty-five (35) feet from the front line of said premises, and that no building to be used as a dwelling house shall be erected, constructed or placed upon said premises within five years from the date of this deed which shall cost less than twenty-five hundred dollars ($2,500.00) and that no fence shall be erected, placed or constructed in front of the front line of any building erected, constructed or placed upon the said premises.'"

In April, 1909, plaintiff by mesne conveyances became the owner in fee of lot 2, has ever since been the owner, and has his residence thereon.

In January, 1907, the Prudential Improvement Company (under a changed name) conveyed lots 3, 4, and 5 (also fronting on West Adams street) to one Hundley. The deed contained the following conditions, also alleged in the complaint to have been for the benefit of the purchasers of all of the lots:

> "This deed is made subject to the following express conditions, to wit: That no building or buildings shall be erected, constructed or placed upon the premises hereby conveyed, the front line of which shall be less than thirty-five (35) feet from the front line of said premises on West Adams street; and that no fence shall be erected, placed or constructed in front of the front line of any building erected, constructed or placed upon the said premises within five years from the date of this deed."

Thereafter by mesne conveyances the defendants, in February, 1914, became the owners in fee of lot 3 which adjoins plaintiff's property, lot 2.

It is further alleged (but without the date being given) that lot 1 fronting on West Adams street was sold by the Prudential Improvement Company and conveyed by deed, which was duly recorded; said deed containing restrictions similar to those in the deed to lot 2 which we have quoted above.

When defendants became the owners of the property here involved, they had knowledge and notice of the restrictions upon all the lots fronting on West Adams street.

[1] It is further averred that, at all times prior to the date of the acquisition of title by defendants in 1914, "the said building restrictions upon said lots have been faithfully observed" (an allegation which respondents very justly term a mere conclusion). Defendants were about to construct a building within 35 feet of the front line of their property, and plaintiff by this action sought to enjoin them from so doing. Appellant believes that he has sufficiently pleaded the existence of

enforceable covenants entered into with the design of carrying out a general plan for the development of real property subdivided into parcels, and he cites in this behalf many authorities, such, for example, as De Gray v. Monmouth Beach Club House Co., 50 N. J. Eq. 329, 24 Atl. 388; Brouwer v. Jones, 23 Barb. (N. Y.) 153; Korn v. Campbell, 192 N. Y. 490, 85 N. E. 687, 37 L. R. A. (N. S.) 1, 127 Am. St. Rep. 925; Allen v. City of Detroit, 167 Mich. 464, 133 N. W. 317, 36 L. R. A. (N. S.) 890.

[2-4] Undoubtedly, covenants imposing building restrictions have been frequently upheld, but the courts are slow to declare such burdens upon real property to exist unless it clearly appears from the deeds of conveyance, not only that a general scheme of improvement is contemplated, but also, if a grantee of the original covenantee seeks to enforce the restriction, that it is not a mere personal covenant but passes with the land. In the pleading now under consideration it does not appear that there was any reversion left in the original covenantee. The complaint shows neither by direct averment nor by quotation from the original conveyances that any penalty attached to disobedience of the building restrictions. It does contain allegations to the effect that the fee passed from the Prudential Improvement Company to the predecessors of plaintiff and defendants in the ownership of lots 2 and 3 and from them by mesne conveyances to these litigants respectively. The rule is that where the fee is passed to the covenantor and no reversion is left in the covenantee, there is no privity of estate or tenure between the parties, and the burden of the covenant, though imposed upon the land conveyed, is solely for the personal benefit of the covenantee, not passing with the realty to his grantee. Los Angeles Terminal Land Co. v. Muir, 136 Cal. 36–42, 68 Pac. 308; Berryman v. Hotel Savoy Co., 160 Cal. 559–565, 117 Pac. 677, 37 L. R. A. (N. S.) 5.

There is nothing in either of the quotations from conveyances set forth in plaintiff's pleading and nothing in the averments of the complaint to take the pleaded restrictions out of the category of purely personal covenants made for the original grantor's benefit. For this reason the demurrer was properly sustained.

[5] Respondents also insist, and we think correctly, that the covenants were intended to and did expire by limitation of time. Inspection of the quoted portion of the deed to respondents' predecessor reveals the fact that it contains the negative covenant that no building shall be placed less than 35 feet from the front line of the property, and that no fence shall be erected in front of the front line of any building "within five years from the date" of the deed. It is true that the two parts of the sentence are separated by a semicolon, but they are conjunctively attached, and it is a reasonable construction to apply the time limit as expressed by the words "within five years," etc., to both building restrictions, the one referring to houses as well as that applying to fences. The authorities indicate a tendency on the part of courts to read a restriction expressed in a deed as a whole, disregarding at times even the strict rules of punctuation. For example, the limitation for ten years was held to apply to all restrictions, including that with reference to the building line in the following covenant in a deed:

> "That the said grantee or his heirs or assigns shall not for a period of ten years erect on the granted premises any buildings or parts thereof which shall be used or occupied for any other purposes than dwelling-houses, and private stables, and buildings usually appurtenant to dwelling houses, except the corner lots, which may be used for store purposes, and said dwellings to be occupied by none but respectable families, and that no building, or part of any shall be erected within fifteen feet of the front line of each lot." In re Welsh, 175 Mass. 68, 55 N. E. 1043.

In Best v. Nagle, 182 Mass. 495, 65 N. E. 842, a similar ruling was made with reference to the following provisions in a conveyance:

> "That no building except the ordinary outhouses shall be placed upon said lots, or either of them, of less value than four thousand dollars, and all buildings erected thereon, shall set back from the line of the several streets shown on said plan, at least twenty feet, nor shall any building erected on said land be used for a livery stable or tenement house, or for any manufacturing purposes, for the period of ten years."

Another instructive case upon this subject is Armstrong v. Griffin, 83 N. J. Eq. 599, 91 Atl. 1016; Id., 84 N. J. Eq. 196, 93 Atl. 1084.

[6] The quotations from deeds appearing in the complaint do not justify the pleading that there was a uniform plan for the benefit of all lots fronting on West Adams street. In the conveyance to appellant's predecessor, made in 1901, three prohibitions are expressed, one against erecting a building within 35 feet of the front line of the premises, a second forbidding the construction of a house costing less than $2,500, and a third for the prevention of the placing of a fence in front of any building on the property. The phrase "within five years from the date of this deed," upon the strict grammatical construction for which appellant contends, might be held by reason of its place in the sentence to apply only to the limitation regarding minimum cost of any house, leaving the other two provisions enforceable for all time. Identical provisions were in the deed disposing of the Prudential Company's interest in lot 1. Yet in the deed to lots 3, 4, and 5, made in 1907, while the restriction upon lowest cost of any building is omitted as it would be very properly if a general and uniform plan of improvement were being carried out the inhibition regarding the erection of a fence in front of any building is followed by the

words "within five years from the date of this deed." This absolutely contradicts appellant's pleaded conclusion that the covenantee was pursuing a general and uniform plan of establishing a residence district with similar spaces in front of each dwelling. And it does more than that. It indicates that the grantor was merely seeking to put a personal covenant in each deed terminable as to all its parts after the lapse of five years.

The judgment is affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

178 Cal. 116

In re FISKE'S ESTATE.

CHAMBERS, Controller, v. PRINCETON UNIVERSITY et al.

(L. A. 5433.)

(Supreme Court of California. April 12, 1918.)

TAXATION ⟹876(6)—INHERITANCE TAX—EXEMPTION—FOREIGN CHARITABLE OR BENEVOLENT CORPORATIONS—STATUTE.

Foreign charitable corporations were exempt from inheritance tax on property left them by will under Inheritance Tax Law 1915 (St. 1915, p. 421) art. 1, § 7, exempting charitable corporations.

Department 2. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

In the matter of the estate of Marie Antoinette Fiske, deceased. From a judgment exempting Princeton University and other corporations from paying an inheritance tax, John S. Chambers, Controller, etc., appeals. Affirmed.

John W. Carrigan and Edwin H. Pennock, both of Los Angeles (Robert A. Waring, Inheritance Tax Atty., of Sacramento, of counsel), for appellant. C. J. Willett and A. G. Allen, both of Pasadena, for respondents.

WILBUR, J. This is an appeal from a judgment declaring that certain foreign corporations, to wit, Princeton University, Cheshire Public Library, and Cheshire Cemetery, all existing for nonprofit purposes, are exempt from paying an inheritance tax upon the property left to them by the will of the decedent. The facts are stipulated, and the only question is whether, under the inheritance tax law of 1915 (St. 1915, p. 421), such foreign corporations are exempt from the payment of the tax. That statute (article I, § 7) reads as follows:

> "All property transferred to societies, corporations, and institutions now or hereafter exempted by law from taxation, or to any public corporation, or to any society, corporation, institution, or association of persons engaged in or devoted to any charitable, benevolent, educational, public, or other like work (pecuniary profit not being its object or purpose), or to any person, society, corporation, institution, or association of persons in trust for or to be devoted to any charitable, benevolent, educational, or public purpose, by reason whereof any such person or corporation shall become beneficially entitled, in possession or expectancy, to any such property or to the income thereof, shall be exempt."

It is difficult to conceive of any language by which a more direct exemption could be made. Authorities are cited from other states wherein exemptions of charitable corporations have been held, under the language of the particular statute construed, to apply only to domestic charitable corporations. Our attention is not called to any law which is as broad and comprehensive in its scheme of exemption as our statute. If this statute simply read, "All property transferred to corporations and institutions now or hereafter exempted by law from taxation," it might very well be argued, as it was in the cases in question, that the exemption "law" referred to was the law of this state, and that therefore we should look to its law to determine what societies, corporations, and institutions are exempt from taxation. As there are additional provisions in the statute concerning exemptions, we are not justified in any construction of the statute which depends upon such consideration alone. Some of the cases cited are based upon the general consideration that, where "corporations" are referred to in such legislation, it must be inferred that the Legislature was exempting such corporations only as it has jurisdiction over, namely, domestic corporations. Under the statute of this state there is no room for such construction, for the exemption is extended to a "society," an "institution," an "association of persons," and to "any person" as well, if engaged in the work described. It must be apparent that the Legislature intended to exempt from taxation all property devoted to certain purposes, namely, property "devoted to any charitable, benevolent, educational, or public purpose," "or any other like work." The fact that the devisee or legatee might be a corporation, foreign or domestic, was an entirely indifferent matter, for the exemption was made to apply to "societies," "corporations," "institutions," "association of persons," and to all "persons." It would seem to verge upon an absurdity to say that when the Legislature used the word "person" it meant any person, resident or nonresident of the state; but, when it used the word "corporation" in exactly the same connection and in the same sentence, it meant only domestic corporations. We are in entire accord with what was said in Re Frain, 141 La. 932, 75 South. 847, where the numerous decisions relied upon by the appellant were reviewed. The court there pointed out that the decisions holding that foreign charitable corporations were not exempt were based upon the language of the particular statute under consideration, and added:

> "Very true, these decisions are reinforced by considerations based on the policy of the law in granting exemptions; but their main and real basis is the text itself of the statute. And the text of the statute * * * extends the exemption to religious institutions in general, without qualification."

We find it unnecessary to discuss the numerous decisions of other states, in which laws more or less similar to ours are construed to mean that domestic corporations are exempt and foreign corporations taxed. Nor is it at all necessary to discuss the conceded right of a state to discriminate between foreign and domestic corporations in the imposition of the inheritance tax. Estate of Speed, 203 U. S. 553, 27 Sup. Ct. 171, 51 L. Ed. 314.

The judgment is affirmed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

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178 Cal. 128

HAMAKER et al. v. BRYAN et al.

(L. A. 4164.)

(Supreme Court of California. April 13, 1918. Rehearing Denied May 9, 1918.)

1. Trial 🔑194(11) — Instructions — Bad Faith—Province of Jury.

In an action for damages for breach of contract to convey real estate in which damages for bad faith were claimed under Civ. Code, § 3306, an instruction defining bad faith as any unlawful or unjustifiable refusal on the vendors' part to comply with the agreement would be sufficient to constitute bad faith, taking into consideration all the facts and circumstances surrounding the failure to convey, was erroneous; the bad faith of the vendors being a jury question.

2. Vendor and Purchaser 🔑351(1) — Breach of Contract—"Bad Faith."

In an action for breach of contract to convey real estate, it was not bad faith, under Civ. Code, § 3306, providing measure of damages in case of "bad faith" of vendor, for the vendors to enter into the contract after having made arrangements to secure title to the land they agreed to convey.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bad Faith.]

3. Vendor and Purchaser 🔑351(1) — Breach of Contract—"Bad Faith."

In an action for breach of contract to convey real estate, a few days' delay by the vendors in securing title to the land does not constitute bad faith, within Civ. Code, § 3306, relating to measure of damages in case of "bad faith" of vendor.

Department 2. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by W. M. Hamaker and others against E. P. Bryan and others. Judgment for plaintiffs, and defendants appeal. Reversed.

W. W. Butler and Anderson & Anderson, all of Los Angeles, for appellants. Morton, Hollzer & Morton, Harry A. Hollzer, and C. B. Morton, all of Los Angeles (Jerome H. Kahn, of Los Angeles, of counsel), for respondents.

WILBUR, J. This is an action brought by the plaintiffs to recover damages for breach of contract to convey real estate, executed March 14, 1911. The Code prescribes the ordinary measure of damages in such cases, and then makes this special provision, "but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate to be conveyed," etc. The price agreed to be paid in the instant case was $33,500, of which $250 was paid and $4,750 agreed to be paid in cash, the balance by mortgage and trust deed on the property. The verdict was for $5,250. The principal question involved was whether or not there was bad faith in the refusal, if any, to convey. On this subject, the court instructed the jury as follows:

> "In order to charge the defendants with bad faith, it is not necessary that their conduct be shown to be fraudulent. It is sufficient to show that their conduct in failing to convey this property to the plaintiffs was by reason of any frivolous or unfounded refusal in law or in fact to comply with the terms of their agreement. Any unlawful or unjustifiable refusal on their part to comply with their agreement would be sufficient to constitute bad faith; and in determining whether or not the conduct of the defendants in this case was such as to show bad faith, you should take into consideration all of the facts and circumstances surrounding their failure to convey the property as disclosed by the evidence."

[1-3] The jury were thus instructed that:

> "Any unlawful or unjustifiable refusal on their [the vendors'] part to comply with their agreement would be sufficient to constitute bad faith."

Every breach of a valid and subsisting contract for which damages may be recovered under section 3306, Civil Code, is "unjustifiable," and in a sense "unlawful," for the law requires that a person fulfill his legal obligations. The instruction was therefore clearly erroneous and prejudicial. The bad faith of the vendors was a question of fact to be determined by the jury. Appellate courts have been called upon to determine whether or not the evidence before the trial court was sufficient to justify a decision as to the fact of good faith or bad faith, but our attention has not been called to any case where a trial court, as a matter of law, has attempted to define "bad faith." In Morgan v. Stearns, 40 Cal. 434, 439, before the enactment of section 3306, Civil Code, the Supreme Court declined to disturb a judgment for damages based upon a difference between the market value and the contract price of land where the vendor "willfully refused to comply with the terms of the agreement to convey merely because the land has in the meantime considerably appreciated in value," but said:

> "It is unnecessary to examine to what, if any, extent the rule of damages for failure to convey

land is affected by the good faith of the defendant appearing."

In Yates v. James, 89 Cal. 474, 26 Pac. 1073, the failure of the vendor to convey was due to the refusal of the vendor's wife to join in a deed, the property being covered by a homestead declaration filed by the vendor before the contract of sale, and yet it was held that "bad faith" was not "proved," and the judgment was reversed for that reason, although the inability of the defendant to convey was due to a defect in his title (if a homestead may be classed as such) existing at the time he made the contract of sale. In Clark v. Yocum, 116 Cal. 515, 48 Pac. 498, the vendee paid the full purchase price ($4,400) of certain land and appurtenant water right. The price of the water right was not segregated, but it was alleged to be of the value of $2,000. A judgment for that amount was secured and affirmed. The vendors were the owners of said water right, and accepted the full purchase price therefor, and then, "without any just reason or excuse," refused to perform their contract. It was held that they were guilty of bad faith as a matter of law. In the instant case it was not bad faith for the vendors, having made some arrangement to secure title, to enter into a contract of sale. Yates v. James, supra. Nor would a few days' delay in securing such title be sufficient evidence of bad faith.

Judgment reversed.

We concur: VICTOR E. SHAW, Judge pro tem.; MELVIN, J.

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36 Cal. App. 460

FOSTER v. LOS ANGELES TRUST & SAVINGS BANK. (Civ. 2113.)

(District Court of Appeal, Second District, California. March 4, 1918.)

1. ESCROWS 🔑1—WHAT MAY BE PLACED IN "ESCROW."

The term "escrow," ordinarily considered, applies to a deposit of deeds, etc., and not to money.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Escrow.]

2. DEPOSITARIES 🔑3—RIGHTS AND OBLIGATIONS.

Where, under agreement between buyer and seller, money is deposited in a bank with instructions to deliver it to a seller on delivery of property, the bank is an agent for both parties, and must hold the same and pay it to the seller if there is a delivery, and the buyer if there is not.

3. ELECTION OF REMEDIES 🔑3(4) — INCONSISTENCY OF REMEDIES—REMEDIES AGAINST DIFFERENT PERSONS.

In such case, the seller waives its rights against the depositary, where on refusal of buyer to accept delivery it sells the property at public auction and sues the buyer alone and gets judgment for the full amount of the difference between the amount realized from the sale and the amount of the contract price, making no account whatever of the sum on deposit; such action by the seller being inconsistent with its further assertion of ownership of the sum deposited.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by E. K. Foster against the Los Angeles Trust & Savings Bank, a corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

Isidore B. Dockweiler, of Los Angeles (W. D. Finch and Thomas A. J. Dockweiler, both of Los Angeles, of counsel), for appellant. Jones & Weller, of Los Angeles, for respondent.

JAMES, J. This action was brought to recover the sum of $840 and interest. The gist of the claim of the plaintiff was that this money had been deposited with the defendant by a third party for his benefit, and that, conditions precedent having been satisfied and demand made, plaintiff was entitled to collect from the defendant the sum mentioned. Answer was filed to the complaint, and among the defenses alleged was that of the bar of the statute of limitations. The case came on for trial, and before any witnesses were examined, defendant asked and was allowed to withdraw its plea of the statute of limitations. Thereupon plaintiff being called as a witness in his own behalf, defendant objected to the introduction of any evidence on the ground that plaintiff's complaint failed to state sufficient facts to constitute a cause of action. This objection was sustained, and the judgment of dismissal, from which this appeal is taken, followed.

It will be necessary to a proper understanding of the legal question presented to state more particularly the facts relied upon by plaintiff to sustain his suit, as the same are expressed in the complaint. In March, 1907, the plaintiff and A. W. McCready entered into a contract executory in form as to both parties, by which McCready purchased from the plaintiff ten motorcars, to be thereafter shipped from St. Louis, Mo. The cars were to cost McCready in Los Angeles $2,800 each. One car was to be shipped immediately on the making of the agreement and the remainder, in lots of three, were to be shipped in March, April, and June, respectively, of the same year. McCready deposited with the defendant on account of the purchase and for plaintiff's benefit the sum of $2,800, which the defendant was instructed to pay over to the plaintiff in installments of $280 for each car as the same was delivered. In May of the same year three of the cars contracted for were delivered to McCready and were paid for in full by McCready. Thereupon McCready and the plaintiff mutually released one another as to the sale and purchase of four of the cars referred to in the contract, and agreed further that McCready might draw down the sum of $1,960 of the

$2,800 deposit. The defendant was advised of this change in the agreement of the parties by letter in the following form:

> "May 24, 1907.
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> "Los Angeles Trust Co. Gentlemen: We agree to the releasing of $1,960 of the $2,800 deposit on the escrow on Moon motorcar, balance to be applied on the last three cars. Time of shipment of same to be extended to Aug. 15, 1907.
>
> E. K. Foster.
> "A. W. McCready."

Thereafter, and in August, the three motorcars agreed to be last delivered, arrived, and on August 31st the plaintiff notified McCready and the defendant that the cars had arrived and were ready for delivery in accordance with the contract, and an offer was then made to deliver the same. McCready refused to accept the cars, and this defendant refused to pay over the balance of the deposit, which amounted to $840, being the same sum herein sued for. The refusal of defendant to pay over the money was based upon instructions given to it by McCready. Thereafter the plaintiff gave due notice that he would sell the three cars at public auction, and such a sale was held. The three cars were sold at this sale for an aggregate of $6,020. The expenses of sale amounted to the sum of about $400. Thereafter an action was commenced by this plaintiff in the superior court, in which action McCready and this defendant were made defendants and in which action plaintiff sought to recover from McCready the difference between the amount received by him for the motorcars at the auction sale, plus expenses of sale, and the price which McCready had agreed to pay for the cars. It is not stated whether in this action summons was served upon this defendant, but it is set forth in the complaint here that defendant McCready demurred to the complaint in the action last mentioned, which demurrer was sustained. Thereupon this plaintiff, being the plaintiff there, filed an amended complaint, in which this defendant was not named as party defendant. That action proceeded to trial, and judgment was recovered against McCready for the amount prayed for. The judgment was rendered in November, 1908. This action was commenced in March, 1915.

[1-3] It is appellant's contention that the money deposited by McCready with the defendant bank became due to plaintiff upon the performance of the conditions precedent, to wit, the offer to deliver the motorcars contracted for, and that upon the refusal of the bank to pay the same to him, there arose a cause of action in favor of the plaintiff, entitling him to recover the principal amount in suit. Respondent asserts in its brief that it was acting as a mere depositary, and under the provisions of section 1822 et seq., Civil Code, was obligated to return to McCready the money upon his making demand therefor. Respondent asserts that the conditions of the deposit were not like those attending an escrow wherein a release of the fund must be assented to by both the depositor and the other party in interest. Ordinarily considered, the term "escrow" applies to a deposit of deeds, etc. However, there is no occasion for dispute as to terms in characterizing the situation which arose between the plaintiff and defendant. It is quite clear that the contract as made between Foster and McCready, and of which the bank had full instruction, required the depositary to pay over to Foster the remainder of the deposit when the last three cars were delivered. The depositary was the agent of both parties for the purpose of applying the money in the way contracted for. On the other hand, had Foster failed to deliver the cars or to offer to deliver them, it is equally clear that the money would then belong to McCready, and he would be entitled to recover it from the bank. We think, however, that the facts as stated in the complaint of plaintiff show that the plaintiff waived his right to recover this money from the bank. If upon the tender of the motorcars it may be said that the defendant held in its hands as agent for the plaintiff the $840, then it must also be said that there was then paid upon the purchase price of the motorcars the sum of $840, for the possession of the money by the agent of the plaintiff would be the possession of the plaintiff. However, plaintiff was not content to assert his right to the deposit and refused to so apply the deposit at that time. Plaintiff acted in a way which was inconsistent with the idea that he further asserted ownership of the remainder of the fund. After selling the motorcars at public auction, he proceeded to bring an action against McCready for the full amount of the difference between what plaintiff actually secured at the auction sale of the cars and the amount of the contract price, making no account whatever of the $840 which he now alleges he is entitled to recover. In our opinion, after such action was taken by the plaintiff, the bank was justified, upon the demand of McCready, in refusing to turn over the money to the plaintiff.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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36 Cal. App. 454

A. P. HOTALING & CO. v. HAMILTON.

(Civ. 1792.)

(District Court of Appeal, Third District, California. March 4, 1918. Rehearing Denied by Supreme Court May 3, 1918.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS 🔑295(8)—SPECIFIC FINDINGS—NECESSITY.

Where plaintiff and defendant, creditors, entered into an agreement with debtor unable to pay his debts, whereby debtor assigned all his interest in his business to defendant, in trust for the benefit of all creditors, and plaintiff sued for breach of such agreement, defendant, to be protected against personal actions against him by creditors other than plaintiff for damages for violation of the agreement, was, notwithstanding the action purported to be one at law for damages, entitled not only to an accounting, but to clear and specific findings and a judgment based thereon adjudicating the respective rights of all the creditors.

2. TRIAL ⚿318—VERDICT TO SUPPORT JUDGMENT.

The general verdict not being determinative of the issues made by the pleadings and developed by the evidence, the judgment is without sufficient support.

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by A. P. Hotaling & Co. against L. Hamilton. Judgment for plaintiff, and defendant appeals. Reversed.

Mason I. Bailey, and Taylor & Tebbe, of Yreka, for appellant. Samuel T. Bush, of Los Angeles, and B. K. Collier, of Yreka, for respondent.

HART, J. The action is for damages for the breach of a certain written agreement entered into and executed by the parties hereto.

The complaint alleges that prior to the 18th day of July, 1914, one R. F. Crist owned, operated, and conducted a saloon and retail liquor business in the town of Dunsmuir, Siskiyou county; that said Crist was indebted to the plaintiff and to numerous other creditors for goods, wares, and merchandise sold and delivered to him by said creditors; that said Crist was then and there unable to pay said indebtedness, and that "all of said indebtedness is still unpaid; that at the suggestion and by and with the consent of this defendant and this plaintiff, the said Crist, on or about said 18th day of July, 1914, transferred, assigned, and conveyed to the defendant all his rights, title, and interest in and to the said business and all the property of any kind connected with and appertaining thereto, including the saloon license granted by the town of Dunsmuir," in trust for the benefit of all of said creditors, with the understanding and agreement then and there expressly made and had between said Crist and this plaintiff and defendant that the said transfer, assignment, and conveyance was made and executed upon condition that the said defendant should occupy and conduct said business and conserve the assets thereof for the joint benefit of all of said creditors, and distribute the net proceeds and profits realized therefrom pro rata to all said creditors; that on said 18th day of July, 1914, the defendant entered into and took possession of all of said property under said agreement and upon the terms and conditions therein specified, and remained and continued in possession thereof thereunder until some time in the month of December, 1914, when he, without the consent or the permission of the plaintiff or any of the other aforesaid creditors, transferred and conveyed all right, title, and interest in and to said business, including the town license to conduct the same, to one Toleman, "who ever since has been and is now in possession thereof, and who ever since and now claims to be the owner thereof." It is further alleged that the said saloon business and all the property appertaining thereto, including the said saloon license, were at all times mentioned in the complaint and are actually and reasonably worth the sum of $2,750; that the defendant failed to exercise due and reasonable diligence in the performance of the terms of the said agreement, "and that if defendant had done so he could have sold said saloon and saloon property and license while it was in his possession as trustee as aforesaid for the sum of $2,750;" that defendant "willfully, wrongfully, carelessly and negligently failed and refused to operate, conduct, conserve or dispose of said saloon in a businesslike, diligent or proper manner, and in violation of said agreement * * * transferred and surrendered said saloon and all property * * * and delivered possession thereof to the said Toleman for some unknown consideration," thus allowing and permitting said business and all property connected therewith and the proceeds thereof to become wholly lost, to the damage of said plaintiff and all other creditors of the said Crist in the sum of $2,750. The complaint proceeds to say that, within the state of California there are numerous creditors of said Crist, the exact number of whom or the amount of their respective claims the plaintiff was at the time of the commencement of this action unable to ascertain, but that the plaintiff is informed and believes and therefore alleges that said claims exceed in the aggregate the sum of $2,750, and that each and all of said creditors have a common and general interest with the plaintiff in the outcome of this action, and that the action is commenced, maintained, and prosecuted on behalf and for the benefit of all of said creditors in common with the plaintiff, as provided by section 382 of the Code of Civil Procedure; "that it is impracticable to bring all of the said interested parties before this court, and that this plaintiff does hereby consent to the intervention in this action of said creditors at any time that the court may grant them leave to intervene and does hereby agree to prorate to and with all of said creditors in a lawful manner the proceeds of any judgment obtained herein."

The prayer of the complaint is for "judgment against said defendant in the sum of $2,750 damages" with legal interest and costs. A demurrer on general and special grounds was interposed to the complaint, and the same being overruled, the defendant met the issues tendered by the plaintiff by specifically denying the vital averments of the complaint. The cause was tried before a jury and a verdict returned in favor of the plaintiff in the sum of $950. Judgment was entered accordingly. This appeal is by the defendant from said judgment.

The action proceeds upon the theory that defendant was the trustee for the creditors of Crist; that the sale to Toleman was without the consent or permission or knowledge of the plaintiff or other creditors, and that the sum received by defendant from Toleman was greatly below the value of the property. The plaintiff contends that as to the remedy it had the right to elect between an action for an accounting in equity of the trust property and the proceeds derived therefrom and therefor and an action in tort for a wrongful breach of the trust agreement, and selected the latter remedy.

Appellant contends: (1) That the case is essentially one in equity, that the verdict of the jury was advisory only, and that the court should have found the facts; (2) that the evidence was insufficient to justify the verdict, the amount found by the jury as the value of the property being excessive.

The evidence discloses that for several years prior to the 14th day of July, 1914, said Crist owned and operated the saloon property and business in question; that, on that date, being unable to meet an indebtedness of approximately $4,000 which he had incurred in the operation of said business, he sold the same, together with the stock of liquors and cigars then on hand and the fixtures, to the defendant, giving the latter a bill of sale as evidence of the transfer; that on the 18th day of July, 1914, one Rafferty, a representative of the plaintiff, having previously learned of said transfer, went to Dunsmuir and called upon the defendant and said to him that the plaintiff, to which Crist was indebted in a large sum of money, would not stand for the transfer of the saloon by Crist to him, and, after considerable conversation about the matter, the two men (Rafferty and the defendant) agreed to the proposition embraced within the written agreement upon which this action is founded. The evidence further shows that Crist was, at the time said agreement was made and executed, indebted to the defendant in the sum of about $800 and to the plaintiff in the sum of $1,200.

Crist testified that he was indebted to his several creditors in a sum amounting near to $4,000. A Mr. Diggles, a wholesale liquor dealer, testified that Crist was indebted to him for liquors in the sum of $32.50. There was no testimony showing who the other creditors, if any, were, or how much he owed to persons other than the plaintiff, the defendant, and Diggles. The defendant testified that the business, while under his management, did not pay or return any profits, and that, as a matter of fact, during said time he paid out more than he took in by the sum of $141.30. This testimony was not contradicted, except in the testimony of Attorney Bailey, of Dunsmuir, to whom it was agreed that all profits received by the defendant from the business should be turned over and by him distributed pro rata to the creditors, who testified that in one of the months during which the saloon was managed by Hamilton under the trust agreement the latter turned in to him $102 as profits from the business.

The transaction culminating in the agreement, while not strictly a technical assignment by Crist for the benefit of his creditors, amounted in practical effect to the same thing. But whether it was or not, the agreement nevertheless purports to be for the benefit of all the creditors of Crist, and the complaint, as we have shown, proceeds upon that theory. That there were other creditors than the plaintiff, the defendant, and Diggles, is made manifest by the fact that, whereas the combined claims of these persons against Crist is or was approximately $2,032.50 only, the aggregate indebtedness of Crist was approximately $4,000. Both the complaint and the evidence show this to be so. There is no showing either in the complaint or by the proofs that the creditors other than the plaintiff and the defendant knew anything about or consented to or bound themselves by the agreement which is the basis of this action, or by any judgment that might be obtained herein.

[1, 2] The defendant, to be protected against personal actions against him by creditors other than the plaintiff for damages for a violation of the trust agreement, was, notwithstanding that the action purports to be one in law for damages, entitled not only to an accounting of the trust property and funds, but also entitled to clear and specific findings of the facts by the court or by the jury under the order or direction of the court, and a judgment based upon those findings involving an adjudication of the respective rights of all the creditors of Crist. The general verdict and the judgment thereupon entered are uncertain as to many important facts essentially arising under the issues as made by the pleadings. It cannot be determined either from the verdict or the judgment who the creditors of Crist are, or who are entitled to partake of the fruits of the judgment, and to what extent. Then the further question arises: What is the effect or full scope of the judgment? Does it end or extinguish the trust so as to protect the defendant against the effect of actions by other creditors than the plaintiff for damages for breach of the trust agreement? These and a number of other matters which could be suggested are of vital importance

to the defendant, and, whether the action be one at law or in equity, it should have been disposed of by special and distinct findings either by the court or by the jury under the order or direction of the court. We are of the opinion, however, that, although the plaintiff seeks relief by way of compensatory damages, the peculiar nature of the transaction on which the action is based and the averments of the complaint bring the action within the cognizance of equity, since an accounting was necessary to arrive at a just determination of the rights of the respective beneficiaries, and that special findings and conclusions of law were necessary to a specific and definitive adjudication thereof. See Wingate v. Ferris, 50 Cal. 105. At all events, as above stated, the general verdict is not determinative of the issues as made by the pleadings and developed by the evidence, and the judgment is therefore without sufficient support.

In view of the conclusion thus reached, the point that the evidence is insufficient to support the verdict, while possessing much force, need not be considered here.

The judgment is reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

36 Cal. App. 425

FERGUS v. VENICE INV. CO. (Civ. 2093.)

(District Court of Appeal, Second District, California. March 2, 1918.)

LIMITATION OF ACTIONS 🔑66(15)—ACCRUAL OF CAUSE OF ACTION—REASONABLE TIME—DEMAND.

Where money was paid for treasury stock of a corporation to an agent who diverted the money, limitations did not start to run against a right of action for a return of the money until demand was made, providing such demand was made in a reasonable time, and where the corporation did not refuse to issue the stock for two years and two months, during which time a dispute was on between its officers, demand for return of the money and suit at that time was in time, under the two-year statute (Code Civ. Proc. § 339) because two months was not an unreasonable time to wait for delivery of the stock under such peculiar circumstances.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by B. G. Fergus against the Venice Investment Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. S. Hupp and Lynden Bowring, both of Los Angeles, for appellant. Birney Donnell, of Los Angeles, for respondent.

WORKS, Judge pro tem. The respondent paid to an agent of appellant, as the purchase price of certain shares of its stock, to be taken from its treasury, the sum of $375. The agent diverted the money, applied it to his own use, and it never was paid to appellant. Respondent made demand upon appellant for the delivery to him of the stock he had bought, and the demand was refused. He then demanded a return of his money, and, that demand being also refused, he commenced this action for its recovery. The trial court rendered judgment in his favor. The appeal is from the judgment.

The purchase price of the stock was paid on July 6, 1912, and this action was commenced on September 19, 1914, after demand made on September 16, 1914, for a return of the money. The appellant contends that the cause of action is barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure, which fixes a limitation of two years for the commencement of actions upon a liability such as is here sued on.

A cause of action on such a liability ordinarily accrues only upon a demand made to the person upon whom the liability rests, requiring him to perform his obligation; but there is a long line of cases to the effect that one in whose favor such a liability exists cannot defeat the purpose of the statute by an unreasonable delay in the making of the demand, and those cases also decide that a reasonable time within which to make demand is, by the adoption of an analogy, the period which is fixed by the statute of limitations in similar cases, and that, if the demand is not made within that time, an action brought after the making of the demand is barred. Bills v. Silver King Min. Co., 106 Cal. 9, 21, 39 Pac. 43, concurring opinion; Vickrey v. Maier, 164 Cal. 384, 389, 129 Pac. 273; Jenkins v. Marsh, 22 Cal. App. 8, 132 Pac. 1051. However, this rule is not an absolute one, for it is said in one of the cases cited that it does not apply where "there are peculiar circumstances affecting the question" (Vickrey v. Maier); and, indeed, it could not in justice be absolute, as the principal rule announced by the decisions is that the demand must be made within a reasonable time, and appeal is made to the analogy furnished by the statute of limitations only as an aid to the determination of that principal question. In short, the line of decisions relied upon by appellant does no more than establish the rule that what is a reasonable time for making demand must depend upon the facts of each case, whenever those facts are such as to indicate that the analogy of the statute of limitations does not in justice apply.

It will be noted that there was an express agreement upon the part of appellant to deliver the purchased stock to respondent. That, however, is not the agreement for the enforcement of which this action is prosecuted, and it was only after a breach of the contract to deliver the stock that there could arise an implied agreement to return the money, upon which agreement the action is prosecuted. Rose v. Foord, 96 Cal. 152, 30

Pac. 1114; Richter v. Union Land Co., 129 Cal. 367, 373, 62 Pac. 39. And the breach of the express contract did not occur until after appellant had been allowed a reasonable time, after demand, within which to deliver the stock. Civ. Code, § 1753; Pinkiert v. Kornblum, 5 Cal. App. 522, 90 Pac. 969; Roughton v. Brookings Lum. & Box Co., 26 Cal. App. 752, 148 Pac. 539. Respondent's demand for the return of his money was made about two years and two months after the money was paid to the agent of appellant. If two months was a reasonable time for respondent to await a delivery of the stock—assuming, which we do not by any means decide, that he was bound to demand it immediately after the money was paid—then the demand for the return of the money was within two years, and the rule of Bills v. Silver King Min. Co., supra, and the other cases like it, is satisfied, even forgetting the saving language of Vickrey v. Maier, supra, about the "peculiar circumstances affecting the question" in particular cases.

Was two months an unreasonable time to wait for the delivery of the stock? In Pinkiert v. Kornblum, supra, this court declined to assume, in the absence of evidence upon the question, that 20 days was a reasonable time to be allowed for the issuance of stock in a corporation to one who had purchased it. See, also, Roughton v. Brookings Lum. & Box Co., supra. In the present case, evidently with the intention of bringing it within the rule stated in Vickrey v. Maier, supra, the trial court found that certain "peculiar circumstances" existed, and they are stated specifically in the findings of fact. Although respondent looks to them as a justification for a delay of two years and two months in demanding a return of his purchase money, they are established as facts in the case, and we may look to them for aid in determining whether two months was an unreasonably long time to await the delivery of the stock. Among the "peculiar circumstances" found were these: That a dispute arose between appellant and its officers who received respondent's money, and that those officers were friends of respondent, and that he was lulled into a sense of security by assurance from them that he would in due time receive his stock. The circumstance involved in the dispute mentioned is very generally stated, as we are not told what was the subject of the dispute; but taking all the circumstances together, taking the rule expressed in Pinkiert v. Kornblum, supra, and in Roughton v. Brookings Lum. & Box Co., supra, we are of the opinion that two months was not an unreasonably long time to await the delivery of the stock, and that therefore the demand for the money was made within two years after respondent reasonably first could have made it.

There is an angle of the above discussion which we have not yet followed to its conclusion. If we overlook the necessity for a disposition of the rights of the parties under the express contract for the delivery of the stock, as a prerequisite to the arising of the implied agreement for the return of the purchase money, and regard the case as one in which the money became returnable at once after it was paid over to the agent of appellant, we may yet dispose of the question of the statute of limitations satisfactorily to the contention of the respondent, and along the lines evidently followed in the settlement of that point by the trial court. The question then is: Under all the circumstances of the case—and giving due regard to the rule of Bills v. Silver King Min. Co., supra, and cases like it—was two years and two months an unreasonably long time to elapse before the making of demand for the return of the purchase money? In addition to the "peculiar circumstances" stated above, the trial court also found that "plaintiff made repeated demands for the aforesaid stock; that said defendant did not finally refuse to deliver said stock until September 16, 1914, and plaintiff did not treat said refusal as final until said time, but until said time expected that said defendant would deliver said stock." It is shown by the evidence upon which these facts are found that there was continual argument among the officers of appellant—and that argument was continued as late as at a session of the directors of the appellant held on September 16, 1914—upon the question whether the stock contracted to be delivered to the respondent should be delivered by the agent who had received and used respondent's money, from his own holdings, or whether it should come out of the treasury of the appellant. The evidence shows that the respondent was justified in believing, until the date last mentioned, that his stock would be forthcoming from either the one source or the other, and the directors of the appellant never at any time formally refused to make delivery from the corporate treasury. These facts bring the case within the rule as to "peculiar circumstances," stated in Vickrey v. Maier, supra, and a delay of two years and two months in making demand for the money was justified.

There are certain other contentions made by appellant, but they do not merit a discussion.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

36 Cal. App. 430

ANDERSON v. WILCOX et al. (Civ. 2101.)

(District Court of Appeal, Second District, California. March 2, 1918.)

Appeal and Error 🔑939—Record on Appeal—Briefs—Presumptions.

Under Code Civ. Proc. § 953c, providing that in filing briefs the parties must print in such brief or in a supplement such portions of the record as they desire to call to the attention of the court, it will be presumed that counsel have presented to the appellate court all portions of the record which they desire to have printed.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by A. D. Anderson against H. W. Wilcox and another as constable. Judgment for defendants, and plaintiff appeals. Affirmed.

H. W. Scheld and William J. Carr, both of San Diego, for appellant. Shreve & Shreve, of San Diego, for respondents.

CONREY, P. J. Plaintiff appeals from the judgment. In the briefs the action is described by counsel for appellant as one in replevin to recover the possession of certain personal property, and by counsel for the respondents as an action to recover damages for alleged wrongful conversion of personal property. No part of the record has been printed in the briefs, except that the findings of fact and conclusions of law are printed in the brief of respondents.

The facts found are sufficient to sustain the judgment. Counsel for appellant say that the findings of fact are contrary to the evidence, but do not point out any particulars in which the evidence is not sufficient to support those findings. They further say in their brief that "the evidence in this case shows" certain facts stated by them, without setting forth any part of the record of such evidence. The only record on appeal consists of a typewritten transcript. It is presumed that by their briefs counsel have presented to us all portions of the record to which they desire to call our attention. Code Civ. Proc. § 953c. Many decisions concerning such defective presentations of the record are collected in Barker Brothers v. Joos, 171 Pac. 1085 (No. 2054), decided by this court February 19, 1918.

The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

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36 Cal. App. 433

NELSON v. THOMAS et al. (Civ. 2298.)

(District Court of Appeal, First District, California. March 2, 1918. Rehearing Denied by Supreme Court April 29, 1918.)

1. Deeds 🔑208(1) — Evidence — Delivery —Intention to Make Will.

Evidence *held* to show that a deed was never delivered, but was intended as a testamentary disposition to take effect after death, and not as a present conveyance of property.

2. Parties 🔑93(2)—Substitution—Notice of Motion—Waiver.

On the substitution of a party plaintiff defendants stipulated in open court that the substituted plaintiff was to acquire no greater rights than the original plaintiff had in the cause, and that the answer and cross-complaint should stand as like pleadings to the supplemental complaint, and all that defendants did while stipulating and tacitly consenting was to say on the order being made that they had an exception to the ruling of the court. *Held*, that they thereby waived notice of the motion.

3. Parties 🔑93(2) — Objections Below — Substitution of Parties.

When defendants merely stated on an order for substitution of a plaintiff being made that they had an exception to the ruling of the court, objection that there was no notice of the motion, not being seasonably and clearly presented to the trial court, was not reviewable.

4. Deeds 🔑54 — Undelivered Instrument —Title Conveyed.

An undelivered deed conveys no title legal or otherwise.

5. Quieting Title 🔑10(2)—Right of Action—Legal Title.

Suit to quiet title for want of delivery of a deed from plaintiff to defendants under which the latter claim may be maintained; the legal title in such case being in plaintiff, and not in defendants.

Appeal from Superior Court, Humboldt County; Clifton H. Connick, Judge.

Action by John Nelson against Clarence G. Thomas and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Thos. H. Selvage, of Eureka, for appellants. Coonan & Kehoe, L. M. Burnell, and J. S. Burnell, all of Eureka, for respondent.

KERRIGAN, J. This was an action to quiet title. Judgment was rendered in favor of plaintiff, and the defendants appealed; Clarence G. Thomas being thereafter substituted for C. S. Thomas, one of the original defendants.

The defendants in the action claimed title to the property described in the complaint by virtue of an instrument dated December 30, 1913, purporting to be a deed from plaintiff Nelson to C. S. Thomas and Ella Thomas, his wife, and which property they claimed to have received from Nelson as a gift. Nelson, on the other hand, while admitting that he signed and acknowledged this paper, supported his claim of title by evidence that in signing it he supposed he was executing his will, and therefore denied that on December 30th, or at any other time, he either made or intended to make or deliver a deed of the property to the defendants. The court accepted this view of the transaction, and entered judgment accordingly quieting plaintiff's title.

[1] The circumstances attending the execution of the instrument in controversy are briefly these: About the year 1879 Nelson acquired a small ranch in the southern portion of Humboldt county, at a place known as Elk Ridge, where he engaged in cattle raising. From time to time he increased his

holdings until he had acquired the property here involved, a tract of some 1,700 acres. About the year 1890 the defendants went to work for Nelson on his ranch. C. S. Thomas was a carpenter, and built barns, outhouses, and fences for Nelson, while his wife, Ella, was engaged there as cook and housekeeper. They were thus respectively employed for about a year, when they moved to Briceland, a place about 8 miles distant. The relationship between Nelson and Thomas became very close and strong, so much so that Nelson would sign without reading any paper that Thomas might present to him, according to a statement attributed by one of the witnesses to Thomas. At Briceland, Thomas, in addition to pursuing his regular calling, occupied the offices of justice of the peace and notary public, and for 4 or 5 years prior to the execution of the disputed deed he transacted Nelson's legal business for him. On December 28, 1913, Nelson was single, about 68 years of age, and in poor health. About a week before this date he had told Thomas that because of ill health he could no longer look after his stock, and had concluded to lease his property, whereupon Thomas offered to try to find a tenant for him, and in a few days sent to Nelson a prospective renter. This man failed to inspire confidence in Nelson, and no arrangement was arrived at with him. Thereafter Thomas called on his friend, and informed him that he would be willing to rent the ranch himself if the terms were reasonable, and in the course of the conversation invited Nelson to come to Briceland and live with him as one of the family if the ranch should be rented. The next morning Nelson rode into Briceland, called on Thomas, and announced that he had come to stay, and would let Thomas have the ranch for 5 years at an annual rental of $550. The terms were accepted, and Thomas was told to prepare the lease, which he accordingly did. The document being completed, Nelson expressed a wish to make his will, and requested Thomas to prepare it. He indicated his desire that legacies of $500 each should be given to two friends, $1,500 to each of the defendants' children, and that the residue of his estate should go to Thomas and his wife, share and share alike. The will was accordingly prepared, being completed that evening.

Up to this point there is no material dispute between the plaintiff and defendants, nor of the fact that on the following evening Nelson executed several papers, one of which was a deed to his property in favor of Thomas and his wife, and left them with Thomas.

The plaintiff was a witness in his own behalf, and testified that he did not know that he had signed a deed; that he had no intention to make a deed of the property; that he supposed he was making a will; that the first intimation he received that he had made a deed was from a friend, one Alfred Grey, who told him that Thomas was claiming to have a deed to the property; that at that time he did not believe Thomas had deceived him, and apparently desiring not to give offense, said nothing to Thomas at the time of what he had heard from Grey; that later, however, becoming apprehensive, he asked Thomas for the paper, and learning that it was in a bank in Eureka he, although feeble, rode 90 miles on horseback to that city for the purpose of examining it and thus learn if Grey's statement was true; that on being denied an inspection of the document in Eureka he at once returned to Briceland and called on Harry Cowen, a notary public, who had taken his acknowledgments on the occasion of his executing the papers prepared by Thomas, and then learned from him that one of those papers was a deed. Nelson thereupon left the home of Thomas, where he had been staying for the past 15 months, employed counsel to advise him, and finally brought this action.

The notary Cowen testified that he took the acknowledgment of Nelson to a deed and a lease; that in doing so Nelson admitted to him that the signatures affixed to the deed here involved and the lease were his, but at that time that Nelson did not read the instruments in his presence nor participate in the conversation, but sat back and looked sick, bad, and distressed; that at some time between May 25 and June 5, 1915, Nelson called on him and inquired whether or not one of the papers acknowledged by him on December 30th was a deed; that upon being informed that such was the fact the color left the man's face, he staggered, made queer motions, and looked horribly shocked.

Another witness, Fred Fearrien, testified:

> "A few days after December 30, 1913, I asked Thomas if there would be any chance to rent or lease the Nelson ranch, and he said, 'No;' that he had already leased it for five years. Later he [Thomas] told me that Mr. Nelson had willed the property to him and his folks and two other parties. I don't think he ever told me he had a deed."

It appears that this witness and Thomas were friends of 20 years' standing, and on intimate terms.

Witness Nathan Stansberry testified:

> "In the spring of 1915 I had a conversation with C. S. Thomas. I came along and Thomas was working on the ranch. We got to talking, and I said jokingly, 'I guess you will give a man something now to kill Nelson for you.' Mr. Thomas said, 'No, Nelson has always been good to me, and I am going to be good to him, and maybe he will give me the place some day.'"

Witness Grothe testified:

> "On April 6, 1915, I rode from Garberville to Briceland with Thomas. He told me Nelson wanted to come to Eureka, and wanted all his deeds and other papers that he [Thomas] had. He said he had them down in a safe in the Bank of Eureka. He was coming down in about two weeks and would get them for Nelson then; that they were Nelson's and he could have them; that they belonged to him. He said the deed and will were the only papers that he had of Mr. Nelson's left at this time. Thomas said,

speaking of the lease, that he had read it over several times, and never noticed it before, but there was nothing in the lease to prevent him from selling all the cattle, and he could go ahead and sell the cattle. He said he had a notion to put the deed on record and sell the cattle, and use the money to fight the case, but that he was not going to do it."

Witness William Herman testified:

> "The morning Mr. Nelson left Thomas's place he [Herman] called there, and Mrs. Thomas in Mr. Thomas's presence said that when Nelson left they asked him if, at the expiration of their lease, he would give them a new one, and that he said he did not know; that he might want to go back there and live himself. She also stated that it was not likely that Nelson would want to go back there and live any more by himself."

According to the story of Thomas, told by him on the witness stand, after the will had been thoroughly discussed and prepared, and after he and his wife had retired that night, his wife suggested to him that as long as Nelson intended to give them the place, it would be a good plan for Nelson to make a deed of it to them. The next morning at the breakfast table Thomas said to Nelson that he had been thinking the matter over, and that as he was giving them the place, why not make a deed instead of a will? That Nelson assented, and according to the plan then adopted a deed to Thomas and his wife was made conveying the real property to them, and a will was drawn disposing of the personal property as originally provided; that on the evening of December 30th the will was signed by Nelson with two witnesses; that the lease and deed of the ranch were signed and acknowledged by Nelson, and formally delivered to Thomas.

On May 10, 1915, Nelson conveyed the property to Lowrey, and the deed was recorded the next day. Ten days thereafter the defendants recorded their deed. This action was commenced May 25, 1915. We think it is clear that the evidence abundantly sustains the findings of fact, including finding IV (which appears to be the one seriously attacked by the appellants), to the effect that the deed made by Nelson was never delivered to the defendants or either of them, and was intended by respondent as a testamentary disposition to take effect after his death, and not intended as a present conveyance of the property.

It is true, as asserted by appellants, that the deed was executed so far as signing and acknowledging it were concerned, and that it was left with the appellants by respondent. Still it does not follow under the circumstances of the case that there was a delivery of the instrument. On the contrary, the evidence establishes that there was no delivery, and without a delivery there could be no deed. In Williams v. Kidd, 170 Cal. 638, 151 Pac. 3, Ann. Cas. 1916E, 703, the court says:

> "It is essential to the validity of a transfer of real property that there be a delivery of the conveyance with intent to transfer the title, and the true test under which delivery is to be determined is in ascertaining whether in parting with the possession of the conveyance the grantor intended thereby to divest himself of title. If he did, there was an effective delivery of the deed. If not, there was no delivery. The solution of the question is grounded entirely on the intention of the grantor, and this essential matter of intention is a question of fact to be determined by the trial court from a consideration of all the evidence in a given case bearing upon the question." Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509; Donahue v. Sweeney, 171 Cal. 388, 153 Pac. 708.

[2] Appellants also complain of the order of the court granting a motion substituting the respondent Nelson as plaintiff in the action for Charles Lowrey, the original plaintiff therein.

At the beginning of the trial the attorney representing the plaintiff pressed a motion which had, it appears, theretofore been perhaps informally made, to substitute Nelson as plaintiff for Lowrey, and for permission to file a supplemental complaint alleging, in conformity with the fact, that the property had been retransferred from Lowrey to Nelson since the filing of the original complaint. Assuming that the defendants were entitled to notice of the motion (as we think they were), still it is plain from the record that they waived such notice. It was stipulated by the parties in open court that through this substitution Nelson was to acquire no greater rights than Lowrey had in the cause. It was also later stipulated that the answer and cross-complaint filed by the defendants should stand as the answer and cross-complaint to the supplemental complaint. The court was painstaking and appeared anxious to proceed cautiously; and all that the defendants did, while entering into these stipulations and consenting, though tacitly, to the substitution, was to say, upon the order of substitution being made, "We have an exception to the ruling of the court."

[3] As before stated, notice was waived; and even if it were not, the objection was not seasonably and clearly presented to the court, and is therefore not available on appeal. Mott v. Smith, 16 Cal. 534. Moreover, it is very clear that the defendants suffered no prejudice as the result of the order, for which reason they cannot now be heard to complain.

[4, 5] The appellants say in their brief:

> "Under the complaint and the foregoing facts, what evidence could the plaintiff, Charles Lowrey, introduce on the trial to prove the allegations of his complaint? There was no privity between himself and these defendants. The plaintiff was not in possession; he was not entitled to possession. All that he had was merely a paper title."

Continuing, they argue that being the holder of a paper title merely, Lowrey had to trace the chain thereof to the original patentee; that he could not do so because of the break in the chain by the deed to defendants; therefore that the legal title was in defendants, and that Lowrey had merely an equitable estate; that an action to quiet title cannot be maintained by the owner of an equitable estate against the holder of the legal title under a complaint containing only the usual averments made in such actions; that under such a complaint Lowrey could not prove fraud or undue influence or deceit between his grantor and defendants, and therefore when he conveyed to John Nelson, his grantor, and the latter was substituted as plaintiff, a new cause of action arose. This argument is based upon the assumption that at the date of the commencement of the action the legal title to the property was in the appellants by virtue of the deed of December 30th, but that deed, the court found, was never delivered, and hence conveyed no legal or any title. Cutler v. Fitzgibbons, 148 Cal. 562, 83 Pac. 1075.

Appellants further assume in their argument that the plaintiff is attempting in this action to set aside his deed to the defendants on the ground that it was procured through fraud and undue influence. Such is not the case. The position of the plaintiff is that since there was no delivery of the instrument there was no deed. The situation is well stated in Cutler v. Fitzgibbons, supra, which was a case in which the complaint contained two counts. The first count contained ordinary allegations in quiet title action. The second count averred that the defendants base their claim to said land upon a certain written instrument purporting to be a deed, signed, acknowledged, and executed by plaintiff to defendant Fitzgibbons, dated January 14, 1890, conveying to him said land; that plaintiff did not on said day, or at any time, make, sign, acknowledge, or execute said instrument, or any deed conveying said land to Fitzgibbons or to any other person, and did not authorize any other person to execute it for her; that said alleged deed is false, fraudulent, and forged; that said deed has been recorded, and clouds plaintiff's title to said land. The prayer of the complaint was for a judgment quieting plaintiff's title to the land, adjudging that defendants have no estate or interest therein, and decreeing that said deed be canceled, etc. A judgment was rendered quieting plaintiff's title to the land and canceling the deed. The Supreme Court said:

> "We see no reason for reversing or disturbing the judgment. Appellant's contention seems to be that respondent is in the position of one who is trying to overturn a legal title on account of fraud, and that the complaint is deficient because it does not state with sufficient fullness the facts constituting the fraud; and he cites in support of his contention Burris v. Adams, 96 Cal. 664, 31 Pac. 565. But the facts in Burris v. Adams are different from those in the case at bar, and the principle applied there is not applicable here. The plaintiff in the case at bar is not trying to set aside a deed which conveyed the legal title on the ground that the deed was procured through fraud, mistake, undue influence, conspiracy, etc. During all the times mentioned in the complaint the plaintiff had the legal title; it certainly did not pass out of her by a written instrument which she did not execute and which was forged. Having the legal title to the land in contest she brings this action to have her title quieted against appellant, who asserts and proclaims an estate in the land which is without any right, and to have the forged deed under which he claims, and which was recorded, canceled."

For the reasons heretofore given, the judgment is affirmed.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

36 Cal. App. 441

PEOPLE v. SHAW. (Cr. 404.)

(District Court of Appeal, Third District, California. March 4, 1918.)

1. Homicide 🔑257(1) — Assault with Intent to Murder — Sufficiency of Evidence.

Evidence *held* to justify conviction of assault with intent to murder.

2. Homicide 🔑257(8) — Assault with Intent to Kill—Intent.

A wound producing instantaneously a complete relaxation of the muscular system and utter helplessness when deliberately inflicted carries with it the implication that the perpetrator intended to kill the victim.

3. Criminal Law 🔑825(2)—Instructions—Requests—Necessity.

There is no merit in the claim that the conviction of assault with intent to murder should be reversed because the court did not specifically instruct that intent to kill was essential, defendant having made no request for such instruction, sufficiently covered by given instructions.

4. Witnesses 🔑287(3)—Redirect Examination—Meeting Impeaching Testimony.

Where, upon cross-examination of a victim of an assault with intent to kill, who had stated at the trial that he could not recall incidents, it developed that before the grand jury he attempted to give some details of the shooting, it was proper on redirect examination to ask how he came to give such testimony before the grand jury.

5. Criminal Law 🔑361(1)—Evidence—Explanatory Matters.

Where experts had testified that the injury from an assault with intent to kill would likely cause the victim to accept the statements of others as his own, and it was developed on cross-examination that he had testified before the grand jury to details of shooting, which he could not recall at the trial, it was proper to question the assistant district attorney as to conversations which he had had with the victim and how the victim's statements corresponded with defendant's, and that a change had been noticed in the victim's account.

Appeal from Superior Court, Shasta County; James G. Estep, Judge.

Robert W. Shaw was convicted of assault with intent to murder, and appeals. Affirmed.

M. G. Gill and Dean & Carter, all of Redding, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. [1] The defendant was convicted of the crime of assault with intent to commit murder. The evidence was ample to justify the verdict. Indeed, a careful examination of the entire record can hardly fail to produce the conviction that the assault was the result of a deliberate, premeditated, and brutal design on the part of appellant to take the life of his victim. The offense was committed in the afternoon of December 26, 1916, near the cabin of defendant and about 3½ miles from the town of Shasta. In the forenoon of that day in said town appellant had an acrimonious controversy with one T. L. Cockrum who was about to go with a horse and buggy to deliver some groceries to a party at the Mount Shasta mine, some distance beyond said cabin. Appellant requested Cockrum to take some supplies to one Charles Paige. This Cockrum refused to do for the reason that he disliked Paige. The discussion which ensued developed a good deal of heat, and each became abusive and truculent. The defendant repaired to an adjoining saloon, where he drank some liquor and made inquiries about a gun which he claimed was to have been left there for him. In reply to a question by one of those present, he said he expected to kill a couple of men and that he himself might be one of them, but he did not specifically mention any other. The jury herein were entirely warranted in believing that murder was then rankling in his mind, and that he had formed the intent and was then planning to take the life of Cockrum. There is other evidence which we need not recite, that he had a feeling of resentment and hostility toward the prosecuting witness. Shortly after the occurrence in the town, Cockrum, accompanied a part of the way by one Filmore Davis, drove from Shasta over to the mine, passing the said cabin of Shaw, and, after delivering the articles which had been sent, he started back alone between 3 and 4 o'clock in the afternoon.

Shaw, in the company of two other men, walked to his cabin, which appellant entered; the other men going on to some other destination. What occurred between Shaw and Cockrum at the time of the shooting is the subject, as might be expected, of earnest dispute. It is the theory of the people that Cockrum was shot from ambush as he approached Shaw's cabin; the appellant firing, probably, from within the house. Circumstances are not wanting to support this view. There is, however, no direct testimony to that effect. Of the only eyewitnesses, Cockrum testified that he could recall nothing of the occurrence, that his mind was a blank as to what happened after he arrived at a point some 700 feet from Shaw's cabin until several weeks thereafter when he found himself in the county hospital.

The defendant attempted to give the details of the tragedy, seeking to justify himself; but it is apparent that his story is unbelievable, and it would be surprising if the jury had accepted it as of exculpatory significance. In fact, the statement upon its face falls short of any justification for the overt act. He was standing, so he says, near his cabin when Cockrum drove up, renewed the quarrel, drew his pistol, and leveled it upon him. Thereupon he went into the cabin, obtained his shotgun, came out, and Cockrum was still standing at the same place and in the same position with his pistol still leveled. Immediately he fired, as he testified "to make him put his gun down and keep his mouth shut," because "I didn't like to see that thing pointed toward me particularly any more," "although a gun never scared me much." Accepting his statement as true, he was perfectly safe when he went into the cabin, and he was not warranted in coming out to shoot Cockrum.

Moreover, there are many circumstances that brand his story as false and incredible. The cold record even seems to compel the conclusion that his pretended self-defense was a pure fabrication. The spirit which animated him is not difficult to discern in the statement which he made to one Charles Gibson, the first man he saw after the shooting:

> "Gibson, I would like to have you come over to my place. I shot a man all to hell. I shot that man, Cockrum, in the head. I expect he is dead by this time."

Not a word about self-defense until some time afterward, and then his statement was entirely at variance with his testimony on the stand. We will not dwell on the subject, beyond saying that his explanation to different persons was also conflicting with said testimony. His conduct in taking the pistol of Cockrum after the shooting and placing it on the seat of the buggy showed a disposition to simulate and create the appearance of self-defense, and his entirely incredible declaration that after such a wound Cockrum climbed into the buggy, in connection with other significant facts, must have led the jury to regard him not only as a cruel man but as a perjured witness.

We are led to believe that his conduct and attitude were characterized by inexcusable savagery, and we do not hesitate to say that seldom does a record present such persuasive and convincing evidence of guilt.

[2] It is hardly necessary to add that there is no merit in the contention that the intent to kill was not shown. According to appellant's testimony, he was standing about 30 feet from Cockrum when the shot was fired. The full charge struck the latter in the upper part of the face, destroyed his eyes, fractured his skull, and penetrated the brain. The effect of such a blow, according to the testimony of experts, is to cause immediate and total unconsciousness with the suspension of all the functions of the body except those of an elementary and essential character, such as respiration and pulsation.

It produced instantaneously a complete relaxation of the muscular system and utter helplessness. Such a wound deliberately inflicted carried with it the implication that the perpetrator intended to kill the victim. Indeed, it is passing strange that Cockrum survived. That he lived was due, no doubt, to a vigorous constitution and to careful and skillful treatment. We may add that nowhere did Shaw deny that he intended to kill Cockrum and his actions show clearly enough that he had such purpose.

[3] There is no more merit in the claim that the cause should be reversed for the reason that the court did not specifically instruct the jury that they must find that the defendant had the intent to kill Cockrum in order to convict him of the crime charged. As to this, it may be said that if the defendant desired such instruction he should have requested it. Moreover, this very condition was covered by the instructions given. There was a general instruction that the plea of not guilty put in issue every material allegation of the indictment and that the burden was upon the prosecution to prove these allegations to justify a verdict of guilty. Again, the jury was told:

> "The court further instructs the jury that if you believe from the evidence beyond a reasonable doubt that the defendant committed an assault upon the person of T. L. Cockrum with a deadly weapon as charged in the indictment, but without any specific intent to kill and murder the said T. L. Cockrum, then you should find the defendant guilty of assault with a deadly weapon" and also, if they believed that the defendant "committed an assault upon the person of T. L. Cockrum with a deadly weapon as charged in the indictment with intent to kill and murder said T. L. Cockrum, and that such assault was not committed in the necessary self-defense of the defandant, then you should find the defendant guilty of an assault with a deadly weapon with intent to commit murder as charged."

From the foregoing the jury would necessarily conclude that they could not find the defendant guilty of the higher offense unless they were convinced that he had the intent to kill Cockrum.

[4, 5] The only other point made in the opening brief of appellant—and the only one at all of any merit—is that the court erred in overruling objection to certain questions asked of the assistant district attorney and of Cockrum on his redirect examination. The questions propounded of the former called for the conversations which he had with Cockrum concerning the tragedy, and, particularly, how the latter's statements corresponded with Shaw's explanation of the affair, and, also, when the assistant district attorney noticed a change in Cockrum's account of the occurrences of that day.

The inquiry of Cockrum was as to whom he had stated he made a mistake in his testimony before the grand jury, and as to his sending for certain persons to inform them that he had made such a mistake. This examination grew out of the fact that on the cross-examination of Cockrum it developed that before the grand jury he attempted to give some of the details of the shooting, and here at the trial he declared, as we have seen, that he could not recall any of the incidents.

Appellant in support of his contention invokes the general rule, as thus stated in People v. Turner, 1 Cal. App. 420, 82 Pac. 397:

> "Impeachment of a witness by showing that he has made statements in conflict with his present testimony cannot be met by the party calling such witness with evidence that at other and different times the impeached witness has made statements in harmony with his present testimony, and to permit introduction of testimony of this latter character is prejudicial to the party against whom it is received."

But it may be said that the rule is subject to modifications and exceptions as pointed out in volume 1, § 492, of Wharton's Criminal Evidence (10th Ed.); People v. Doyell, 48 Cal. 85; Barkly v. Copeland, 74 Cal. 1, 15 Pac. 307, 5 Am. St. Rep. 413, and it could be plausibly urged that we have here such an exception. However, the rulings can be supported on other grounds.

In the first place, the said questions asked of Cockrum were entirely proper in view of his cross-examination. After his attention was called to his testimony before the grand jury, he was asked by appellant whether such statements were true, and, "how did you come to give that testimony before the grand jury if it was not correct?" His answer was:

> "Well, I was very nervous and had not slept any for some time and was in pretty bad shape, and I was thinking about losing my eyesight so much, and so much had been talked to me about Shaw's story about what he told about shooting me, and I come to think his story was true, or something to that effect. Seemed later I could not remember seeing him that day. I thought of that at nights when I could not know where I am at."

He was further interrogated about whether he had talked to any one in reference to his recollection of the affair. This was all brought out for the first time on the cross-examination, and the door was certainly thereby opened for the further inquiry by the people. Besides, it could hardly be said that the testimony to which objection was made added virtually anything to the force and effect of Cockrum's statements which were elicited by appellant.

Moreover, it is plain that the purpose of these questions was to throw light upon the mental condition of Cockrum at the time of his testimony before the grand jury and at the trial. The experts had testified as to the effect upon his mind produced by the frightful injury, and how his memory might be gradually or suddenly restored, and to his susceptibility to the influence of statements and suggestions made by others. In other words, these witnesses had testified that while his mind was impaired he would be likely to accept the statements of others as the product of his own recollection of the events, but that when his memory was entirely restored he would be able to distinguish between what he was told and what he had himself observed. They also declared that, when he recovered his normal mental activity, he might not be able to recall any impressions whatever of the immediate circumstances of the shooting, although his memory might be accurate as to what happened a short time before. These experts had portrayed in the abstract the situation as to his mentality, and there was no better way than by recitals of the conversations with him on the subject to present a concrete view of the actual effect upon his memory and reasoning faculties of the dreadful physical and nervous shock. We may say, also, that if the form of some of the questions was objectionable no prejudice resulted. No doubt, it would have been better practice to ask the assistant district attorney to repeat what Cockrum said, than to inquire how it corresponded with what the former repeated to the latter; but the consideration is not of sufficient moment to demand serious attention.

Even if it should be held that the whole line of inquiry was improper, it could be demonstrated that it was more favorable than otherwise to appellant. Indeed, one can hardly avoid the conclusion from a careful reading of the transcript that Cockrum was trying as far as possible to favor the appellant.

We think the judgment is just and should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

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36 Cal. App. 431

HAMMOND LUMBER CO. v. KEARSLEY et al. (Civ. 2103.)

(District Court of Appeal, Second District, California. March 2, 1918.)

BILLS AND NOTES 🔑293—INDORSEMENT OF ALL INTEREST AND TITLE — "WITHOUT RECOURSE."

Under Civ. Code, § 3118, providing that an indorser may qualify his indorsement with words "without recourse" or equivalent words, assignment of "all our interest in this promissory note" is equivalent to indorsement without recourse, and the assignors, on the maker's default, were not liable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Without Recourse.]

Appeal from Superior Court, Los Angeles County; E. T. Zook, Judge.

Action on a note by the Hammond Lumber Company against F. T. Kearsley and others as makers, and Fred L. Stocks and others as indorsers. From a judgment for plaintiff against defaulting makers, and in favor of indorsers, plaintiff appeals. Affirmed.

R. L. Horton, of Los Angeles, for appellant. Harry M. Irwin, of Los Angeles, for respondents.

WORKS, Judge pro tem. The defendants Stocks, who are also the respondents, delivered to the appellant a certain promissory note secured by trust deed, after writing on the back thereof, over their signatures, the following:

> "For value received we hereby assign all of our interest in this promissory note of $757.66, dated April 23, 1913, signed by Francis T. Kearsley and C. B. Kearsley, to Hammond Lumber Company, a corporation."

Two of the respondents were payees of the note, and the third was the wife of one of the others. This action was commenced against the makers of the note and against the respondents upon their assumed liability as indorsers under the terms of the instrument above quoted. The makers defaulted and judgment was entered against them; but judgment was rendered in favor of the respondents. The plaintiff appeals.

The appellant contends that a liability as indorsers rests upon the respondents and cases are cited, in support of the position, to the effect that an assignment written on the back of a note by the payees named in it is not different from an indorsement by them in blank, and that they are liable as indorsers in the one instance as in the other. There are many cases which so decide, but they are cases in which the assignments were transfers, without words of qualification, of the instruments upon the backs of which they were written. The assignment in question here conveys "all of our interest in this promissory note," which is quite different from such an indorsement as, for instance, "we hereby assign the within note." The respondents cite many cases which point out the difference, in legal effect, between two such indorsements. We do not present a citation of those cases, but content ourselves with quoting from one of them (Evans v. Freeman, 142 N. C. 61, 66, 54 S. E. 847, 849), in which the court, speaking of a section of the Negotiable Instruments Law of the state, said:

> "A qualified indorsement may, by the express terms of that section, be made by adding to the indorser's signature the words 'without recourse, or any words of similar import.' It has been settled in commercial law that a transfer by indorsement of the 'right and title' of the payee or an indorser to a negotiable note is equivalent to an indorsement 'without recourse' and words such as were used in this case are therefore in their meaning or 'import' similar to such an indorsement, and this is their reasonable interpretation. 1 Daniel, §§ 700 and 700a; Norton on Bills and Notes (3d Ed.) 120; Hailey v. Falconer, 32 Ala. 536; Rice v. Stearns, 3 Mass. 225, 3 Am. Dec. 129; Randolph, Com. Paper (2d Ed.) §§ 721, 722, 1008; Goddard v. Lyman, 14 Pick. (Mass.) 268; Borden v. Clark, 26 Mich. 410; Eaton & Gilbert on Commercial Paper, § 61."

This decision, and the others cited by respondents, bring the presnt case within the terms of section 3118 of the California Civil Code, which, with our own italics, is as follows:

> "An indorser may qualify his indorsement with the words, 'without recourse,' *or equivalent words;* and upon such indorsement, he is responsible only to the same extent as in the case of a transfer without indorsement."

The propriety of such a construction as we place on the assignment executed by respondents is plain. They conveyed all of their interest in the note. To permit the appellant to hold them as indorsers would be to allow it to exercise a right which was not within nor a part of that interest.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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36 Cal. App. 447

DROUILLARD v. SOUTHERN PAC. CO. et al. (Civ. 1778.)

(District Court of Appeal, Third District, California. March 4, 1918. Rehearing Denied by Supreme Court May 3, 1918.)

1. Railroads ⟹350(13) — Crossing Accidents—Contributory Negligence.
A passenger riding in an automobile, driven by another, struck by train at a crossing, was not negligent as a matter of law, where the view of the approaching train was obstructed by a box car until within 50 feet of the track in which position an approaching train could have been seen 150 or 200 feet away, and the automobile had been stopped about 44 feet from the track; it being presumed that the passenger either attempted to warn the driver or to leave the car, in view of Code Civ. Proc. § 1963, making it a rule of evidence that a person takes ordinary care of his own concerns.

2. Railroads ⟹350(13) — Crossing Accidents — Ordinary Care — Questions of Fact.
A passenger in an automobile driven by another across a railroad track must exercise ordinary care for his own safety, and whether he does so is a question of fact.

3. Negligence ⟹113(1)—Pleading—Negative Defenses.
In an action for wrongful death, plaintiff need only show that defendant's negligence was the proximate cause, and he need not negative the claim of contributory negligence.

4. Trial ⟹359(1)—Verdict and Findings—Conflict.
A general verdict and special findings should be reconciled, if possible, and no specific finding should overthrow the general verdict unless entirely inconsistent and irreconcilable thereto.

5. Railroads ⟹352—Crossing Accident—Verdict and Findings.
In an action for wrongful death of a passenger in an automobile struck by defendant's railroad train at a crossing, a special finding that if decedent had looked he could have seen the approaching locomotive was not inconsistent with a general verdict against the railroad company, since it does not compel a conclusion that decedent was negligent.

6. Railroads ⟹348(1)—Crossing Accident —Evidence.
In an action for wrongful death of a passenger in an automobile struck by defendant's railroad train at a crossing, a special finding that decedent was leaning forward against the front seat, either warning the driver or in the act of jumping, *held* supported by the evidence.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Edward Drouillard against the Southern Pacific Company and another. Judgment for plaintiff, and defendants appeal Affirmed.

A. F. Jones and George F. Jones, both of Oroville, and Roy G. Hildebrand, for appellants. J. Oscar Goldstein, of Chico, for respondent.

BURNETT, J. This action was for damages for the death of Edward Drouillard, a minor, and the verdict of the jury was for the plaintiff in the sum of $7,000. The accident occurred at a grade crossing just outside the town of Durham while the deceased was in the employ of one Thomas Fimple, the former riding on the back seat of an automobile driven by the latter. The machine was struck by a detached locomotive in charge of and being driven by the defendant McKnight while on his way from Chico to Roseville. Fimple and young Drouillard were the only occupants of the machine, and they were both killed by the collision; the former's body being found about 150 feet from the point of the accident, and the latter being carried on the cowcatcher for a distance of 1,113 feet, and dying within a few minutes after being taken therefrom.

There is abundant evidence of the negligence of appellants. Indeed, with commendable candor their able counsel concede that the finding of the jury in that respect is legally supported. The case seems to have been tried with unusual care, and not a single ruling of the court as to the admissibility of evidence, nor is its action in reference to the instructions challenged; the only contention herein being that, as a matter of law, it should be held that the deceased was guilty of contributory negligence, and, furthermore, that certain special findings of the jury are inconsistent with and control and render ineffective the general verdict.

To appreciate the significance of the question as to the contributory negligence of the deceased, it may be well to call attention to these facts disclosed by the evidence: There were two railroad tracks at the crossing where the accident occurred—one the main line track, and the other the house track which extended to certain buildings for freight purposes. The centers of these are about 44 feet apart. There were certain buildings near the house track which obstructed the vision of one coming from the west and looking north, and this condition was augmented at the time of the collision by the presence of a box car, 10 feet in width, standing upon said house track. At any rate, it may be said that the view of the occupants of the machine in the direction of the approaching locomotive was intercepted until they reached a point about 50 feet from the main track. There they stopped, and both were seen looking north up the track from which position they could see the main track for a distance of 150 or 200 feet, and it is fair to say from the evidence that, if it had not been for the obstruction of the view by the box car, they would have seen the track for a distance of probably 2 miles. Having stopped near the house track and not being apprised of any danger, they proceeded on till the collision occurred on the main track. There was a space of 35 or 40 feet over which they passed just prior to the accident wherein they had an unobstructed view of the approaching locomotive, and what occurred within this interval is really the subject of the whole controversy in the case. The time was exceedingly short —not over five seconds at the rate they were traveling, while the locomotive was coming at a tremendous speed of probably 50 miles an hour or 73 feet per second.

The direct evidence throws little light, if any, upon the question as to what during this interval the deceased did to protect himself against the impending menace and to secure his own safety. An important witness for the plaintiff, who was standing about 100 feet away where he had a clear view of the situation, testified:

> "I noticed a man coming with an automobile, and I noticed he slowed down just before he started to pull down to the track, looking up the track and when he started he came over the track and just as he got on the track the engine struck the car and threw it"; that, when the driver stopped, the engine was over 1,000 feet away; that no bell was rung and no whistle was blown; and that "the old man was sitting in the front seat and the boy in the back seat."

The only other witness who pretends to have seen the automobile and its occupants within the brief interval was the defendant McKnight, who had charge of the locomotive; but he admits that when he first saw the automobile it was right on the rail, and that he struck the machine as if in an instant, that he did not have a good view of the automobile, but that he saw Drouillard leaning over the front seat as if to talk to Mr. Fimple. "I saw him turn his face to the engine when we hit him; that was all there was to it. His eyes looked like two balls of fire. I couldn't say whether he was paralyzed or not—the expression looked that way to me."

[1, 2] In view of this situation, must it be said that Drouillard did not exercise that care which the law exacts of every one in a similar position? In deciding that question, we must, of course, distinguish between the driver and the guest. For the purposes of the case it might be conceded that, within the rule often announced in reference to railroad crossings, Fimple was chargeable with such negligence that no action in his behalf would lie against the railroad company; but this concession would not militate against the view that the same defense is not available in this action. In other words, certain things are sometimes required of the driver to satisfy the requirements of ordinary care and prudence that it would be unreasonable to demand of the guest who has no control over the driver and who is not directing the movements of the machine. This is necessarily so, and we do not dwell upon it as it is sufficient to refer to Lininger v. San Francisco, etc., R. R. Co., 18 Cal. App. 411, 123 Pac. 235, Thompson v. Los Angeles R. Co., 165 Cal. 748, 134 Pac. 709, and Bryant v. Pac. Elec. Ry. Co., 174 Cal. 737, 164 Pac. 385, wherein the subject is fully discussed.

But, of course, it is true, as recognized by all the authorities, that Drouillard was required to exercise ordinary care for his own safety, and whether he exercised such care is a question of fact, and unless the evidence is all one way this question must be submitted to the jury. Parmenter v. McDougall, 172 Cal. 306, 156 Pac. 460.

> "No one can be allowed to shut his eyes to danger in blind reliance upon the unaided care of another, without assuming the consequences of the omission of such care." Fujise v. Los Angeles Ry. Co., 12 Cal. App. 207, 107 Pac. 317.

What, then, within the interval of four or five seconds should Drouillard have done to acquit himself in the eyes of the law? The contention of the appellants at the oral argument was that he should have looked up and down the track and discovered the approach of the locomotive and warned the driver to stop. It may be debatable whether under the circumstances he was required to do even this much. It might be plausibly argued that he would be justified in believing that the driver would be apprised of the danger and would stop his machine before attempting to cross the track. But granting that appellants' contention is not unreasonable, even conceding that, when he became convinced that the driver did not intend to heed the warning, it was the duty of Drouillard to attempt to leave the machine; then, we must for the purposes of this appeal hold that Drouillard did just what appellants contend he should have done. The case would be no different if a witness had testified to such facts. This follows necessarily from the presumption—which is a rule of evidence —"that a person takes ordinary care of his own concerns." Section 1963, Code Civ. Proc. Of course, this is a controvertible presumption, but until controverted it is evidence which the jury is bound to accept. Crabbe v. Mammoth Channel Gold Mining Co., 168 Cal. 500, 143 Pac. 714.

There are other cases illustrating the application of the presumption to the question of the conduct of a decedent. It is sufficient to refer to Baltimore & Potomac R. Co. v.

Landrigan, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262, wherein the court said:

> "In the absence of all evidence tending to show whether the plaintiff's intestate stopped, looked, and listened before attempting to cross the south track, the presumption would be that he did. But that presumption may be rebutted by circumstantial evidence, and it is a question for the jury whether the facts and circumstances proved in this case rebut that presumption, and, if they find that they do, they should find that he did not stop and look and listen. * * * In order to justify them in finding that he did not, all the evidence tending to show that should be weightier in the minds of the jury than that tending to show the contrary."

[3] Herein there was no evidence that the deceased failed to do what the most stringent rule of ordinary care demands, and therefore there can be no contention that said presumption was overcome. Indeed, if there were no such presumption, the implied finding of the jury that Drouillard was not chargeable with contributory negligence would demand concurrence for the reason that it is an affirmative defense which the defendants are called upon to establish. Having shown that his death was the proximate result of the negligence of the defendants, the task of the plaintiff was complete, and he was not required to negative the claim of contributory negligence. As is well known, the rule in this state, as to that matter, differs from some other jurisdictions.

[4] We can perceive no greater merit in the other contention of appellants that the special findings are inconsistent with the general verdict. Of course, the rule is that they should all be reconciled, if possible, and that no specific finding should operate to overthrow the general conclusion of the jury unless they are entirely inconsistent and irreconcilable.

The matter is thoroughly discussed in Antonian v. Southern Pacific Co., 9 Cal. App. 718, 100 Pac. 877, by the presiding justice of this court to which it is sufficient to refer. Among other cases that might be cited, we may add the recent decision of the Supreme Court in Law v. Northern Assurance Co., 165 Cal. 394, 132 Pac. 590.

[5] That no such inconsistency exists may be seen by exhibiting the three special interrogatories and their answers to which the argument is addressed:

> "No. 4. Did William Drouillard do anything for his own protection or safety after the automobile passed the box car and before it reached a point where it could have been struck by the locomotive passing on the main track? Answer: Yes.
>
> "No. 5. If your answer to question No. 4 is 'Yes,' then what did William Drouillard do for his own protection? Answer: From defendants' testimony Drouillard was leaning forward against front seat, either warning Mr. Fimple of the approaching danger, or in the act of jumping.
>
> "No. 6. If William Drouillard had looked north toward the approaching locomotive at any point after the locomotive passed the box car, and before it reached the point where it could be struck by the locomotive on the main track, could he have seen the approaching locomotive? Answer: Yes."

In fairness to appellants, it should be remarked that they insist that only the last of these is inconsistent with the general verdict. But they are clearly mistaken in the contention. Indeed, the jury could not possibly have made a different answer to the interrogatory. That he could have seen the locomotive if he had looked is beyond question, since there was nothing to obstruct his view.

Appellants argue upon the theory that the finding necessarily implies that Drouillard did not look and therefore omitted a plain duty. But the answer to question No. 6 is not inconsistent with the contention that he did look and did observe the approach of the locomotive. From the form of the question you might infer that Drouillard neglected such duty, but it does not compel that conclusion.

[6] Nor can it be said that the jury was unwarranted in its answer to any of these interrogatories. The point is made, especially in reference to question No. 5. It is argued that the answer is not a fair inference from the testimony of Mr. McKnight. But it is apparent that his testimony is not necessarily opposed to the findings of the jury. Accepting as a fact the statement by him that Drouillard was leaning forward as if talking to the driver, it is, of course, no violent inference that he was warning Fimple of the approaching danger or even that he was about to attempt to leave the the machine. But in addition it must be borne in mind that McKnight was an interested witness, and it is not unfair to say that he would naturally favor appellants as far as possible. He would, indeed, be under great temptation to support the theory of appellants at the price even of the truth. At any rate, the jury was the exclusive judge of his credibility and might accept one and reject another portion of his testimony. Moreover, we may disregard the explanatory part of the answer if it be deemed an improbable inference from the testimony of Mr. McKnight, and we shall have left the simple affirmative, which is supported by the presumption hereinbefore suggested. Again, if it be conceded that the whole answer must be disregarded because the testimony of McKnight does not warrant it, the result is not affected, for the reason that the other findings are supported by the evidence and lead necessarily to the conclusion that plaintiff is entitled to the judgment.

It may be said that the case has been argued extensively and with ability by counsel, and, while their briefs have been examined with care, we see no necessity for more elaborate treatment of the questions involved or for the specific consideration of the distinguishing features of the various cases which have been cited. It seems clear that we are called upon to determine the application of a few well-settled principles of law, and that there is no legal ground for interfering with the result reached by the lower court.

The judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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36 Cal. App. 143

SMITH v. McCALLUM et al. (Civ. 1814.)

(District Court of Appeal, Third District, California. Feb. 4, 1918. On Rehearing, March 6, 1918. On Rehearing in Supreme Court, April 5, 1918.)

1. CRIMINAL LAW ⚷1026 — WAIVER OF RIGHT TO APPEAL.

One who gave his bond for the support of his minor child under Pen. Code, § 270b, and judgment was suspended, did not waive his right to appeal from an order denying his motion for a new trial.

2. CRIMINAL LAW ⚷1081 — NOTICE OF APPEAL.

Notice of appeal to the clerk gives the appellate court jurisdiction in criminal cases, in view of Pen. Code, §§ 1246, 1247, 1247a, relating to duties of clerks in reference to criminal appeals.

3. CRIMINAL LAW ⚷1023(13) — ORDERS APPEALABLE.

Although Pen. Code, § 1239, makes no mention of an appeal from a motion for a new trial, in view of such right given by section 1237, and sections 1201, 1202, providing that motion for new trial must be made before judgment, an appeal may be taken where judgment has been suspended, and not entered.

On Rehearing.

4. COSTS ⚷3—WHEN ALLOWED.

Costs are allowable by statutory authority only.

5. MANDAMUS ⚷190 — COSTS — COURT REPORTERS.

In an original proceeding in the appellate court in mandamus to compel a court reporter to transcribe notes in a criminal case to the appellate court, the applicant, if successful, is entitled to costs under Code Civ. Proc. § 1095, although the judge of the superior court refused to order the transcribing of the notes.

Angellotti, C. J., dissenting.

Application by F. J. Smith for writ of mandate to compel Duncan C. McCallum and Anna D. Duffy, as court reporters, to transcribe certain notes and file them with the clerk of the appellate court. Writ granted.

R. Platnauer, of Sacramento, for petitioner. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., Raymond A. Leonard, Dist. Atty., of Oroville, and H. R. Davids, Asst. Dist. Atty., of Chico, for respondents.

CHIPMAN, P. J. Application for writ of mandate. It appears from the petition: That petitioner was informed against for omitting without lawful excuse to furnish his minor child with necessary food, and on December 14, 1917, he was convicted of the offense charged in the information. The court appointed December 17, 1917, as the time for pronouncing judgment. On said day, and before judgment was pronounced, defendant in open court made and filed a motion and application in arrest of judgment, and also a motion and application for a new trial. Thereupon the court, at the request of the petitioner, continued the hearing of said motions until the 20th day of December, 1917, and extended the time for pronouncing judgment until said last-named day, on which day the court made an order denying petitioner's said application and motion in arrest of judgment, and also made an order denying petitioner's application and motion for a new trial in said action, and thereupon, at the time said orders were made, petitioner in open court announced that he appealed to the District Court of Appeal for the Third District from the order denying his application and motion for a new trial in said action. Thereafter, and on the same day, to wit, December 20, 1917, defendant appeared before the court and entered into an undertaking to the state, with two sureties, in the penal sum fixed by said court, conditioned that he would pay to the person having the custody of said minor child the sum per month fixed by said court in order to thereby provide for said minor child the necessary food, clothing, shelter, and medical attendance, which bond was approved by said superior court. "That thereupon said court suspended proceedings and sentence in said action." "That on said 20th day of December, 1917, and after proceedings and sentence had been suspended, petitioner filed with the clerk of said court and presented to said superior court an application for a reporter's transcript, which application stated in general terms the grounds of said appeals and the points upon which he relied, and designated the portions of the stenographic reporter's notes relied on, which application is in the words and figures following, to wit." Therein appears a recital of the proceedings relating to the notice of appeal, the grounds of the appeal, ten in all, and also a designation of the portions of the phonographic reporter's notes relied on. In the body of the application, as copied in the petition herein, it is stated that the notice of motion was given on December 20, 1917, and the motion was denied by the court on December 20, 1917, and it also appears that defendant gave notice of appeal from the judgment. In the concluding paragraphs the date of the notice of motion and the order made by the court is given as December 17, 1917. Since the argument a certified copy of the application on file in the action has been filed in this court, from which it clearly appears that the correct date at which the motion and order were made was December 20, 1917, and it was on that date and after the said order was made that the order suspending sentence was made. It is then shown in the petition herein that on said December 20, 1917, "the said superior court refused to make an order directing the phonographic reporter to transcribe such portion of her notes as in the opinion of the court might be necessary to fairly and fully present the points relied upon by petitioner, and refused to make an order directing such phonographic reporter to transcribe any portion of her notes; that said superior court has never at any time made any order directing said phonographic reporter to transcribe any portion of said notes." It is further shown that respondent McCallum is the official reporter of said court, and took down the shorthand notes of the proceedings in said action on the said motions, and that respondent Duffy was the acting official reporter at the trial; that on December 28, 1917, petitioner demanded of respondents and each of them that within 20 days after said December 20, 1917, they and each of them file with the clerk of said court an original and three carbon copies "of those portions of their respective notes so required by petitioner and his application so filed and presented," but they and each of them refused so to do, "and they have and each of them has informed respondent [petitioner?] that they will not do so." It is further alleged that the said superior court "is of the opinion that petitioner is not entitled to prosecute his said appeals, and that the county of Butte should not be put to the expense of paying for said transcription, and has so informed petitioner."

The first point made by respondents is based on the assumption that petitioner in his petition refers to orders made on December 17, 1917, whereas "there are no such orders." The petition itself leaves little doubt that the true date is December 20th. However, the certified copy clears away all doubt, and shows that the date of the orders was December 20th, and also that there was no notice of motion of appeal from the judgment, and, had there been, it should be treated as superfluous, for judgment was in fact suspended.

Respondents' second point is that no appeal has been taken in the manner required by the provisions of section 1239 of the Penal Code. This section refers to an appeal from the judgment, and provides that it must be taken at the time judgment is rendered, and also that an appeal from an order after judgment must be taken at the time the order is made. It makes no provision as to when the appeal from an order denying motion for a new trial is to be taken. Section 1182, however, provides that the application must be made before judgment, and the order denying the motion must immediately be entered by the clerk in the minutes. The contention is "that an appeal can only be taken under the provisions of section 1239," and, as this section makes no mention of an appeal from the order denying the new trial, no appeal lies. But section 1237 of the Penal Code expressly provides:

> "An appeal may be taken by the defendant: 1. From a final judgment of conviction; 2. From an order denying a motion for a new trial; 3. From any order made after judgment, affecting the substantial rights of the party."

The right to appeal is thus clearly given. Section 1239 provides that the appeal may be taken from the judgment in open court at the time it is rendered and from an order made after judgment, but does not mention the order denying motion for new trial, and, of course, does not provide at what time such appeal is to be taken.

This brings us to the principal point urged by respondents, to wit, that no appeal lies from an order denying motion for a new trial until after judgment of conviction is entered.

[1] The right of appeal has been said by the Supreme Court to be guaranteed by the Constitution and to be as sacred as the right to trial by jury, and is one of the means provided by law to determine the guilt or innocence of the accused. Ex parte Hoge, 48 Cal. 3, 6; In re Adams, 81 Cal. 163, 167, 22 Pac. 547. Under sections 1201 and 1202 the motion for a new trial must be made before judgment is pronounced. Under subdivision 1, § 1203, the court may suspend sentence, and in cases arising under sections 270 and 270a (under which petitioner was convicted) the suspension may continue for five years. The bond given by petitioner for the support of his minor child was under section 270b, and by that section the court was also authorized to suspend sentence, but this bond, in our opinion, is not a waiver of petitioner's right to appeal from the order denying his motion for a new trial. In State v. Coolidge, 72 Wash. 42, 129 Pac. 1088, a bond was given by the defendant after conviction in a case such as we have here, and it was there claimed that the bond operated as a waiver of defendant's right to appeal. Said the court:

> "It may be that a case might arise where the giving of a bond, conditioned for the performance of a judgment, would operate as a waiver of the right to appeal; but it cannot be so held in this case. The verdict still stands, and defendant is entitled to urge such legal defense as he may have thereto."

In the case cited no judgment had been entered, but the court made an order, as here, staying proceedings. A motion for a new trial had previously been made and denied.

[2] It has been held that the giving notice of appeal to the clerk under the new system gives the appellate court jurisdiction in civil cases. Hibernia Savings & Loan Society v. Doran, 161 Cal. 118, 120, 118 Pac. 526; Clemens v. Gregg, 167 Pac. 299. We see no reason why this should not be true of appeals in criminal cases. Section 1247 of the Penal

Code provides that upon an appeal from an order of the superior court to the District Court of Appeal in any criminal action where appeal is allowed by law the defendant must within a given time make application to the trial court, stating the grounds of the appeal and designate the portions of the stenographic reporter's notes upon which defendant relies. It is made the duty of the court, upon such application, to order the transcription made and also the duty of the reporter to file with the clerk such transcription. Everything which this section requires of the defendant was done in this case. Section 1247a makes it the duty of the clerk to deliver copies of the transcription to the parties named, including a copy to the court for its approval, and, if no objection is made to the transcription, it is made the duty of the court to approve it and deliver it to the clerk. Provision is made for hearing objections and for approval by the court thereafter. When finally approved and received by the clerk from the judge, the clerk "must immediately transmit the same to the court to which the appeal was taken, and thereupon it shall become a part of the record on appeal." Section 1246 provides that, "upon the appeal being taken, the clerk of the court from which the appeal is taken must," without charge, within 20 days thereafter, transmit to the clerk of the appellate court a typewritten copy of the following papers. The enumerated papers include "the proceedings on motion for arrest of judgment or new trial."

[3] The machinery seems to be amply provided for perfecting the appeal from the order in question, and is the same for perfecting the appeal from the judgment or any order made after judgment, without regard to the fact that no mention of such order is made in section 1239. It was held in People v. Thompson, 115 Cal. 160, 46 Pac. 912: that although there was no question raised on an appeal from the judgment as to the instructions, and the instructions were not in fact presented or passed upon, the instructions, nevertheless, may be reviewed upon an appeal from the order, notwithstanding that they might also have been reviewed on an appeal from the judgment, if presented on such appeal. Still, as was there held, the Penal Code provides for an appeal from an order denying a new trial (section 1237), and as the motion for a new trial is an independent proceeding, it may happen, as in civil cases, that a judgment is set aside on a motion for a new trial after it had been affirmed on appeal from the judgment, and such was the result in the case cited.

In the case of People v. Irish, 167 Pac. 900, a case such as this one, sentence was suspended and an appeal taken and heard and judgment affirmed. The opinion does not state from what the appeal was taken, but an examination of the record shows that it was from the order denying a new trial while the sentence remained suspended.

The contention of respondents leads to this, that the defendant may rest under suspended sentence for a period of five years before he can have his motion for a new trial heard. He may not have been guilty of the offense charged or he may not have been legally convicted, but the law furnishes no remedy under which he can have these questions answered by an appellate court pending suspension of sentence.

We think petitioner is entitled to have his appeal heard pending suspension of sentence, and it is therefore ordered that he have the writ prayed for.

We concur: HART, J.; BURNETT, J.

On Rehearing.

Petitioner was granted a writ of mandamus compelling respondent Duffy to transcribe her notes of all the proceedings taken at the trial of petitioner, when as defendant in a criminal action he was convicted of failing to support his minor child, and also compelling respondent McCallum to transcribe his notes of the proceedings of the court on the motion of petitioner, defendant in the action, in arrest of judgment and for a new trial, it appearing that in said action respondent Duffy was acting as the official reporter at the trial and respondent McCallum was acting as official reporter at the hearing of said motion, and it further appearing that said transcripts were regularly demanded by the defendant in aid of his appeal from the judgment and the order denying his motion for a new trial. In the present matter petitioner seeks a rehearing for the purpose alone of having the judgment so amended as to allow him his costs herein. It is understood that, if costs are not legally allowable, the petition should be denied, and, if allowable and allowed by the court, that the judgment be amended accordingly.

[4, 5] Costs are allowable by statutory authority only. They are allowed to the plaintiff, of course, in the following cases:

> "* * * 4. In a special proceeding." Code Civ. Proc. § 1022.
>
> "In other actions than those mentioned in section ten hundred and twenty-two, costs may be allowed or not, * * * in the discretion of the court. * * *" Code Civ. Proc. § 1025.
>
> In an application for mandate, "if the judgment be given for the applicant, he may recover the damages which he has sustained, * * * together with costs; and for such damages and costs an execution may issue. * * *" Code Civ. Proc. § 1095.

In the case of Platnauer v. Superior Court, 33 Cal. App. 394, 165 Pac. 41, relied on by respondents, we held that costs were not allowable for the reasons there stated at some length. The application there, however, was for a writ of review, running against the court. The prevailing party relied upon sections 1027 and 1032, Code of Civil Procedure, but these sections were held to be inapplicable, and it was also held that costs could be recovered neither against the judge nor the county.

The statute as to writs of review makes no mention of costs, leaving the question to be determined under the general provisions as to costs. The reasons given for the decision in the Platnauer Case are not applicable here. Besides, in mandamus proceedings there is express authority given for recovering costs. The argument of respondents that "shorthand reporters are governmental agencies of the superior court, which is a governmental agency of the state," and hence should enjoy the immunity given the court in the matter of costs, does not strongly appeal to us. The court in the case cited was exercising a judicial function in a matter wherein it had jurisdiction of the person and subject-matter and could decide wrongly or rightly. Here respondents had no judicial function to perform; the duty which the defendant in the criminal action (petitioner here) called upon them to perform was ministerial and its performance was made mandatory by the statute. If it be conceded (and we make no such concession) that section 1095, Code of Civil Procedure, does not "take away, as is contended, the discretion of the court in allowing or denying costs," we should hesitate to exercise such discretion against petitioner for the reason that the policy and letter of the law give to the defendant in a criminal action the services of the courts and their officials free of expense at all stages of the proceedings, and in harmony with that policy he should have his costs when driven to the court to compel a court stenographer to perform a mere ministerial duty placed upon him by the statute, especially where the performance of this duty is indispensably necessary to enable the defendant in the action to perfect his appeal.

In Power v. May, 123 Cal. 147, 152, 55 Pac. 796, the Supreme Court held that sections 1022 and 1095, Code of Civil Procedure, applied where the writ of mandate was against a county treasurer, and that costs of the mandamus proceeding were chargeable against the defendant personally. It was held in Gould v. Moss, 158 Cal. 548, 111 Pac. 925, that:

> Section 1095, Code of Civil Procedure, applies "to original proceedings of that character, whether begun in the superior court, in the Supreme Court, or in a District Court of Appeal. The point that this court is without power to award costs in such cases is without merit."

Our conclusion is that petitioner is entitled to his costs.

It is ordered that the judgment be amended to read that the petitioner have the writ prayed for, and that he have judgment for his costs.

We concur: HART, J.; BURNETT, J.

Action of Supreme Court Denying Rehearing.

PER CURIAM. Motion for rehearing denied by the Supreme Court.

ANGELLOTTI, C. J. (dissenting). I am of the opinion that there should be a hearing of this matter in this court. Regardless of other questions involved, it seems clear to me that our law does not require the shorthand reporter to furnish a transcript of the proceedings in a criminal case for the purposes of an appeal upon the demand of the appellant and without payment of fee, where the trial judge to whom application is made for an order requiring such a transcript expressly rules that the appellant is not entitled thereto, and denies the application therefor, and no order for such a transcript is made by the court to which the appeal is taken. To my mind the intent is clear to vest in the trial court the power to determine to what extent the appellant is entitled to a transcript of the reporter's notes for the purposes of an appeal, the expense of which, when properly ordered, is a county charge, with the right in the court to which the appeal is taken to order a further transcription, if deemed essential to the appellant's rights. It is only where the trial court fails to take any action for a specified time regarding appellant's application that the shorthand reporter may be required to furnish the transcript as demanded; the idea apparently being that such failure of the court to act shall be taken as assent to the application as made. Here the trial court acted, and expressly refused to order the transcript, ruling that appellant was not entitled thereto. And the reporter, who doubtless felt himself bound by the ruling of the superior court in the matter, is held guilty of a breach of statutory duty for not having disregarded such ruling, and is also penalized in costs. The law seems to provide in effect that the compensation of the reporter for such a transcription is to be paid from the county treasury only when the same is, at least in effect, ordered by a court, and I do not see how the reporter here could have received any compensation in this case had he proceeded in the face of the ruling of the court refusing the transcript.

36 Cal. App. 416

PILUSO v. SPENCER. (Civ. 1785.)

(District Court of Appeal, Third District, California. March 1, 1918. Rehearing Denied by Supreme Court April 29, 1918.)

1. Civil Rights 🔑5—Hotel Accommodations—Lodgers for Indefinite Periods—"Hotel"—"Inn."

Civ. Code, §§ 51, 52, providing for full and equal accommodations, advantages, etc., of inns, hotels, etc., and imposing liability in damages for the same, contemplates by the use of the term "hotel," a public resort for protracted accommodation as well as temporary refreshment, and the statute applies to lodgers for indefinite periods, there being a distinction between hotel and inn as regards guest and lodger for indefinite period, especially in view of rule as to civil liability changed by amendment of section 1859 of the Civil Code so as to include hotel keepers, etc., in addition to innkeepers.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Hotel; Inn.]

2. Civil Rights 🔑13—Hotel Accommodations—Action for Damages—Complaint—"Incited."

In a complaint in an action for damages under Civ. Code, §§ 51, 52, for causing plaintiff's removal from a hotel, alleging defendant incited the proprietor to discriminate against plaintiff, the term "incited" carries with it the idea of encouragement, persuasion, and inducement, and is sufficient for the purpose suggested in the complaint of causing removal from the hotel, and hence the complaint shows a causal connection between the defendant's act and plaintiff's removal.

[Ed. Note.—For other definitions, see Words and Phrases, Incite.]

3. Civil Rights 🔑13—Hotel Accommodations—Action for Damages—Evidence.

In an action for damages under Civ. Code, §§ 51, 52, for causing plaintiff's removal from a hotel, evidence of defendant's treatment of plaintiff in other respects, such as interfering with pursuit of his business and possession as tenant of a cottage, was admissible in support of an allegation of malice and as indicative of oppression.

4. Civil Rights 🔑13—Hotel Accommodations—Action for Damages—Evidence.

A letter from defendant to the hotel proprietor asking him to inform plaintiff that he would have to have the rooms he was occupying, and that board in the restaurant would be doubled thereafter, was admissible to show defendant's malice and hostility.

5. Trial 🔑233(3)—Instructions—Direction to Construe Pleadings.

A direction to render a verdict for plaintiff if the jury found certain facts from admissions of the pleadings and evidence did not impose on the jury the responsibility of construing the pleadings when the court had already informed the jury what facts were admitted therein.

6. Civil Rights 🔑13—Hotel Accommodations—Action for Damages—Instructions—Punitive Damages.

In an action under Civ. Code, §§ 51, 52, for causing plaintiff's removal from a hotel, the jury might award punitive damages for malice or oppression in excess of the $50 minimum fixed by the statute.

7. Civil Rights 🔑13—Hotel Accommodations—Action for Damages—Instructions.

In an action under Civ. Code, §§ 51, 52, for causing plaintiff's removal from a hotel, a refused instruction that the law does not require the keeper of an inn or hotel to furnish the public or any person a place of residence or business therein was subject to criticism as being too sweeping, since, if it were the practice and custom of the hotel to receive and entertain other guests of that class, it would have no right to discriminate against plaintiff.

8. Trial 🔑260(6)—Charge as Covering Refused Instruction.

In an action under Civ. Code, §§ 51, 52, for causing plaintiff's removal from a hotel, a statement in a refused instruction that the law only requires the keeper of hotel or inn to give accommodations alike to all who compose the traveling public, making no distinction on account of race or color or for any other reason not applicable alike to all persons, was covered by a part of the charge that, if plaintiff was permitted the ordinary and usual accommodations, and was not on account of his race or color, or for any other cause or reason other than such as was applicable to all, denied such privileges and accommodations, verdict must be for defendant.

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by Frank G. Piluso against F. F. Spencer. From a judgment for plaintiff, defendant appeals. Affirmed.

Taylor & Tebbe, of Yreka, for appellant. H. R. Raynes and L. F. Coburn, both of Yreka, for respondent.

BURNETT, J. The action was brought under sections 51 and 52 of the Civil Code for the violation of the "personal rights" of plaintiff. After alleging that one H. W. Pollman was, and had been for some time, "the keeper and did keep a hotel for the accommodation of lodgers and travelers" in the town of McCloud, in the county of Siskiyou, and that plaintiff and his wife and child lodged in said hotel from August 14, 1914, until November 20th, paying all of said Pollman's demands in full for said lodging, the complaint proceeds:

> "That on or about the 20th day of November, 1914, said H. W. Pollman did wantonly, wrongfully, willfully, and maliciously, and without any good cause therefor, discriminate against and refuse to permit and did not permit said plaintiff to continue to lodge in said hotel, and did then and there wrongfully, willfully, and maliciously and without any good cause therefor discriminate against and remove and eject plaintiff from said hotel, all for the purpose of depriving said plaintiff of a place of abode in said town of McCloud and for the purpose of compelling plaintiff to leave and depart from said town of McCloud and for the purpose of harassing, annoying and vexing plaintiff."

The allegation as to the defendant's participation in the transaction is as follows:

> "That on or about the 4th day of November, 1914, defendant herein did wrongfully, willfully and maliciously and without any good cause therefor incite said H. W. Pollman to so discriminate against and to so refuse to permit said plaintiff to continue to so lodge in said hotel as hereinbefore set forth, and did then and there wrongfully, willfully, and maliciously and without any good cause therefor incite said H. W. Pollman to so discriminate against and to so remove and eject plaintiff from said hotel as above set forth."

Said section 51, as far as is necessary to quote, is as follows:

> "All citizens within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities, and privileges of inns, restaurants, hotels * * * and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens."

We also quote from said section 52 as follows:

> "Whoever violates any of the provisions of the last preceding section by denying to any citizen, except for reasons applicable alike to every race or color, the full accommodations, advantages, facilities, and privileges in said section enumerated, or by aiding or inciting such denial, or whoever makes any discrimination, distinction, or restriction on account of color or race, or except for good cause applicable alike to all citizens of every color or race whatever, in respect to the admission of any citizen to, or his treatment in, any inn, hotel * * * or other public place of amusement or accommodation * * * or whoever aids or incites such discrimination, distinction, or restriction, for each and every such offense is liable in damages in an amount not less than fifty dollars, which may be recovered in an action at law brought for that purpose."

[1] The general intent and significance of the foregoing provisions are clear enough. The purpose, of course, is to compel a recognition of the equality of citizens in the right to the peculiar service afforded by these agencies for the accommodation and entertainment of the public. There is no doubt of the constitutionality of the provisions and of the sound, public policy of such legislation. Greenberg v. Western Turf Ass'n, 140 Cal. 363, 73 Pac. 1050.

This is not disputed, but it is urged here that the case does not fall within the inhibition of the statute, for the reason that plaintiff was not a "guest" at the hotel, but a "lodger" for an indefinite period. The contention is based upon the rule at common law as to inns, and upon certain decisions which discuss the nature of these places of public refreshment and accommodation. The California decisions to which appellant refers are Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657; Moore v. Long Beach Development Co., 87 Cal. 483, 26 Pac. 92, 22 Am. St. Rep. 265; Fay v. Pacific Improvement Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198; Magee v. Pacific Improvement Co., 98 Cal. 678, 33 Pac. 772, 35 Am. St. Rep. 199.

In the Pinkerton Case, supra, the contention of the defendant was that he kept "a lodging house," and not an "inn," but the Supreme Court decided that he held himself out to the world as an innkeeper, and that he could not "be heard to say that his professions were false, and that he was not in fact an innkeeper." He was therefore held to the responsibilities for the property of his guests which by his representations he induced them to believe he would assume. Therein was not involved any such statute as the one before us here.

In the Moore Case, also, the question was as to the liability of the defendant for the property of the patron, and the distinction as to such liability between the case of a boarder and of a guest was recognized. It seems that the complaint therein counted upon the fact of the plaintiff being a guest, but it was held that he was a boarder, and must therefore bear the loss of his personal effects caused by a fire.

Again, in the Fay Case, the question of liability for loss of personal effects turned upon the consideration as to whether the place of entertainment was a "public inn" or a select boarding house, and the court held that it was the former, and that the general rule as to inns applied.

In the Magee Case a similar question was involved, and the court there held:

> That there should have been a finding as to whether the plaintiff was a guest or a boarder, and it was declared that whether "the plaintiff made a special arrangement respecting her stay with the defendant was only evidence to be considered by the court in determining the ultimate fact whether she was a guest or a boarder. Even if the finding of the court that she had made a special arrangement with the defendant for board and lodging by the week had been sustained by the evidence, that fact would not be determinative of the issue whether she was a guest or boarder, but would be merely evidence to be considered in determining that issue."

However, it may be said that the rule as to such liability has been changed in this state by the amendment (St. 1895 p. 49) of section 1859 of the Civil Code, so as to include a "hotel keeper, boarding and lodging house keeper," as well as "innkeeper."

The statute in question herein also recognizes inns and hotels as belonging to two distinct classes, and we think it cannot be said that the decisions in reference to inns are necessarily controlling in this case, involving, as it does, the duty of a hotel keeper. It may not be possible to make a clear distinction, that will apply to all cases, and, no doubt, sometimes the terms "inns" and "hotels" are used interchangeably, but we are entirely satisfied that in said section by the use of the term "hotel" the Legislature contemplated a public resort not only for temporary refreshment, but also for protracted accommodation. It is a matter of common knowledge, indeed, that the places designated as hotels in this state are open to the accommodation of permanent as well as transient guests. And, unless it appears to the contrary, we would have a right to conclude that, having advertised the resort as a hotel, the proprietor intended to receive guests for an indefinite period as well as the traveling public. But, as far as the complaint is concerned, it may be added, it was expressly alleged, as we have seen, that the hotel was kept for the accommodation of "lodgers and travelers."

[2] Nor do we think that there is any merit in the contention that the complaint fails to show a causal connection between the act of the defendant and plaintiff's removal from the hotel; in other words, that defendant's conduct was effective to accomplish the purpose which he had in mind. The complaint alleges that defendant incited the proprietor to discriminate against the plaintiff. The term carries with it the idea of encouragement, persuasion, and inducement, and is sufficient for the suggested purpose. And it may be said that the evidence shows without any conflict that it was only by reason of said incitement of defendant that the proprietor ejected plaintiff from the hotel.

It does not appear in the complaint that plaintiff used his room therein for an office. Hence appellant's criticism upon that supposition is without significance.

Indeed, we are satisfied that the complaint is not substantially defective in any respect although it probably contains some unnecessary and evidentiary averments that might have been stricken out on the motion of appellant. However, the order denying it was without prejudice.

[3, 4] As to the evidence, appellant claims that the court erred in allowing proof of his treatment of respondent in other matters not alleged in the complaint. One of these instances was in relation to an automobile business in which plaintiff had embarked, and he was asked:

> "Well, what caused you to cease your occupation there then, running this machine for hire?"

His answer was:

> "Spencer stopped me from it. I ceased working for the McCloud River Lumber Company there in the store about May, 1914, May or June, I think, some time like that."

There were also introduced two letters complaining of his activity in said business, one of them signed, "The McCloud River Lumber Co. F. F. Spencer, Ass't to Pres't," and the other, "F. F. Spencer, Ass't to Pres't." A written notice to surrender possession of a cottage occupied by plaintiff and his family and belonging to said company and a notice of the termination of his tenancy signed in a similar manner were also received in evidence. We think this line of evidence was admissible to show the general course of conduct of appellant toward respondent in support of the allegation of malice contained in the complaint and indicative of oppression. Lyon v. Hancock, 35 Cal. 376; Davis v. Hearst, 160 Cal. 166, 116 Pac. 530. As to the contention that the signature indicated that the writing emanated from the company, it is sufficient to say that it appears that such matters were under the complete control and direction of the defendant. For the purpose of showing hostility and malice on the part of appellant, we think also that this letter was admissible:

> "Mr. Pollman: Will you please inform Frank Piluso that you will have to have the rooms he is occupying in the hotel; also that board at the restaurant will be doubled after to-day. Yours truly, F. F. Spencer."

The following from the same source addressed to the clerk of the hotel stands on the same footing:

> "11—20—14. Jack: All you have to do now is to move Piluso's effects from the room and lock the door. Nick will help you if you need assistance. F. F. S."

It may be stated that the Nick therein referred to was the deputy sheriff.

There is other evidence in support of the position that appellant was influenced by ulterior motives in his efforts to have respondent removed from the hotel, and that other guests received entirely different treatment. Indeed, the clerk testified that in obedience to Spencer's letter he doubled the price of meals for Piluso, but did not for any one else, because he had no instructions from Spencer, and that the sole reason for the ejectment was in consequence "of these letters received from Mr. Spencer," and that the Pilusos "were there a couple of months," and "I found no fault with their conduct; they were all right."

We deem it unnecessary to notice further the contention that the hotel was not for the accommodation of permanent lodgers, and that therefore there was no discrimination against respondent. It was a fair inference from the advertisement offered in evidence and from the testimony of plaintiff that he belonged to a class gladly received and entertained at this public place. Indeed, it abundantly appears that his ejectment was not by reason of the fact that his stay was to be indefinite.

There is some pretense that appellant incited the dismissal of respondent for the reason that he was using his room for an office, and also because his wife used an electric "toaster" in preparing breakfast for their son, but we are satisfied that the jury was warranted in finding that no such reason animated appellant in the matter. If such consideration had been regarded, he would undoubtedly have made complaint or notified plaintiff to discontinue such use of the room. From the whole record the conclusion seems quite unavoidable that defendant's conduct arose from a desire to make it impossible for plaintiff to secure a place of abode in the town.

[5] As to the instructions, we find no prejudicial error. The court directed the jury to render a verdict for the plaintiff if they found certain facts from the admissions of the pleading and the evidence. This, however, did not impose upon the jury the responsibility of construing the pleadings, as claimed by appellant, since the court had already informed the jury as to what facts were admitted therein.

We think the court was right in declaring that under said provisions of the Civil Code there is no difference as to the treatment demanded "between a lodger and a guest in a public place of amusement or accommodation," and that "a hotel is a public place of accommodation."

[6] We find no fault with the instruction that the jury might award punitive damages for malice or oppression in excess of the $50 fixed by the statute. The maximum recovery was declared to be $2,500. The instruction clearly contemplated that this should include the $50 as well as the other element, and was in harmony with the principle announced in the decision of the Greenberg Case, supra.

As to all the instructions given, it might be said that we could presume they were given at the request of the defendant, since it does not appear to the contrary, but in our consideration of them we have not followed that presumption.

[7, 8] Of the four instructions refused by the court we consider the following worthy of specific notice:

> "The court instructs you that the law does not impose upon the keeper of an inn or hotel the duty to furnish the public or any person a place of residence or a place of business in such inn or hotel, but only imposes upon the keeper of such hotel or inn the duty to give accommodations alike to all who compose the traveling public, making no distinction on account of race or color or for any other reason not applicable alike to all persons."

The first part of the instruction is subject to criticism. The statement is too sweeping. If it were the practice and custom of the particular hotel to receive and entertain other guests of that class, it would have no right to discriminate arbitrarily against the plaintiff. As to the latter part of the instruction, it was covered by this part of the charge:

> "If you find that plaintiff was permitted the ordinary and usual accommodations at the McCloud Hotel, and was not on account of his race or color or for any other cause or reason other than such as was applicable to all denied such privileges and accommodation, then I instruct you that your verdict must be for the defendant."

We find no prejudicial error in the case, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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36 Cal. App. 467

S. C. SMITH ESTATE v. J. M. DUNN AUTO CO. (Civ. 2108.)

(District Court of Appeal, Second District, California. March 6, 1918. Rehearing Denied April 4, 1918.)

LANDLORD AND TENANT ⚷231(8)—ACTIONS FOR RENT—ASSIGNMENT OF LEASE.

In action against assignee of a lease which had assigned it to another person who did not pay his rent, evidence *held* sufficient to sustain finding that defendant was an assignee of the lease for value, and was not a mere reorganization of the original lessee corporation.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the S. C. Smith Estate, a corporation, against the J. M. Dunn Auto Company, a corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

Wiley & Lambert, of Bakersfield, for appellant. T. N. Harvey and Geo. E. Whitaker, both of Bakersfield, for respondent.

WORKS, Judge pro tem. The appellant was the lessor under a lease made to the Mason & Flickinger Auto Company, which assigned the instrument to the J. M. Dunn Auto Company, the respondent. The latter corporation occupied the premises covered by the lease for more than two years and then, in turn, assigned it to one Lunceford. Rent was paid until some months after this last assignment, but a default in payment then followed and the present action was the result. Judgment went for the defendant, and the plaintiff appeals.

The action was commenced against the respondent as if it were the original lessee, under the claim that it was but the Mason & Flickinger Auto Company under another name; the contention of appellant being that the formation of the respondent was merely a reorganization of the older corporation; the one being substituted in the place of the other and taking up the business formerly conducted by it. As a matter of fact, the respondent did take a transfer of the business and assets of the Mason & Flickinger Auto Company.

The sole point presented by appellant is whether certain findings of fact are supported by the evidence. These findings were, first, that it was not true that the officers, directors, and stockholders of the Mason & Flickinger Company formed the respondent; second, that it was not true that the older corporation transferred to the new, without consideration, the leasehold interest under the lease from appellant, together with all its other assets; third, that it was not true that the new corporation continued the business of the older one. Another finding is also assailed, but it becomes immaterial, in view of the state of the evidence upon which the others mentioned are based. Those findings are supported by the record. There is some evidence to sustain each of the following assertions: There were some stockholders of respondent at its organization who had not been stockholders of the older company. The organization of the respondent was planned before its prospective incorporators took up negotiations for the acquisition of the assets of the older company, although that purchase took place before the actual formation of the respondent. The prospective incorporators of the respondent acquired the agency for the sale of two particular makes of automobiles before the commencement of the negotiations for the acquisition of the assets of the Mason & Flickinger Company, and the agency became the property of the respondent upon its formation. The incorporators of the respondent put cash into the business conducted by the respondent. A consideration was paid by the respondent for the leasehold interest and for the other assets of the Mason & Flickinger Company which were taken over by it.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

178 Cal. 111

In re LOWE'S ESTATE.
LOWE v. LOWE et al.
(L. A. 5399.)

(Supreme Court of California. April 11, 1918. Rehearing Denied May 9, 1918.)

1. WILLS ⚷88(1)—NATURE OF INSTRUMENT—CONTRACT.

Where a writing, offered by a widow for probate as the will of her deceased husband, on its face purported to be a mere agreement between husband and wife for the support of the latter, and was annexed to an earlier writing of like character signed by both, and, though the signatures of both were contemplated, the husband alone signed, probate was properly refused.

2. EXECUTORS AND ADMINISTRATORS ⚷19—RIGHT OF WIDOW—ESTOPPEL—APPLICATION FOR ADMINISTRATION.

Where decedent's widow, who, under Code Civ. Proc. § 1365, was entitled to letters of administration, unless she waived her prior claim, requested that the petition of children for letters be granted, but before the hearing filed application for grant of letters to herself, asking that her prior request be disallowed, she was not estopped so to apply for letters in her own favor.

3. EXECUTORS AND ADMINISTRATORS ⚷20(8)—RIGHT OF WIDOW—WAIVER—QUESTION FOR TRIAL COURT.

It was for the trial court, in the exercise of a sound discretion, to determine whether greater weight should be given to the original surrender of her right to administer by the widow, or to her subsequent assertion of the right; that is, whether she had waived her prior claim to administer.

4. STIPULATIONS ⚷18(4)—WITHDRAWAL OF ISSUE.

The trial court should not pass upon an issue withdrawn from consideration as immaterial by agreement of the parties accepted by the court.

5. JUDGMENT ⚷728—RES JUDICATA—FINDING ON IMMATERIAL MATTER.

The court's finding in relation to an immaterial matter will not control the parties in any subsequent proceeding.

Department 1. Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

In the matter of the estate of Amos Lowe, deceased, wherein Louesa Lowe, his widow, and Frank E. Lowe and others petitioned for letters of administration. From an order denying her petition, the widow appeals. Order affirmed.

S. V. Wright and I. S. Genter, both of San Luis Obispo, for appellant. Alex. Webster, of Paso Robles, for respondents.

SLOSS, J. Upon the death of Amos Lowe rival applications for letters of administration were presented by the respondents, children of deceased, and by the appellant, his surviving wife. The widow also asked for the probate of a paper claimed to be the will of Amos Lowe. The widow appeals from the order denying her petition.

[1] The court below was clearly right in refusing probate to the paper offered as a will. The writing on its face purported to be a mere agreement between husband and wife for the support of the latter, and was

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

annexed to an earlier writing of like character signed by the two. Although the signatures of both was contemplated, the husband alone signed. Whether there was an effective execution of the agreement contemplated is not to the point. Manifestly the paper was not drawn and signed animo testandi. Tennant v. John Tennant Memorial Home, 167 Cal. 570, 140 Pac. 242; Estate of Keith, 173 Cal. 276, 159 Pac. 705.

[2, 3] The other point in controversy was over the right to administer. The widow was entitled to letters, unless she had waived her prior claim. Code Civ. Proc. § 1365. The petition of the respondents was first filed, and was accompanied by a request, signed by the widow, that it be granted. Before the hearing the widow filed an application for the grant of letters to herself, asking that her prior request in favor of the son and daughter be disregarded. The court found that there was no good or sufficient reason for this change of position. There is a further finding to the effect that the respondents had gone to expense and trouble on the faith of the widow's request. This is, in effect, a finding of estoppel. We think the appellant is right in her claim that the evidence does not support the finding last mentioned. But a party may be held to a waiver of a prior right to letters, even though the elements of an estoppel in pais do not appear. The rule established by our decisions is that where it is sought to retract such a waiver, it is for the trial court, in the exercise of a sound discretion, to determine whether greater weight should be given to the original surrender, or to the subsequent assertion of the right. Estate of Kirtlan, 16 Cal. 162; Estate of Moore, 68 Cal. 281, 9 Pac. 164; Estate of Bedell, 97 Cal. 339, 32 Pac. 323; Estate of Shiels, 120 Cal. 347, 52 Pac. 808. Though the evidence was conflicting, there was enough to support the finding that the widow changed her mind without good reason, and this finding, as we have seen, warranted the grant of letters to the respondents, irrespective of any question of strict estoppel.

Complaint is made of various rulings on the admission and rejection of evidence. If error was committed in any instance, it was not of sufficient consequence to require a reversal.

[4, 5] By the pleadings an issue was made regarding the validity and effect of the first agreement between the appellant and her husband, under which, as was claimed by the respondents, the widow had surrendered any right to succeed to the separate property of the decedent. During the trial, a certain stipulation was made, pursuant to which the issues regarding the agreement were, by agreement of the parties, accepted by the court, withdrawn from consideration as immaterial. The court, nevertheless, made a finding against the widow with respect to the agreement. The appellant argues that this finding will bind her in subsequent litigation. The court should not have undertaken to pass upon the issue thus withdrawn. But we think the harmful effect which the appellant fears will not follow. On the entire record it appears that the finding relates to a matter which was not material, and such finding will not, therefore, control the parties in any subsequent proceeding. Collins v. Gray, 154 Cal. 131, 135, 97 Pac. 142.

The order is affirmed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

178 Cal. 181

HUGHES MFG. & LUMBER CO. et al. v. ELLIOTT et al. (L. A. 4142.)

(Supreme Court of California. April 17, 1918. Rehearing Denied May 17, 1918.)

1. BANKS AND BANKING ⟹40—TRANSFER OF STOCK—PASSING OF TITLE.

Escrow instructions to return unpaid for bank stock to vendors at the end of six months was not inconsistent with passing of title to vendees under an agreement that, if the stock was not paid for in six months, the vendors had the option of rescinding or suing for the purchase price.

2. BANKS AND BANKING ⟹40 — SALE OF STOCK—TITLE.

Where purchaser of bank stock held in escrow till payment of price agreed to accept substituted stock which the bank took in exchange for its stock, purchaser was liable for price of either the bank stock or its equivalent, where there was a doubt as to validity of exchange of bank stock; the bank commissioner disapproving the exchange.

Department 2. Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by the Hughes Manufacturing & Lumber Company, a corporation, and others against L. L. Elliott and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Frank J. Thomas, of San Jose, and Scarborough & Bowen, Edwin A. Meserve, and Shirley E. Meserve, all of Los Angeles, for appellants. Sheldon Borden and George H. Moore, both of Los Angeles, for respondents.

WILBUR, J. [1] This is an action to recover from the defendants the purchase price of certain bank stock. The agreement for this purchase was in writing, dated March 15, 1911. The money was to be paid within six months. It was provided that:

> "Said stock shall be placed in escrow with R. J. Waters to be by them delivered upon payment to said bank by said second parties (defendants) for the first parties (plaintiffs) said sum of $24,480. In case said second parties fail or neglect to pay said sum of $24,480 within six months, said first parties shall have the right and option to either declare said sale canceled or recover said $24,480."

Subsequently, on March 24, 1911, escrow instructions directed to R. J. Waters as escrow holder were signed by the parties plaintiffs and delivered to him with said 288 shares of stock. These instructions provided that the stock was to be delivered in whole or in part whenever payment was made therefor at the rate of $85 per share, plus 3 per cent. interest from March 24, 1911, and also provided that:

> "In case the said stock has not been delivered to the said parties named therein on or before six (6) months from date, you will return said stock or such portions thereof as shall then remain, to the Hughes Manufacturing & Lumber Company."

The purpose of this agreement was undoubtedly to secure to the plaintiffs the purchase price of the stock and to give possession of the unpaid for stock to the escrow holder. The provision for the delivery of the possession of the certificates of stock unpaid for to the vendors at the expiration of six months was not inconsistent with the actual vesting of title of all the stock in the vendees at the time of the delivery of the stock to the escrow holder on March 24, 1911. The escrow instructions did not provide that the sale should be rescinded at the expiration of six months. They merely provided that the shares unpaid for should be delivered into the possession of the vendors at that time, while the contract of March 15th gave the option to confirm or rescind the sale to the vendors. After the expiration of the six months the vendors of the stock gave notice to the vendees that they would expect them to pay the full purchase price for the stock, and that "said stock is still with said escrow holder, R. J. Waters, subject to your order." Under these circumstances the trial court was justified in finding that the title passed. Civ. Code, §§ 1140, 1141, 1748, 1756; Cuthill v. Peabody, 19 Cal. App. 304, 125 Pac. 926; Hoover v. Wolfe, 167 Cal. 337, 139 Pac. 794; Provident Gold Mining Co. v. Manhattan Securities Co., 168 Cal. 304, 142 Pac. 884; Provident Gold Mining Co. v. Haynes, 173 Cal. 44, 159 Pac. 155.

[2] After the deposit of the bank stock with R. J. Waters, it was undertaken by the stockholders of the bank to exchange a majority of the stock of the bank for stock in an insurance company. At the request of the defendants the plaintiffs signed the various agreements necessary for such exchange. This was done in pursuance of a written agreement between the plaintiffs and defendants, which agreement provided:

> "But said exchange shall in no way or manner affect the sale of said 288 shares of the said Oil & Metal Bank & Trust Company's stock, except that said Vulcan Fire Insurance Company's stock shall be substituted in place thereof."

In the agreement of exchange by which the insurance company's stock was to be substituted for the bank stock, it was provided that the insurance company's stock received in exchange for the bank stock was to be deposited in escrow with the bank and to remain on deposit with the bank as security for certain agreements on the part of the bank stockholders. The president of the bank, finding that the proposed exchange was disapproved by the bank commissioner and by the insurance commissioner, returned the original certificate for 228 shares of bank stock to R. J. Waters, and it remained with him until the trial. But appellants claim that the agreement of exchange was consummated; that the attempted cancellation of that agreement by the president of the bank was unauthorized; that the title to the bank stock passed to the insurance company or to one Galloway, and that title to the insurance company's stock passed in accordance with the agreement of exchange, and that such consummated exchange was not affected by the unauthorized act of the president of the bank in returning the certificate for the bank stock to Waters. It is immaterial whether or not this deal was consummated. If it was consummated the effect of the transaction was that the bank held the substituted insurance company's shares under the agreement of exchange entered into by the plaintiff for and on behalf of the defendants. If not consummated, the mere cancellation of the 288 shares of bank stock shares, for the purpose of issuing a certificate to effect said exchange, was of no consequence. The reissue of the original certificate for 288 shares and its redeposit with Waters placed the matter substantially where it was in the first instance. In either event, the whole transaction having been at the request of the defendants, they are in no position to complain. Upon payment of the purchase price they would secure all plaintiff's rights in the bank stock or in the stock so substituted therefor. If the transactions with reference to the exchange of the stock have any significance, they merely emphasize the fact that both parties regarded the stock as the property of the defendants.

Defendant Montgomery, after the execution of the original contract, signed the same as a party thereto, and in all subsequent proceedings in relation thereto he was recognized as such by the plaintiffs. We see nothing in the case to distinguish his obligation from that of the other defendants.

Judgment affirmed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

178 Cal. 185

CITIZENS' TRUST & SAVINGS BANK v. TUFFREE et al. (L. A. 4211.)

(Supreme Court of California. April 17, 1918.)

1. TRUSTS 🔑44(2)—EVIDENCE—INCONSISTENCY IN TESTIMONY.

Statements and conduct of a mother, to whom a son made a deed of gift, being consistent with a maternal desire to hold and administer the property for his benefit and protection as his mother, and not as trustee, are not inconsistent with her other testimony expressly denying existence of a trust relation.

2. APPEAL AND ERROR 🔑1011(1)—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

Discretion of the trial court in resolving conflicts in the testimony will not be interfered with on appeal.

Department 1. Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by the Citizens' Trust & Savings Bank, guardian of Fred B. Tuffree, an incompetent, against John C. Tuffree and another, executors of Carolina B. Pittman, deceased. Judgment for defendants, and plaintiff appeals. Affirmed.

Cates & Robinson, of Los Angeles, for appellant. Samuel M. Davis, of Santa Ana, for respondents.

RICHARDS, Judge pro tem. This is an appeal from a judgment in defendant's favor in an action to declare and enforce a trust in real property. The original defendant, Carolina B. Pittman, was the mother of one Fred B. Tuffree, of whom the plaintiff is guardian. The evidence presented at the trial disclosed the following facts: The property in question was a part of a large tract which belonged originally to Mrs. Pittman as a part of her separate estate. In the year 1902 while the father of Fred B. Tuffree was still living his parents joined in a gift deed of the premises to him, placing the same in escrow, to be delivered upon his mother's death, and at the same time placing him in possession of the property and in the enjoyment of its income. In the year 1907 at his request his mother made and delivered to her said son a deed of gift of the same property. Soon thereafter he became involved in an entangling transaction with some other people, and, being in danger of losing the property, came to his mother for relief. She untangled him from the difficulties in which he was involved at that time. It appears that said Fred B. Tuffree had been for a long time afflicted with periodical attacks of lunacy or incomptency, during which he was incapable of caring for his property and was in danger of giving it away to strangers. In the year 1909, not long after an emergence from one of these spells, he came to his mother and offered to deed back the property to her, and, in fact, and upon his own initiative did so, by a deed of gift. Later he undertook to claim that the deed so made was intended to create a trust, by the terms of which his mother should hold the title to the property during her life for his benefit. This being denied by her, the present action was brought on his behalf by the plaintiff as his guardian to declare and enforce such a trust. Upon the trial of the cause both mother and son testified respecting the facts and the nature of the transaction out of which the alleged trust was claimed to have originated. The trial court found against the plaintiff's contention and in favor of the defendant, holding that no such trust existed.

[1, 2] The only question presented by this appeal relates to the sufficiency of the evidence to sustain the findings and judgment of the trial court in this regard. It is conceded on the part of the appellant that Mrs. Pittman did testify in some portions of her testimony that the deed which her son made to her was intended by him and was taken by her as a deed absolute to the property. The appellant, however, insists that this testimony is in conflict with the testimony given by other witnesses and with the circumstances shown in the case, and that it is also in conflict with other portions of the testimony given by the defendant herself. With relation to these latter alleged inconsistencies in the defendant's own evidence we do not agree with the appellant's view that they are in such conflict as to destroy, or even seriously impair, the sufficiency and effect of the defendant's direct testimony that no trust was created by her son's deed of gift to her. The statements and conduct of Mrs. Pittman upon which the appellant relies were, we think, entirely consistent with a maternal desire to hold and administer the property in question for her son's benefit and protection as his mother and not as his trustee, and hence are not inconsistent with that portion of her testimony in which she expressly denies the existence of the trust relation. The trial court evidently so construed her evidence taken in its entirety, and, resolving all other conflicts in the evidence in her favor, rendered its judgment accordingly. With its discretion so to do, this court will not interfere upon appeal.

Judgment affirmed.

We concur: SHAW, J.; SLOSS, J.

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178 Cal. 193

SOPER v. DOMINGUEZ. (L. A. 4226.)

(Supreme Court of California. April 17, 1918. Rehearing Denied May 17, 1918.)

1. APPEAL AND ERROR 🔑539—ORDER GRANTING NEW TRIAL—STIPULATIONS—IDENTIFICATION OF DOCUMENTS.

Of two stipulations, one reciting that the transcript on appeal from an order granting defendant's motion for new trial included certain documents specifically named, and closing with the statement, "without waiver of any objection to any defect in the procedure for taking appeals except as to contents of transcript," the second referring to the transcript and stipulating: "That the foregoing is a full, true, and correct transcript of the records on appeal from the order granting defendant's motion for new trial according to and in pursuance of the previous stipulation as in this transcript above set forth, and that the said transcript is in full compliance with said stipulation"—neither sufficiently identified what documents, records, or evidence were actually presented to and used by the trial judge on the hearing and determination of the motion for new trial.

2. APPEAL AND ERROR ⚷613(1)—ORDER AS TO NEW TRIAL—CERTIFICATE OR STIPULATION AS TO EVIDENCE.

On appeal from an order granting or denying a new trial, either a certificate of the trial judge must be inserted in the bill of exceptions as to the evidence presented and used on the hearing and determination of the motion, or the matter must be covered by stipulation.

Department 1. Appeal from Superior Court, Ventura County; Robert M. Clarke, Judge.

Action by Robert R. Soper against Francisco H. Dominguez. From an order granting defendant's motion for new trial, plaintiff appeals. Affirmed.

Clay G. Knox, of Ventura, for appellant. Orr & Gardner, of Ventura, for respondent.

RICHARDS, Judge pro tem. [1, 2] This is an appeal from an order granting defendant's motion for a new trial. The question involved in the action was that of a disputed boundary line between the lands of the parties thereto. The trial court gave judgment in plaintiff's favor, whereupon a motion for a new trial was made by the defendant upon the following grounds: (1) Irregularity in the proceedings of the adverse party by which the defendant was prevented from having a fair trial; (2) accident or surprise which ordinary prudence could not have guarded against; (3) newly discovered evidence material to the defendant's case which he could not with reasonable diligence have discovered and produced at the trial. The court granted said motion generally, and it is its alleged error in so doing of which the appellant complains. The record on appeal does not contain any bill of exceptions, nor does it embrace any certificate of the trial judge showing what records, affidavits, or other evidence were presented before him or considered by him on the hearing and determination of the motion for a new trial. The transcript does contain two stipulations between counsel for the respective parties purporting to have been entered into upon the same day. One of these simply recites that the transcript on appeal includes certain documents specifically named in the stipulation and closes with the following statement, evidently inserted by the attorney for the respondent:

> "Without waiver of any objection to any defect in the procedure for taking appeals except as to contents of transcript."

The second stipulation, referring to the transcript, stipulates:

> "That the foregoing is a full, true, and correct transcript of the records on appeal from the order of said superior court granting defendant's motion for a new trial according to and in pursuance of the stipulation of said counsel dated March 31, 1915, as in this transcript above set forth, and that the said transcript is in full compliance with said stipulation."

Neither of these two stipulations sufficiently identifies what documents, records, or evidence was actually presented to and used by the trial judge upon the hearing and determination of the motion for a new trial. The later stipulation amounts to nothing more than a stipulation that the documents and records set forth in detail in the former stipulation have been fully, truly, and correctly transcribed, and does not pretend to be a sufficient substitute for the necessary certificate of the trial judge required to be inserted in a bill of exceptions upon appeal from an order granting or denying a new trial. That such a showing is necessary to be made either by the certificate of the trial judge or by the stipulation of the parties has been uniformly held by this court. In the absence of such showing in this record we are unable to determine whether or not the trial court was in error in granting the motion for a new trial upon whatever evidence was before it, and for that reason the order is affirmed.

We concur: SHAW, J; SLOSS, J.

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178 Cal. 131

GARRETT v. GARRETT et al. (L. A. 4179.)

(Supreme Court of California. April 15, 1918.)

1. HUSBAND AND WIFE ⚷298¾—SUITS FOR MAINTENANCE—REMOVAL OF CLOUDS.

In a suit by a wife against her husband for support, she cannot obtain, as ancillary relief, the removal of a cloud on title caused by a deed given by her husband, where he has ample property remaining to maintain plaintiff.

2. VENUE ⚷41—CHANGE—CODEFENDANTS.

In a suit by a wife against her husband and others for support and to remove a cloud, it was error to refuse a change of venue to the husband, a resident of another county, where the complaint stated no cause of action against his codefendants who were residents of the county wherein suit was brought.

Department 2. Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Florence Garrett against David Thomas Garrett and others. From an order denying defendant Garrett's motion for a change of venue, he appeals. Reversed.

Meredith, Landis & Chester, of Sacramento, and Eugene A. Tucker, of Los Angeles, for appellant. Harry M. Irwin, of Los Angeles, for respondents.

WILBUR, J. This is an appeal from an order denying defendant Garrett's motion for a change of venue, based upon his residence in Sacramento county. It was denied because two other defendants resided in Los Angeles county. The suit is brought by plaintiff to secure support and maintenance from her husband, defendant Garrett. The complaint alleges that the defendant Garrett recorded a deed of certain real property to his codefendants, but that such deed was never delivered and that title did not pass. Plaintiff seeks to remove said cloud upon the record as ancillary to her action for support. Garrett's codefendants answer and disclaim.

[1, 2] The complaint shows that defendant Garrett has ample property to maintain the plaintiff other than that covered by the deed to his codefendants. Therefore plaintiff is not injured by the cloud upon the record title, and cannot sue to remove the same. As no cause of action is stated against the codefendants of Garrett, his motion for a change of venue should have been granted. Remington Sewing Machine Co. v. Cole, 62 Cal. 311; Sayward v. Houghton, 82 Cal. 628, 23 Pac. 120; McKenzie v. Barling, 101 Cal. 459, 461, 36 Pac. 8.

Order reversed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

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178 Cal. 132

BOAL et al. v. GASSEN. (L. A. 4168.)

(Supreme Court of California. April 15, 1918.)

1. Mortgages 🔑32(2)—Deed as Mortgage—Intent.

An instrument, though in the form of an absolute conveyance, will be treated as a mortgage, if in fact it was given as security for performance of an obligation; the question being one of intent.

2. Mortgages 🔑38(1)—Payment—Conveyance to Mortgagor.

A deed by a mortgagor covering the property mortgaged under a trust mortgage, given by the mortgagor to the creditor on the threat of foreclosure if he did not, *held*, under the evidence, not a mortgage, but a transfer in payment and extinguishment of the mortgage debt.

3. Mortgages 🔑32(5)—Deed as Mortgage—Evidence.

The continued existence of a debt is a circumstance tending to show that a conveyance is a mortgage.

4. Cancellation of Instruments 🔑59—Setting Aside—Restoration of Status Quo.

Where a deed by a mortgagor to the creditor was set aside as having been obtained without adequate consideration and under undue influence, it was not error to restore the creditor to his former condition, giving him the benefit of the security of the mortgage, which was given up in consideration of the conveyance.

5. Cancellation of Instruments 🔑57—Equitable Relief—Sale of Property.

Where an absolute deed given by a mortgagor to the creditor was set aside, and the mortgage restored, it was not error to direct a sale of the property by a commissioner appointed by the court, instead of by the trustee named in the original mortgage.

Department 1. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Alma L. Boal and husband and another against A. G. Gassen. Judgment for defendant, and plaintiffs Alma L. Boal and husband appeal. Affirmed.

Harrison G. Sloane, Morganstern, McGee, Henning & Hendee, and Wood & Wood, all of San Diego, for appellants. Hunsaker & Britt, W. E. Mitchell, and John A. Powell, all of Los Angeles, for respondent.

SLOSS, J. The cause having been tried, the court made its findings of fact and conclusions of law, and entered a judgment granting certain relief to the plaintiff Alma L. Boal. On the defendant's motion, made under section 663, Code of Civil Procedure, the court altered and amended its conclusions of law, and entered a different judgment. Alma L. and J. Mills Boal appeal from the second judgment.

The findings are, in effect, as follows: Alma L. Boal was, on December 1, 1911, the owner of a parcel of land in San Diego county. On that day she and her husband, J. Mills Boal, made and delivered their promissory note for $75,000, payable September 16, 1913, to the defendant, A. G. Gassen, and secured the same by a deed of trust conveying the above-mentioned land to Title Insurance & Trust Company, as trustee. The note contained a provision for accelerating the due date of the principal on nonpayment of interest. In December, 1912, plaintiffs were in default in payment of interest, and were unable to raise funds to pay such interest or the principal of their note. The defendant was aware of their financial condition. The plaintiffs had theretofore conveyed the land to one Bradbeer for convenience in negotiating a loan. The land was, on December 19, 1912, worth $250,000, and there was then due from the Boals to Gassen $76,293.98. Prior to the last-named date the said plaintiffs had endeavored, but without success, to obtain from Gassen an extension on their debt. About December 14th Gassen notified them that, upon their failure to pay an installment of interest to fall due December 16th, he would elect to declare the principal due, unless they would convey the property to him upon the consideration that he would cancel and satisfy the note and execute to Bradbeer a certain option, which will be described hereinafter, and that, unless said plaintiffs should pay the note or make such conveyance, he would direct the trustee to sell under the deed of trust. On or about December 18th the Boals and Bradbeer "assumed to enter into" an agreement whereby plaintiffs were to convey the property to Gassen in payment of the note, and Gassen agreed to execute to Bradbeer an option for the sale, on or before January 1, 1914, of said land to Bradbeer for $136,240, which was $45,000 in excess of the debt, together with incidental expenses. The plaintiffs were unable to secure funds with which to pay the debt, and they thereupon agreed to accept the terms proposed by Gassen, and to execute the necessary instruments, but such agreement and the execution and delivery of the instruments thereupon executed "was not the free and willing act of plaintiffs or either of them, but was induced by all of the circumstances surrounding the condition of the parties." The deed to the defendant was thereupon executed and delivered. The defendant canceled the note and executed a release to plaintiffs, caused the trustee to make a reconveyance of the property to Bradbeer, and executed in favor of Bradbeer an option as above outlined. The plaintiffs at the same time signed a writing in which they declared and acknowledged, in the most direct and explicit words, that their obligation and indebtedness to Gassen was extinguished; that they owed him nothing; that the conveyance to him was absolute; and that the land was held by him free of any claim or interest on the part of any of said plaintiffs. Except as stated, Gassen gave to plaintiffs no consideration for the conveyance so made to him. On March 11, 1914 (after the commencement of this action), the plaintiffs made to Gassen a written offer to pay him $94,000, being the sum due on December 19, 1912, with interest and expenses, and defendant refused to accept the same, claiming to be the owner of the land. Plaintiffs have not paid anything on account of said indebtedness. It was found that "there is now due and owing by plaintiffs J. Mills Boal and Alma L. Boal to defendant, Gassen," the principal of the promissory note, with interest and sums paid for taxes, aggregating $97,812.82. The plaintiff did not at any time *prior* to the commence of this action tender to defendant any sum of money, or attempt in any manner to rescind the transaction of December, 1912.

The conclusions of law first drawn from these facts were that the deed executed by plaintiffs to Gassen on December 19, 1912, is a mortgage; that plaintiff Alma L. Boal is the owner of the land; that she and J. Mills Boal owe the defendant $97,812.82; and that said defendant has no interest in the land except a mortgage lien as security for the payment of said sum. Judgment was entered accordingly.

The conclusions, as amended following defendant's motion, were that the deed and other instruments executed by plaintiffs in December, 1912, were obtained without adequate consideration and under undue influence, and were voidable at plaintiffs' election, upon the condition that defendant should be restored to his rights under the promissory note originally held by him, and the deed of trust given to secure the same; that the sums due on the note are secured by the deed of trust, and defendant is entitled to have the property sold; and that a commissioner should be appointed to make such sale. These conclusions are, in substance, embodied in the second judgment, the one which is attached to this appeal.

[1, 2] The appellants' contention is that the court was right in the first instance in holding that the conveyance of December, 1912, was a mortgage. But this claim is entirely without support in the findings of fact. It is familiar law that an instrument, though in the form of an absolute conveyance, constitutes and will be treated as a mortgage, if in fact it was given as security for the performance of an obligation. Lee v. Evans, 8 Cal. 430; Hodgkins v. Wright, 127 Cal. 690, 60 Pac. 431. The question is one of the intention of the parties. But the findings, which we have summarized, contain nothing which in any way indicates that the deed of December, 1912, was, so far as the understanding, agreement, or intention of the parties is concerned, given to the defendant as security for a debt. The situation plainly set forth is that Gassen insisted upon the transfer of the property in payment and extinguishment of his debt, and that the plaintiffs yielded to his demand. Nobody ever thought that Gassen was getting a new or continuing security.

[3] The appellants rely upon the findings that Mrs. Boal is the owner of the land, and that she and her husband are indebted to Gassen. The continued existence of a debt is, no doubt, a circumstance tending to show that a conveyance is a mortgage. Montgomery v. Spect, 55 Cal. 353. But when the findings in this case are read as a whole, it is perfectly obvious that the declarations of ownership and indebtedness were in reality conclusions based upon the more specific facts which led the court to the belief that the transaction of December, 1912, was not, in equity, binding upon the appellants. In other words, the court found that the debt remained because the parties, although intending and agreeing that it should be extinguished, had dealt under conditions which entitled the parties of the one part to avoid their agreement. The theory of the trial court evidently was that the transaction had been induced by undue influence, as defined in subdivision 3 of section 1575 of the Civil Code.

[4, 5] The judgment finally entered gives to the appellants at least as much as they have a right to ask. If the transaction of December, 1912, is to fall, the defendant must be entitled to the benefit of the security which he gave up in that transaction. His note is overdue and unpaid, and the judgment gives him no more than he could claim under the original and unquestioned contract, when it decrees a sale under the deed of trust. We are unable to see that error was committed or that the interests of the appellants were prejudiced by the action of the court in directing a sale by a commis-

sioner appointed by it, instead of by the trustee named in the deed of trust. See More v. Calkins, 85 Cal. 177, 190, 24 Pac. 729.

Whether, on the facts found, the plaintiffs were entitled to any relief at all, is open to serious doubt. But, since the defendant makes no complaint of the judgment, this question does not call for consideration.

The judgment is affirmed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

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178 Cal. 178

KURTZ et ux. v. CUTLER et al. (L. A. 4233.)

(Supreme Court of California. April 17, 1918.)

1. Appeal and Error 🔑753(2) — Appeal — Grounds for Dismissal.

Lack of specifications of error is not a ground for dismissal.

2. Exceptions, Bill of 🔑26—Ambiguity—Settlement in Favor of Party Alleging Error.

An ambiguity created by filing marks on purported bill of exceptions, showing that it was indorsed as filed on two different dates, will be settled against the party seeking to establish error.

3. Evidence 🔑44 — Judicial Notice — Retirement from Office.

The Supreme Court is bound to take judicial cognizance of the fact that the judge who denied motion for new trial retired from office on a certain date.

4. Judges 🔑31 — Powers After Expiration of Term—Diminution of Record.

The judge who denied motion for new trial could not, after termination of his term, make an order in diminution of the record, even if counsel for the parties so stipulated, since jurisdiction cannot be conferred by consent.

Department 2. Appeal from Superior Court, Santa Barbara County; E. P. Unangst, Judge.

Action by Eugene Kurtz and wife against William C. Cutler and another. From an order denying his motion for new trial, R. G. Putnam appeals. Affirmed.

Ben S. Hunter, of Los Angeles, for appellant. B. F. Thomas, of Santa Barbara, and Haas & Dunnigan, of Los Angeles, for respondents.

MELVIN, J. Defendant Putnam appeals from an order of the superior court denying his motion for a new trial.

[1] This case has been before us twice—once on motion to dismiss, and again on motion to affirm on the record. The first motion was denied because the lack of specifications of error is not a ground for dismissal, and the other was denied without prejudice because the court declined to make the inspection of the record which would be involved until the case should be regularly before us on appeal. It has now reached that position, and we will examine the transcript in the light of the contention of respondents that there is no record upon which the court may consider any alleged errors.

The action was one relating to the rescission of a contract for the exchange of real property and the recovery of the land of plaintiffs alleged to have been secured by fraud. Chronologically the following facts appear from the record before us: The original complaint was filed May 22, 1908; amended complaint December 15, 1908; and the case came on regularly for trial June 13, 1911. The decree was filed June 17, 1912, and the judgment roll was filed on the following day. There was no attempted appeal from the judgment. The court denied the motion for a new trial August 19, 1914, and notice of appeal from said order was filed October 16, 1914, having been served upon the attorneys for respondents on some earlier day of the same month. Following the clerk's certificate to the judgment roll in the printed transcript before us are 50 pages of matter under the title "Bill of Exceptions," purporting to be an assignment of errors and specifications of the particulars of insufficiency of evidence. This bill does not purport to have been signed by an attorney, settled by any judge, nor formally filed in the action. It is followed by that which apparently is a reproduction of a document fully entitled in the action and bearing the designation "Statement on Motion for New Trial." This seems to be a statement of the testimony received at the trial and the proceedings thereon. It covers more than 400 pages of the printed transcript. Counsel for respondents stipulated on April 10, 1914, that it was a true and correct "bill of exceptions" which might be settled by the court. It purports to have been settled "within the time and as required by law" and bears the name of Hon. E. P. Unangst, judge of the superior court, under date of April 11, 1914. There appear to have been two filing marks on this document, for the printed copy shows that it was indorsed as filed April 23, 1914, and March 4, 1915.

[2, 3] If we regard the printed transcript alone these indorsements create an ambiguity which we must settle against the party seeking to establish error. It is impossible to tell when the documents were filed or when either of them received the clerk's indorsement. While the term "bill of exceptions" is used in the order of settlement, it is not clear whether that order refers to the document so entitled or to the one designated as "Statement on Motion for New Trial." The location of the copy of this order would indicate, however, that it was meant to apply only to the latter paper, and that, therefore, there is no authenticated bill or statement containing any specifications of error. But in any view of the matter we are bound to take official cognizance of the fact that Judge Unangst retired from office in January, 1915, and that, therefore, if the last filing mark was the correct one, there was no record on file when he denied the motion for a new

trial. Upon such a conclusion we would have no specifications of error before us upon which we could act, and, therefore, could do nothing but affirm the order for want of a proper record.

If we inspect the affidavits and stipulation of facts filed upon the motion to affirm, the real history of the record becomes clear. Both the proposed "Bill of Exceptions" and the proposed "Statement on Motion for New Trial" were served by copies, under one cover, upon counsel for respondents. Subsequently the proposed "Bill" was left by the clerk upon the desk of one of the judges of Santa Barbara county, and the "Statement" was sent to Judge Unangst at San Luis Obispo after counsel had agreed to certain amendments and the said amendments had been inserted in an engrossed bill and a certificate of the correctness, signed by counsel, had been attached thereto. This document, as engrossed, submitted to the judge and approved by him did not contain the matter included in the original document called a "Bill of Exceptions." In other words, the judge never had before him the specifications of error and of insufficiency of evidence, because the missing paper was not discovered by the clerk until long after the judge's term of office had expired. He denied the motion for new trial on August 19, 1914. The record then before him contained nothing amounting either in form or substance to specifications of errors of law or insufficiency of evidence. After discovery of the missing paper and after the termination of Judge Unangst's term of office, in March, 1915, he made an order amending the statement on motion for new trial by adding thereto the specifications of error and insufficiency in form as contained in the proposed "Bill of Exceptions" originally served on counsel for plaintiffs. This he did after receipt of a letter from the attorney for appellants containing the statement that the paper had been omitted inadvertently from the engrossed bill. This letter was indorsed by L. A. Lewis with the names of attorneys for respondents, but it appears by affidavit that he acted under a misapprehension regarding the contents of the letter, and that he had no authority to represent respondents or their counsel. Subsequently the new filing mark was made.

[4] Whether we act upon the record contained in the transcript or regard the documents filed on motion to affirm as still before the court and available in the preparation of an opinion, the result is the same. The order must be sustained. The former judge could make no order in diminution of the record even if counsel for the parties stipulated that he might do so. Jurisdiction may not be conferred by stipulation. He was utterly without power in the premises.

In affirming the order for the reasons above set forth, we act the more readily because we have carefully read the briefs, and upon examination of the case find the contentions of appellant without merit.

The order is affirmed.

We concur: VICTOR E. SHAW, Judge pro tem.; WILBUR, J.

178 Cal. 160

COOPER et al. v. HUNTINGTON et al.
HELLMAN COMMERCIAL TRUST & SAVINGS BANK v. CONDON et al.

(L. A. 4181, 4182.)

(Supreme Court of California. April 16, 1918. Rehearing Denied May 16, 1918.)

1. VENDOR AND PURCHASER ⚷109—RESCISSION—FAILURE OF CONSIDERATION—PARTIAL CONSUMMATION.

Where a flood had washed away a substantial portion of land before partial consummation of contract of purchase by payment of any of the purchase price, the vendees could withdraw from a supplemental contract settling a suit for rescission of the original contract of sale for false representations, though they had taken possession.

2. VENDOR AND PURCHASER ⚷119—RESCISSION—ESTOPPEL.

A vendor who, by holding out promises, induced vendees to postpone efforts to rescind, cannot insist on laches as a bar to rescission.

3. VENDOR AND PURCHASER ⚷36(2)—VALIDITY OF CONTRACT—REPRESENTATIONS.

Representations amounting to a promise that a water company by means of its improved facilities could and would furnish the vendees the agreed quantity of water, would bring the case within the rule that assurance by a vendor that land to be sold is well watered during the irrigation season, is not a mere opinion.

4. PLEADING ⚷279(4)—SUPPLEMENTAL COMPLAINT—NEW MATTER.

Where, after commencement of action to rescind contract to purchase land for false representations as to water supply, about four acres of the ten purchased were washed away by flood, plaintiff was properly permitted to file a supplemental complaint averring such fact; it being the allegation of new matter accruing after commencement of action entitling plaintiff to additional relief.

Department 2. Appeal from Superior Court, Los Angeles County; G. W. Nicol, Judge.

Action by Hattie O. Cooper and others against H. H. Huntington and others and by the Hellman Commercial Trust & Savings Bank against T. J. Condon and others. From the judgment rendered in the first action, defendants appeal, and from the judgment rendered in the second action, plaintiff appeals. Judgments affirmed.

Sheldon Borden and George H. Moore, both of Los Angeles, for appellants. Kemper Campbell, Frank P. Doherty, W. J. Clark, Edward E. Leighton, and Leighton & Peairs, all of Los Angeles, for respondents.

MELVIN, J. These two cases involve substantially the same questions of law and fact, and will, therefore, be treated in one opinion. The appeals are from the judgments.

The Hellman Commercial Trust & Savings Bank, formerly known as Merchants' Bank & Trust Company, was the nominal owner of the properties involved in both actions, which were certain lots of "tract 1292" in the San Fernando valley in Los Angeles county. This corporation, which we will designate as "the bank," was in reality a trustee for the equitable owners, Huntington and Brookins.

The Condon Case. Under date of March 25, 1912, the bank entered into a contract with T. J. Condon for the sale to him of lots 16 and 17 in the tract for $3,500, in four installments of $875 each, with certain interest on deferred payments. The sum of $75 was paid by the vendee at the time of the execution of the agreement. By the terms of the contract the bank promised to grant to Condon without cost to him 1⅓ miner's inches of continuous flow of water, and "a 10-240 interest in the reservoir and complete distributing system." The water was described as a part of that conveyed to the bank by a designated deed of certain date from the Tejunga Company. The deed in question conveyed to Condon's vendor 33 inches continuous flow, subordinate, however, to rights of previous purchasers to 333 inches.

On June 18, 1913, the bank filed its complaint to quiet title as against Condon, and one month later the vendee served notice of rescission of the contract, and verified and filed his answer and a cross-complaint. In the latter he prayed rescission of the agreement upon the ground that at and prior to the time of the execution of the contract it was falsely represented that the vendee should have "a plentiful supply of water for domestic purposes, irrigation, and fire protection, viz. 1⅓ miner's inches continuous flow." In the answer the bank set up the deed from the Tejunga Company, and pleaded laches of the vendee in failing to seek rescission for more than a year after knowledge of the facts of which he complained. The trial court found that false representations had been made to the vendee, on which he relied, and that he had not been guilty of laches.

Cooper Case. The bank agreed to sell to Hattie O. Cooper and her son Jos. L. Cooper lots 31 and 32 for $3,250 in certain installments, the initial payment, which was made, being $1,000. The agreement was dated May 28, 1912. The clauses with reference to water were the same as those in the Condon contract. On May 27, 1913, the vendees served notice of rescission, tendering a quitclaim deed to the property, demanding, however, return of the $1,000 and $800 which they alleged had been expended by them in improvements on the land. On May 28th they filed their complaint in a suit for rescission similar in all essential particulars to the cross-complaint of Condon. The judgment was in their favor, and the findings were like those in the other case. The court also found that the improvements made by the Coopers were of the value of $450, and that there was a partial failure of consideration in two particulars: (1) Because of the lack of a water supply; and (2) by reason of the damage done by a flood in February, 1914. In explanation of the latter finding we should call attention to the fact that, as appears from the record, negotiations for settlement were had between the vendor and vendees after the Coopers filed their complaint. This resulted in an arrangement for a settlement on the basis of a reduction of $300 in the purchase price in favor of the vendees. A letter embodying these terms was written by Mrs. Cooper and her attorney and received the sanction of the real owners of the land. A check for the amount of the agreed initial installment under this new alleged contract of sale was sent, but payment thereon was stopped for the reason, as it appears, that a flood had washed away the soil from a substantial portion of the land described in the contract. The alleged agreement embodied in the letter and its indorsement, which latter was made in February, 1914, was set up by supplemental answer, to meet the allegations of a supplemental complaint filed by the Coopers.

[1] We are of the opinion that before partial consummation of this contract by a payment of any of the purchase price under it, the Coopers were in a position to withdraw from it. Without reviewing the testimony in detail, it is sufficient to say that before purchase of the properties by the Coopers and Condon, the vendor and its representatives assured them that there was and would continue to be a constant supply of water to the amount indicated by the contracts of sale. They were told that there was an abundance of water, and that in Tejunga Canyon there was a dam and reservoir, with ample supply of water to irrigate all San Fernando valley. The evidence amply justified the finding of the court "that at times there was not sufficient water for domestic use, and there has never been sufficient water for irrigation at all times of the year when irrigation was necessary for the raising of crops."

[2] But appellants insist that even conceding these representations to have been made, the proof of laches in each case is so clear that the respondents must be held to have accepted their contracts in spite of the scarcity of water, and that they were not in position to rescind because each was in default in payments due under the respective agreements when the notices of rescission were given. Undoubtedly, the vendees realized that they were not getting the water supply promised by the vendor and its agents, and if nothing had been done further by Condon and the Coopers there would have been reason for a conclusion that they were bar

red by laches from seeking relief. But there was ample evidence to the effect, and the trial court found, that the purchasers were given assurances from time to time, and that these promises induced them to remain upon the properties, and to endeavor to cultivate the land. For example, it was in testimony that, at a meeting on the tract in July, 1912, Mr. Huntington, one of the owners, said that given a little more time they would supply water to the vendees. Dr. Hanson, the president of the water company, said all they wanted was a little time and plenty of water would be supplied. These promises were given from time to time, not only before this litigation, but the alleged compromise with the Coopers was induced by representations made by Mr. Huntington and others, that improvements in the water system then being made would insure a bountiful supply of water. Under these circumstances there is much force in the argument of respondents that the conduct of the vendor estopped that corporation and all who are interested with it from setting up the defense of laches on the part of the vendees. The bank, after holding out such promises, and thereby inducing the vendees to postpone any efforts to rescind the agreements, may not subject the said vendees to injury by disappointing the expectations on which they acted. Carpy v. Dowdell, 115 Cal. 677, 686, 47 Pac. 695.

[3] Appellants cite such cases as Owen v. Pomona Land & Water Co., 131 Cal. 530, 63 Pac. 850, 64 Pac. 253, in which it was held that where water shares were sold with certain land, the prediction by agents of the vendor that wells furnishing the water would always yield as abundantly as they were then providing was but an expression of opinion in the absence of any guaranty that the supply of water would be permanent. There is nothing in that authority, or in the other cases cited, which is in conflict with the conclusion reached by the court in this case. In the contract now before us the grantor promised a definite quantity of water, and the representations made to the vendees were not mere matters of opinion, but amounted to promises that the water company by means of its improved facilities could and would furnish the agreed quantity of water. The facts in this case bring it within the rule announced in such authorities as Hill v. Wilson, 88 Cal. 92, 95, 25 Pac. 1105, to the effect that assurance by a vendor that the land to be sold is well watered during the irrigation season is not the mere utterance of an opinion. See, also, Tracy v. Smith, 165 Pac. 535.

[4] Complaint is made by appellant that there was grave error committed in permitting the Coopers to file a supplemental complaint. By this pleading it was averred that about the 20th or 21st of February, 1914, the consideration for the contract failed in a material respect because the soil of about four acres of the ten which the Coopers had contracted to purchase was washed away and destroyed by flood waters. This is surely the allegation of new matter occurring after the commencement of the original action, entitling the plaintiffs to additional relief, and we think a supplemental complaint was proper under the circumstances. Melvin v. E. B. & A. L. Stone Co., 7 Cal. App. 324, 326, 94 Pac. 389. By its answer appellant emphasized the fact that the relations of the litigants had altered after the commencement of the action by pleading an alleged new contract made by way of compromise.

But it is argued that the loss caused by the washing away of the soil must fall on the Coopers (so appellant contends) because they had received the consideration by being permitted to occupy the premises prior to the flood. In this behalf, appellant's counsel cite language from Conlin v. Osborn, 161 Cal. 659, 120 Pac. 755, in which, in analyzing the opinion in Smith v. Phœnix Insurance Co., 91 Cal. 330, 27 Pac. 738, 13 L. R. A. 475, 25 Am. St. Rep. 191, we said that the court had there adopted the rule that:

> "The destruction by fire of buildings on property in the vendor's possession prior to the date fixed for the payment of the purchase price and the conveyance of the title defeats the vendor's right to compel performance on the part of the intending purchaser under the contract."

But that did not amount to a decision that under no contract may there be a failure of consideration, of which a vendee in possession may avail himself. Indeed, in the very case of Smith v. Phœnix Insurance Co., supra, cited by appellant, the court referred with approval to Thompson v. Gould, 20 Pick. (Mass.) 134, wherein a vendee in possession who had paid the whole purchase price, recovered the money because of destruction by fire of a material part of the consideration before any conveyance had been tendered.

No other matters discussed in the briefs require analysis.

Judgments are affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

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178 Cal. 158

ADAMS v. ANTHONY. (L. A. 4204.)

(Supreme Court of California. April 16, 1918.)

1. SALES 🔑479(2)—RIGHT OF POSSESSION OF PROPERTY—CONDITIONAL SALES—LEASES.

An owner of an automobile who has leased it for a certain sum, payable monthly in installments, with an option of purchase, the contract providing that in case of default in any payment the lessor may retake possession is on such default, entitled to take and retain possession of the automobile; the right of the lessor thereto being entirely dependent on the contract.

2. SALES 🔑479(11) — CONSTRUCTION — CONCURRENT RIGHTS.

Where a contract for the lease of an automobile provided that upon default the lessor was

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

entitled to retake possession, and that such retaking of possession should not relieve the lessee from the payment of any sum due, the prosecution by the lessor of an action on the lessee's overdue notes given under the contract did not affect the lessor's right of possession, the right to retake possession and to sue for deferred payments being concurrent and not alternative.

Department 1. Appeal from Superior Court, Los Angeles County; Curtis C. Legerton, Judge.

Action by L. S. Adams against E. C. Anthony, doing business under the style and firm name of California Motor Company. Judgment for plaintiff, and defendant appeals. Reversed.

E. W. Freeman, A. D. Laughlin and Paul N. Nourse, all of Los Angeles, for appellant. Jones & Evans and Monta Moore, all of Los Angeles, for respondent.

SLOSS, J. The defendant appeals from a judgment declaring that plaintiff is entitled to the possession of a certain automobile truck.

On June 15, 1914, the parties entered into a written agreement concerning the truck, which was then the property of the defendant. By the terms of the writing, Anthony leased the truck to Adams for the term of 12 months, for a rental of $3,785, of which $1,200 was paid at the time, and the balance was made payable in monthly installments, for which Adams gave his promissory notes. It was stipulated that in default in payment of any of the rental, the lessor might at his option terminate the lease by written notice to the lessee, whereupon the lessee should lose all right to possession of the automobile and the right to purchase it, and the lessor should be entitled to possession; "but it is agreed," so the writing proceeds, "that such termination of this lease shall not release the lessee from the payment of any sums due lessor up to and including the day of such termination." Time was made of the essence, and it was provided that any default by the lessee should release the lessor from all obligations to further lease the automobile, and the lessee should forfeit all rights thereto. In the event of full performance by the lessee at the times specified, he was given the right, "within three days thereafter," to purchase the automobile for $1. There were other provisions, not necessary to be set forth here. Pursuant to this contract, the plaintiff was given possession of the machine. He defaulted in the payment of the first two installments, of $150 each, due on July 15, and August 15, 1914. The defendant gave him notice of termination, and took possession of the automobile. Thereafter he commenced suit on the two notes given for these installments and recovered judgment.

[1, 2] On these facts, which are undisputed, judgment in this case should have gone in favor of the defendant. The agreement shows in every line the effort of the draftsman to give to the transaction the form and character of a lease. We need not stop to consider how far this effort was successful. Whether the writing be, in legal contemplation, a contract of lease or one of conditional sale, the plaintiff must rest his claim of possession upon its terms alone. By the express provisions of the agreement he was entitled to possession only so long as he complied with his obligation to pay the installments upon the dates when they fell due. Failing in this, the defendant was entitled to retake the property, of which he was and remained the owner. The prosecution of an action on the overdue notes did not affect the right of possession, since, as we have seen, the parties expressly stipulated that the termination of the lease, or agreement, should not relieve the plaintiff from the obligation to pay any sums then due. In suing on the notes, while still retaining possession of the automobile, the defendant was merely exercising rights, which, under the agreement, were concurrent and not alternative. The rules governing the decision are declared in Muncy v. Brain, 158 Cal. 300, 110 Pac. 945, which, in its essential aspects, is not distinguishable from the case at bar.

The judgment is reversed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

178 Cal. 150

HOOD v. BEKINS VAN & STORAGE CO.

(L. A. 4192.)

(Supreme Court of California. April 15, 1918.)

1. EVIDENCE 🔑355(5) — DESTRUCTION OF GOODS—VALUE.

In an action to recover the value of goods destroyed in storage, evidence that defendant had inserted an advertisement in a telephone directory stating that its warehouses were fireproof was properly admitted as corroborating plaintiff's evidence of the existence of a contract whereunder defendants were to have stored the goods in a fireproof depository.

2. APPEAL AND ERROR 🔑1010(1)—REVIEW—QUESTIONS OF FACT.

Where in an action for damages to property the only evidence of value was that of plaintiff, the court on appeal will not disturb finding of court based on such evidence.

3. EVIDENCE 🔑474(19)—VALUE.

In an action to recover the value of goods destroyed while in storage, the owner was competent to testify as to the value of the goods.

Department 2. Appeal from Superior Court, Los Angeles County; S. E. Crow, Judge.

Action by Edith C. Hood against the Bekins Van & Storage Company. From a judgment for plaintiff and a denial of a new trial, defendant appeals. Affirmed.

R. T. Lightfoot, of Los Angeles, for appellant. Shepard & Alm, of Los Angeles, Shepard, Alm & Swenson, and Francis H. Boland, of San Francisco, for respondent.

VICTOR E. SHAW, Judge pro tem. Plaintiff sued to recover the value of certain household goods which under an alleged express contract made with defendant were to have been by it stored in a fireproof depository for a compensation agreed upon. The goods were stored in a nonfireproof building, wherein a fire occurred which destroyed the same. The court found the contract was made as alleged by plaintiff, and that the value of the goods deposited was the sum of $1,500, for which judgment was rendered in favor of plaintiff, and from which, and an order denying its motion for a new trial, defendant appeals.

[1] It appears that defendant had inserted in a telephone directory an advertisement that it was engaged, among other things, in the business of storing household goods and furniture for compensation, and that its warehouses and storage rooms were fireproof, the effect of which was well calculated to lead customers and persons dealing with it to believe that it was not only prepared to, but did, store the goods consigned to it by customers in fireproof depositories. It having been made to appear that plaintiff's agent, prior to making the alleged agreement, had read this advertisement, the same was, over defendant's objection, admitted in evidence. There was no error in this ruling. While the action was based upon an alleged express contract, in support of which direct evidence was offered, nevertheless, as stated in Lynch v. Bekins Van & Storage Co., 31 Cal. App. 68, 159 Pac. 822, wherein a like question was involved:

> "The admission of evidence showing representations by advertisements and printed matter, to the effect that the defendant had at its disposal fireproof warehouses and offered to customers to furnish storage of that kind, was without error, as it tended to corroborate the evidence given by plaintiffs as to the express contract made and found by the court."

[2, 3] The only evidence offered touching the question of the value of the goods destroyed was that of plaintiff herself. Appellant insists not only that she failed to qualify as a witness competent to testify upon the subject, but that her testimony was so uncertain and contradictory that it was not entitled to any weight whatsoever in considering the question. The value of her evidence and weight thereof was a question for the determination of the trial judge. Her testimony, however uncertain and contradictory, was nevertheless the only evidence offered bearing upon the subject, and since it satisfied the trial judge that the value of the goods alleged in the complaint to be worth upwards of $3,000 was in fact $1,500, it is not the province of this court, upon a review thereof, to determine otherwise. As to the other objection, namely, that she was not qualified to testify, Mr. Wigmore, in his work on Evidence (section 716), in discussing the subject, says:

> "The general test, that any one familiar with the values in question may testify, is liberally applied, and with few attempts to law down detailed minor tests. The owner of an article, whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth; the weight of his testimony (which often would be trifling) may be left to the jury."

And in Kirstein v. Bekins Van & Storage Co., 27 Cal. App. 586, 150 Pac. 999, where the court was considering the point here made in a similar case, it was said:

> "It was for the trial court to determine whether the witnesses were qualified to testify as to the value of the articles, and there is nothing disclosed by the record which would justify this court in setting aside its ruling in permitting the testimony, objections to which went to the weight rather than to the competency of the evidence."

To like effect is Willard v. Valley Gas & Fuel Co., 171 Cal. 9, 151 Pac. 286.

In our opinion, the three cases above cited are decisive of the questions presented upon this appeal.

The judgment and order are affirmed.

We concur: WILBUR, J.; MELVIN, J.

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178 Cal. 137

ASEBEZ v. BLISS et al. (L. A. 4162.)

(Supreme Court of California. April 15, 1918.)

1. TRIAL 🔑345—VERDICT—WAIVER OF DEFECTS.

In an action wherein defendant filed cross-complaint against plaintiff and another, defendant waived defects in a verdict which did not mention the cross-defendant and was in improper form as to an item, where defects were not called to attention of the court before the jury was discharged as authorized by Code Civ. Proc. § 619.

2. APPEAL AND ERROR 🔑1070(1)—HARMLESS ERROR.

Where a judgment in favor of plaintiff was necessarily a finding in favor of a cross-defendant and the plaintiff on a cross-complaint, the defendant cannot complain that the verdict did not mention his cross-action.

3. APPEAL AND ERROR 🔑1033(8)—HARMLESS ERROR—AMENDING VERDICT.

A party is not aggrieved by an amendment of a verdict which decreases his liability and reduces the amount of the judgment against him.

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by E. Asebez against R. L. Bliss. Defendant answered and brought cross-action against plaintiff and Alvin Hitchcock. Judgment for plaintiff, and defendant appeals. Affirmed.

Guy E. Maurice, of Los Angeles, for appellant. C. P. Kaetzel, of San Luis Obispo, and Hart & Cunningham, of Los Angeles, for respondents.

RICHARDS, Judge pro tem. In this action the plaintiff brought suit to recover the purchase price of 78 cattle alleged to have been sold and delivered to the defendant R.

L. Bliss and for which he promised and agreed to pay plaintiff $3,527.23, of which only the sum of $500 has been paid. The defendant Bliss appeared and filed what he denominated an "amended cross-complaint and second and separate answer," in which he designated one Alvin Hitchcock as a cross-defendant, and then proceeded to set up in several counts what he claimed to be the real transaction between himself and plaintiff and Hitchcock. In one of these counts he alleged that plaintiff and Hitchcock were partners. In another he averred that plaintiff was merely the agent of Hitchcock, who was the principal in the transaction set forth in his said pleading. In all of these counts the defendant averred that the agreement between the parties was different from that sued on by the plaintiff, and that from its alleged breach the defendant was entitled to recover a large amount of damages from both the plaintiff and Hitchcock. Upon the filing of this pleading the cause was set for trial and proceeded to trial without any order of court or other action of the parties bringing in said Hitchcock as a party thereto. The record does not disclose that he was ever served with the cross-complaint, nor that he ever made any answer thereto, although the judgment recites his appearance by counsel at the trial. The cause was tried before a jury. No special verdict upon any of the issues was requested, and the jury, having been instructed by the court, retired and presently returned a general verdict in the following words:

> "We, the jury in the above-entitled action, find for the plaintiff, and assess the damages against defendant R. L. Bliss in the sum of $3,027.23, plus the 3 per cent. deducted as shrinkage from said last shipment together with interest."

To the form of the verdict as thus rendered the defendant Bliss made no objection at the time of its rendition, nor did he make any request of the court that the jury be directed to make any finding upon the issues tendered in his pleading, nor did he request that the cross-defendant Hitchcock be named in said verdict, nor that as to him the jury should return a verdict.

[1] If the verdict was defective in these respects, it was the duty of the defendant Bliss to have called the attention of the court to such defects before the jury was discharged in order that it might retire and correct its verdict. The Code provides for this procedure (Code Civ. Proc. § 619), and by failing to avail himself of it the defendant Bliss must be held to have waived the defects, if any such existed, in this verdict. Van Damme v. McGilivray Stone Co., 22 Cal. App. 191, 133 Pac. 995; Benson v. S. P. Co. (decided March 20, 1918), 171 Pac. 948.

[2] We are not, however, to be understood as deciding that the verdict was defective in the respects urged by the appellant and which forms his main contention upon this appeal. The action was upon a transaction for the sale of cattle by plaintiff to the defendant Bliss. The agreement, it is admitted by the defendant Bliss, was made by him with the plaintiff, Asebez. His contention, however, was that its terms were other than those asserted by the latter in his complaint, and, further, that Asebez was either a partner of Hitchcock's or was his agent in entering into the agreement. Upon the defendant's own theory of the case he could have had no remedy against either Asebez or Hitchcock if the plaintiff succeeded in sustaining the averments of the complaint as to the terms of the contract between them. The verdict of the jury in the plaintiff's favor and for the amount sued for in his complaint is of necessity a finding against the defendant Bliss upon the averments in his cross-complaint, and hence necessarily a finding that no cause of action existed in his favor against either Asebez or Hitchcock. For both of the foregoing reasons therefore the appellant cannot here be held to complain.

[3] The appellant makes the further contention that the trial court committed an error in granting the plaintiff's motion made after the discharge of the jury and entry of the judgment to amend the verdict and judgment by striking therefrom the words "plus the 3 per cent. deducted as shrinkage from said last shipment, together with interest." The elimination of these words from the verdict and judgment had the effect of decreasing the defendant's liability and reducing the amount of the judgment against him, and to that extent was an order in his favor. He was not therefore aggrieved, and hence cannot question the propriety of the court's action in that regard upon this appeal.

Judgment and order affirmed.

We concur: SLOSS, J.; SHAW, J.

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178 Cal. 147

GERARDI v. BONOFF et al. (L. A. 4137.)

(Supreme Court of California. April 15, 1918.)

TRIAL ⚷260(1)—INSTRUCTIONS—REQUESTS.

Where instructions given fully and fairly informed the jury as to the legal rights and duties of the respective parties and embodied defendants' theory of the case it was not error to refuse defendants' requested instructions thereon.

Department 1. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by V. L. Gerardi against Karl M. Bonoff and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Haas & Dunnigan, of Los Angeles, for appellants. O'Melveney, Stevens & Millikin and A. I. McCormick, all of Los Angeles, for respondent.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

RICHARDS, Judge pro tem. This is an appeal from a judgment in plaintiff's favor in an action for damages for personal injuries alleged to have been sustained by plaintiff through being struck by the defendants' automobile while he was in the act of alighting from a street car upon which he had been a passenger. The street car was proceeding westerly along West Eleventh street in the city of Los Angeles on the evening of July 13, 1912, at about the hour of 6:30 o'clock. The automobile of which the defendant Karl M. Bonoff was the driver, and the defendant D. Bonoff was the owner, and was also an occupant at the time of the accident, was proceeding westerly along the northerly side of said street. As the street car approached the intersection of West Eleventh street and Bonnie Brae street, the plaintiff gave the signal to stop and the car slowed down and stopped at said intersection. The plaintiff alighted and was about to cross to the northerly curb of Eleventh street when he was struck by the defendants' automobile and severely injured. Immediately prior to the slowing down and stopping of the street car, the defendant's automobile had been driving alongside of the car on the proper side of the street and at a rate of speed variously estimated by the respective witnesses at from 15 to 25 miles an hour. The width of the street at that point did not permit an automobile to pass at a distance from the running board or lowest steps of the street car equal to 4 feet while passing the same. The complaint alleged that the defendants' negligence consisted in the fact that they were violating the provisions of the traffic ordinance of the city of Los Angeles then in force in the manner and at the speed at which they were operating their automobile immediately before and at the time of plaintiff's injuries; and also alleged that the defendants were negligent in operating their said automobile in a careless manner and at an unlawful and dangerous rate of speed. These averments were denied in the defendants' answer, and the cause proceeded to trial upon the issues thus framed. Upon the trial the defendants contended and offered some evidence to show that the street car slowed and stopped with unusual suddenness and without warning to the occupants of the automobile in consequence of which they were unable to check the speed of their machine in time to stop or to avoid the accident. There was evidence to the contrary upon these matters, and the appellants do not seriously insist that upon the whole the evidence was insufficient to sustain the verdict.

The most important of the appellants' contentions is that the trial court was in error in giving certain instructions in which it undertook to consider and apply the terms of the traffic ordinance in question and in refusing to give certain other instructions requested by the defendants having the same purpose. The provisions of the traffic ordinance applicable to the situation read as follows:

"Sec. 22. The driver of any vehicle in or upon any street shall keep such vehicle at least four (4) feet from the running board or lowest step of any street car that shall have stopped or that is stopping for the purpose of taking on or discharging passengers; and if, by reason of the presence of a vehicle or other obstruction at the place where such car shall have stopped or is stopping, or by reason of the narrowness of the street, it is not possible to preserve such distance of four (4) feet from such running board or lowest step, as herein prescribed, then such driver shall cause such vehicle to be stopped until the passengers shall have been taken on or discharged from such car.

"Sec. 23. It shall be unlawful for any person to ride, drive or propel, or to cause or permit to be ridden, driven or propelled, any vehicle at a rate of speed greater than four (4) miles per hour in passing any street car or interurban car that is slowing down or standing still in any public street; provided, however, that the provisions of this section shall not apply to any vehicle that is traveling in a direction opposite to that in which the car passed by such vehicle is proceeding and at least ten feet distant from such car."

"Sec. 80. Any person who shall ride, drive or propel, or who shall cause or permit to be ridden, driven or propelled any vehicle at a rate of speed greater than twenty (20) miles per hour and not greater than thirty (30) miles per hour, upon or along any street or portion of any street, in the city of Los Angeles, outside of the district described hereinbefore in this section, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punishable as in this section provided."

We have examined the instructions which the trial court gave with respect to the scope, effect, and application of the foregoing provisions of the ordinance and are entirely satisfied that they correctly interpreted and applied the same and that the appellants' criticism of these instructions as given have no substantial merit. We have also examined the instructions which the defendants requested and which the court gave in connection with those instructions which the defendants requested and which the court refused to give, and we find that the former embodied substantially the defendants' theory of the case, and that the latter were sufficiently covered either by the instructions which the court had already given upon the plaintiff's request or upon its own motion, or by those which the court had given at the defendants' request. Taken as a whole, the instructions given by the trial court very fully and fairly informed the jury as to the legal rights and duties of the respective parties in the premises; while, on the other hand, the defendants' instructions which the court refused to give are defective and misleading in respect to the terms and effect of the ordinance and in their assumption as to the facts of the case, and they were properly refused by the trial court. This applies particularly to those portions of the requested instructions which undertook to set forth the duty of the plaintiff in alighting from the car. The court had already generally instructed the jury upon this subject, and we are of the opinion that the defendants were in no wise prejudiced by the failure of the court to give defendants' requested instructions upon this branch of the case.

No other error being complained of, the judgment and order are affirmed.

We concur: SLOSS, J.; SHAW, J.

178 Cal. 93

WHITING-MEAD COMMERCIAL CO. v. BAYSIDE LAND CO. et al. (L. A. 5555.)

(Supreme Court of California. April 10, 1918.)

APPEAL AND ERROR 🔑345(1)—TIME FOR APPEAL—STATUTES.

Provision of Code Civ. Proc. §§ 939 and 941B, that appeal from judgment must be taken within 60 days from entry, and that, if proceedings for new trial are pending, time for appeal shall not expire until 30 days after entry of order therein, is limited to cases where new trial proceeding is regularly initiated by filing and service of notice of intention to move for new trial within 10 days after receiving notice of entry of judgment or within 10 days after verdict, as required by section 659, and, if a new trial proceeding is not so initiated within 10 days, appeal from the final judgment must be taken within 60 days from entry.

In Bank. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Actions by the Whiting-Mead Commercial Company, a corporation, against the Bayside Land Company, the Fidelity Savings & Loan Association, and Ben Kelsey and others. From the judgment, plaintiff appealed. On motion to dismiss. Motion granted.

R. L. Horton, of Los Angeles, for appellant. Bordwell & Mathews, of Los Angeles, and W. K. Young, for respondents.

PER CURIAM. In this case the motion to dismiss the appeal from final judgment on the ground that the appeal was not taken within the time provided by law was granted from the bench. As the matter involved the construction of certain sections of our Code of Civil Procedure relative to appeals, it is deemed proper to briefly state the reasons on which the decision of the court is based.

The final judgment herein was actually entered in the superior court on August 10, 1917, and the appeal was not taken until November 9, 1917, which was more than 60 days after the entry of the judgment. Our law substantially provides (sections 939 and 941b, Code Civ. Proc.) that an appeal from the judgment must be taken within 60 days from the entry of the judgment. It further provides:

> "If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or other termination in the trial court of the proceedings upon such motion."

Appellant relies on the provision quoted. Its notice of intention to move for a new trial was however, not filed within 10 days after notice of the entry of the judgment, as required by section 659, Code of Civil Procedure. In our opinion the provision relied on is limited in its effect to those cases where a new trial proceeding is regularly initiated by the filing and service of a notice of intention to move for a new trial "within ten days after receiving notice of the entry of the judgment, or within ten days after verdict, if the trial was by jury," as required by section 659, Code of Civil Procedure. If a new trial proceeding be not so initiated within such 10 days, no proceeding on motion for a new trial can be held to be "pending" within the meaning of sections 939 and 941b, and an appeal from the final judgment to be effective must be taken within 60 days from the entry of the judgment.

It was for this reason that the appeal from the judgment was dismissed.

178 Cal. 140

STOW v. SUPERIOR COURT OF CALIFORNIA IN AND FOR ALAMEDA COUNTY. (S. F. 8450.)

(Supreme Court of California. April 15, 1918. Rehearing Denied May 13, 1918.)

1. STIPULATIONS 🔑14(12)—ENTRY OF JUDGMENT ON PLEADINGS.

In an action on a contract, when plaintiff attempted to introduce testimony defendant objected on the ground that the complaint failed to state a cause of action, whereupon plaintiff's counsel said, "If the complaint does not state a cause of action, of course, then, the easiest way to test that is by defendant making a motion for judgment on the pleadings," and such a motion was made and granted. *Held*, the language of plaintiff's counsel did not constitute a stipulation for entry of such judgment; it being merely a statement of that which, in contemplation of the court's view, counsel for plaintiff believed to be a speedy method of getting ready for an appeal.

2. NEW TRIAL 🔑38—NONSUIT—JUDGMENT ON PLEADINGS.

Where a demurrer to the complaint had been overruled, and on trial before another judge plaintiff's evidence was rejected because the complaint was defective, and, plaintiff standing upon his pleadings, the court gave judgment against him, such judgment was not a judgment on the pleadings, but in effect one of nonsuit, the granting of which, if improper, was ground for new trial.

3. APPEAL AND ERROR 🔑662(2)—REVIEW—RECITALS IN JUDGMENT.

That a judgment itself recites that it is entered on the pleadings is not controlling, and will not prevent a reviewing court from examining the entire record to learn all the facts.

4. NEW TRIAL 🔑38—GROUNDS—"ERROR IN LAW OCCURRING AT THE TRIAL."

Where testimony proffered by plaintiff was rejected upon the ground that it could not be relevant under the complaint believed by the court to be faulty, and, plaintiff standing on his pleading, the court gave judgment against him, new trial might be granted because of the court's ruling upon the exclusion of evidence under the complaint, as an alleged "error in law, occurring at the trial," made ground for new trial by Code Civ. Proc. § 657, subd. 7.

In Bank. Petition by F. H. Stow against the Superior Court of the State of California in and for Alameda County for certiorari to review a motion granting a new trial. On transfer by petition to Supreme Court. Writ discharged.

Costello & Costello, of San Francisco, for petitioner. Raine Ewell, in pro. per. in Superior Court.

MELVIN, J. The District Court of Appeal granted a writ of certiorari to review the action of the superior court in granting a motion for a new trial in a certain action entitled Ewell v. McKenzie and Stow, in the superior court of the state of California in and for the county of Alameda. The contention of petitioner was that the judgment had been granted upon the pleadings; that therefore there were no questions of fact to review on a new trial; and that consequently a motion for a new trial would not lie.

The learned District Court of Appeal being satisfied that the judgment was rendered in response to a motion for judgment on the pleadings held, upon the authority of Gray v. Cotton, 174 Cal. 256, 162 Pac. 1019, that the attempt to obtain a new trial was unauthorized, and that the court was without jurisdiction to grant it. On rehearing the court reached the same conclusion as before and set aside the order granting a new trial as one made without jurisdiction by the court below. The Court of Appeal said, in part:

> "This matter was a hearing upon a motion for judgment on the pleadings purely and simply. It was presented in that form, as the record now shows, by the concurrence and consent of counsel for both sides in open court at the time the motion was granted. The judgment in the case shows it was a judgment based upon a motion for such judgment on the pleadings. No issue of fact was tried, and no issue of fact could be re-examined after such judgment. The only remedy which the party had for whatever error the court committed in granting a judgment upon the pleadings was by an appeal. The former opinion which the court rendered in this matter will stand as the opinion of the court."

Upon petition the matter was transferred to this court.

It is contended that both by reason of the stipulation of plaintiff's counsel in the trial of the case in the superior court and because of the contents of the judgment itself, this court is bound to accept the theory that the judgment was one given on the pleadings and involving no disputed issues of fact.

[1] Upon the record now before us it is shown that the course of events was substantially as follows: Action was commenced in the superior court, plaintiff's cause resting largely upon the alleged obligations arising from a certain written contract attached to the complaint as an exhibit. Demurrer to the complaint was overruled, an answer was filed and the cause being at issue was brought on for trial before a judge other than the one who had ruled upon the demurrer. A trial by jury was waived; counsel for the respective parties made their addresses outlining their respective theories and the proofs which they intended to offer in support thereof; a witness for plaintiff was called and sworn, and his testimony was sought to be introduced by plaintiff. Defendant's counsel objected to the introduction of any evidence on behalf of plaintiff on the ground that the complaint failed to state facts sufficient to constitute a cause of action, in that the contract attached to the complaint as an exhibit was for an indefinite term. The objection was sustained by the learned judge of the superior court upon the ground that by the terms of the contract attached as an exhibit to the complaint an action on that agreement was not maintainable. Thereafter defendants moved to dismiss their cross-complaint and the motion was granted. Then they moved for judgment on the pleadings on the ground that the complaint did not state facts sufficient to constitute a cause of action. This motion was granted. The judge by affidavit has declared that in granting the motion last referred to, he did not take into consideration the allegations of the complaint at all, but only regarded the contract marked "Exhibit A." Subsequently, on motion for new trial the court, convinced that the conclusion regarding the insufficiency of the complaint had been erroneous, granted the motion, and this is the order which, it is contended, was beyond the jurisdiction of the superior court to make.

At the trial, after the court had expressed a conviction that the complaint did not state facts sufficient to constitute a cause of action, counsel for plaintiff said:

> "Well, if your honor has that view of it, there is no use going any further; if the complaint does not state a cause of action, of course, then, the easiest way to test that is by the defendant making a motion for judgment on the pleadings, and, if that is granted, then I can settle that bill of exceptions very quickly."

This was followed by dismissal of the cross-complaint at request of counsel for defendants and the making and granting of the motion for judgment on the pleadings. At the oral argument on this proceeding the contention was made, in effect, that the suggestion by counsel for plaintiff in the court below amounted to a stipulation that judgment on the pleadings be entered. As counsel said in argument before this court:

> "I could not have made the motion if it had not been by consent."

We do not construe the remarks of counsel for plaintiff in the court below as amounting to consent that a judgment on the pleadings should be entered. Indeed he stoutly asserted at all times that his pleading was good. His suggestion to his opponent waived nothing. It was merely a statement of that which, in contemplation of the court's view of the law, counsel for plaintiff believed to be a speedy method of getting ready for an appeal. Petitioner's counsel, while conceding that the issue of law had been duly decided when the court passed upon his demurrer to the complaint, says that his motion for judgment on the pleadings was equivalent to a new demurrer, and that the suggestion from his opponent amounted to a consent to the withdrawing of the answer and a stipulation for a decision solely upon the sufficiency of the complaint to aver facts amounting to a cause of action. We cannot see that the language and conduct of plaintiff's counsel in the trial court created such a stipulation, and even if they could be so construed, it does not appear that as matter of record the answer was withdrawn. The situation therefore is this: Upon trial of issues under pleadings which had passed demurrer, proffered testimony was rejected upon the ground that it could not be relevant under the complaint believed by the court to be faulty; plaintiff stood upon his pleading; and the court gave judgment against him.

[2] Respondent takes the position that in essence this was a judgment of nonsuit, and with this view we agree. In the case of Green v. Duvergey, 146 Cal. 379, 80 Pac. 234, the court refused to permit the introduction of any evidence unless plaintiff would deposit a certain sum of money with the clerk. Plaintiff declining to obey this preliminary order a nonsuit was entered and a judgment of dismissal was given. Plaintiff's motion for a new trial was denied and on appeal the court reversed the order denying it, saying, in part:

> "The trial of a cause includes all the rulings of the court and the proceedings before it which conduce to the decision which it makes upon the issues in the case as the basis of its judgment. People v. Turner, 39 Cal. 370; Moore v. Bates, 46 Cal. 29. Any erroneous ruling, by virtue of which a party is precluded from introducing evidence in support of his cause of action as set forth in his complaint or his defense, is an error of law occurring at the trial. The action of the court in improperly granting or refusing a nonsuit is also an error of law, whether made upon the opening statement of counsel or after the close of the evidence in the cause. Craig v. Hesperia Land & Water Co., 107 Cal. 675, 40 Pac. 1057. Under these principles, the order of the court requiring the plaintiffs to pay into court the sum of $25,000, as a condition upon which they could proceed to trial, and the order granting a nonsuit upon the opening statement and admissions of their counsel, may be reviewed as errors of law occurring at the trial."

Respondent is of the opinion that in essence the judgment entered in the superior court in Ewell v. McKenzie et al. was a judgment of nonsuit, and that calling it by another name does not alter that fact. We are constrained to agree with this view and we believe that Green v. Duvergey, supra, supports our conclusion. In that case as in the Ewell Case the court declined to hear proffered testimony at the trial. In that case the refusal was regarded as error of law by this court on appeal. In the Ewell Case the judge who made the ruling excluding the evidence believed that he had committed error and sought to give appropriate relief. That one error was due to a misunderstanding of the court's power and the other to a misconception of the sufficiency of a pleading does not in our opinion make any difference in regard to the power and jurisdiction of the trial court upon motion for a new trial.

[3, 4] The fact that the judgment itself recites that it was one entered upon the pleadings is not controlling. The whole record is before us, and a recital in the judgment will not prevent this court from examining the entire record for the purpose of learning all of the facts. A new trial may be granted for errors in law, occurring at the trial and excepted to by the party making the application. Section 657, subd. 7, Code Civ. Proc. Judge Hayne in his work on New Trial and Appeal uses the following language (vol. 1, § 1, p. 9, Rev. Ed.):

> "But errors occurring at the trial, and having an indirect relation to the pleadings, may be ground for a new trial. So at the trial a party may test the question whether his adversary's pleading states a cause of action or defense by objecting to the introduction of any evidence under it, and the ruling upon such objection may be reviewed on motion for new trial."

Since the court's ruling upon the exclusion of evidence under the complaint was reviewable as an alleged "error in law, occurring at the trial," we must hold that no successful attack may be made upon the court's jurisdiction to pass upon the motion for a new trial.

The writ of certiorari is discharged.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; SHAW, J.; VICTOR E. SHAW, Judge pro tem.; RICHARDS, Judge pro tem.

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178 Cal. 187

REED v. REED. (L. A. 4213.)

(Supreme Court of California. April 17, 1918.)

1. EXECUTORS AND ADMINISTRATORS ⊂⊃443(7) — ACTION — COMPLAINT — CONDITIONS PRECEDENT.

Under Code Civ. Proc. §§ 1493, 1500, providing that a suit against an executrix to enforce a money demand on contract cannot be maintained unless a claim therefor has been presented to the executrix and rejected, complaint against an executrix, stating a cause of action for money on an implied contract against decedent, was insufficient because of failure to allege presentation of the claim to the executrix.

2. EXECUTORS AND ADMINISTRATORS ⊂⊃444(3) — ACTION — POSSESSION AND TRUST CHARACTER OF PROPERTY.

If the intention of plaintiff who sued an executrix on a cause of action for money on an implied contract with decedent was to charge the executrix as trustee of specific property, the complaint should have contained allegations showing she had come into possession of the property, and that it was charged with a trust in favor of plaintiff.

3. Executors and Administrators 🔑453(2)—Action—Judgment—Payment Out of Assets.

Judgment against an executrix on a demand against decedent should have been made payable out of the assets of the estate in due course of administration.

Department 1. Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Ella J. Reed against Ethel M. Reed, executrix of the estate of Henry A. Reed. From a judgment for plaintiff, and an order denying motion for new trial, defendant appeals. Judgment and order reversed.

W. A. Alderson, of Los Angeles, for appellant. Dennison & Towner, of Los Angeles, for respondent.

SHAW, J. The defendant appeals from a judgment and from an order denying her motion for a new trial. We think the appellant's claim that the complaint does not state sufficient facts to constitute a cause of action or to support the judgment of the court below is well taken. The action was against the defendant as the executrix of the estate of Henry A. Reed, deceased. It set forth that in the lifetime of decedent the plaintiff had given said decedent the sum of $2,250 as the purchase price of certain stock in a corporation known as the Southwestern Sugar Company, which said decedent agreed to transfer to the plaintiff for said sum of money. It further alleges that the corporation was insolvent, and that the stock was worthless; that the decedent represented to her that it was of great value and worth the price which she agreed to pay therefor, and by that means obtained from her the said sum of money and the agreement to purchase the stock, and that the decedent further represented that he would consider the money as a trust fund, and would guarantee plaintiff against any loss, and that if the stock should prove to be of no value, he would repay the money so paid by plaintiff. It is alleged that the representations made by the decedent were false and untrue, and that the stock was in fact of no value. There is no allegation that the plaintiff ever offered to rescind the contract and return the stock, or that any claim for the money sued for against the decedent's estate was ever made or presented by the plaintiff, or that the defendant, as executrix, ever received the money paid by the plaintiff to the decedent. There is nothing in the complaint sufficient to state a cause of action to charge the executrix as trustee of any specific property belonging to the plaintiff. The judgment itself purports to be a personal judgment in favor of the plaintiff against the defendant Ethel M. Reed, executrix of the estate of Henry A. Reed. deceased, for $2,123.83 and costs. It is not made payable in due course of administration, nor charged against the estate of decedent.

[1-3] It is well settled that a suit against an executrix to enforce a money demand upon contract cannot be maintained unless a claim therefor is presented to the executrix and is rejected prior to the beginning of the action. Code Civ. Proc. §§ 1493, 1500. The most that can be said of this complaint is that it states a cause of action for money upon an implied contract against the decedent. It is therefore insufficient because of the failure to allege the presentation of the claim. If the intention was to charge the defendant executrix as trustee of specific property, the complaint should have contained allegations showing that she had come into possession of such property, and that it was charged with a trust in favor of the plaintiff. No allegations tending to show such a case are contained in the complaint. Furthermore, there are no allegations to uphold a personal judgment against the executrix, and a judgment upon a demand against the decedent should have been made payable out of the assets of the estate in due course of administration. We find no ground upon which the judgment can be upheld.

The judgment and order are reversed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

178 Cal. 195

BUTLER v. UNION TRUST CO.

(L. A. 4235.)

(Supreme Court of California. April 17, 1918.)

1. Joint Adventures 🔑5(2) — Action for Accounting—Pleading—Variance.

Where in action to dissolve an alleged partnership and secure an accounting plaintiff alleged facts which he claimed created a partnership, which facts were found to be true and to show a joint adventure, the court did not err in refusing a nonsuit on the ground that the facts showed a joint adventure only, since a joint adventure is similar to a partnership, and the right to an accounting of profits in accordance with the agreement therefor and the obligations growing out of such agreement are governed by the same rules of law.

2. Joint Adventures 🔑5(1)—Right to Accounting.

Whether plaintiff, who contributed his skill in manufacturing fur garments, and defendant, who provided a shop, purchased furs, etc., were partners or joint adventurers, an accounting was necessary, where defendant breached his agreement before the time for division of net profits and termination of agreement.

3. Appeal and Error 🔑1011(1)—Findings Based on Conflicting Evidence — Review.

Findings of court based on conflicting evidence are conclusive on appeal.

Department 2. Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by C. E. Butler, Guardian, etc., against the Union Trust Company, executor of the last will and testament of G. A. Williams, deceased. Judgment for plaintiff. From an order denying motion for new trial, defendant appeals. Affirmed.

A. J. Morganstern, of San Diego, for appellant. Clifford C. Pease and Luce & Luce, all of San Diego, for respondent.

VICTOR E. SHAW, Judge pro tem. The purpose of this action, brought by I. J. Grossman, for whom, as plaintiff, C. E. Butler, his guardian, has been substituted, was to dissolve an alleged partnership, secure an accounting of profits accruing therefrom, and recover damages alleged to have been sustained by reason of the acts of G. A. Williams, now deceased, and for whom, as such defendant, the Union Trust Company, as executor of his estate, has been substituted, which prevented plaintiff from carrying out the terms of the partnership agreement. Judgment was rendered for plaintiff, and, the court denying defendant's motion for a new trial, he prosecutes this appeal from such order.

As found by the court (reference being had to the original parties to the action), plaintiff was a skilled designer and manufacturing furrier, but without means to purchase material or conduct such business. In February, 1913, he and the defendant entered into an agreement whereby the former was to contribute his labor and skill, and defendant should advance the necessary money for the purchase of material and to pay the expenses of conducting the business of manufacturing fur garments in a shop therefor provided by defendant, and advance to plaintiff for his personal expenses the sum of $15 per week; the goods so manufactured to be sold by defendant at his storeroom, where he conducted another line of business. The conduct of the business was to continue until January 1, 1914, at which time the net profits, less such sums as defendant had advanced to plaintiff for personal expenses, were to be equally divided between the parties.

Issue was joined upon the question as to the existence of the alleged partnership, and at the trial the court suggested that such issue be first determined before entering upon an inquiry as to the accounting prayed for. Thereupon evidence was introduced touching the issue, at the close of which the court indicated that the transaction between the parties did not constitute a copartnership. Thereupon defendant moved for a nonsuit upon the ground that the cause of action was based upon the theory that a partnership existed, out of which there arose the responsibility of one party to the other, and since, in the opinion of the court, the facts did not justify such theory, there was nothing on which to base an accounting. This motion was denied, the court holding that, while no partnership was created, facts were established which entitled plaintiff to an accounting upon the theory that the arrangement had between the parties constituted a joint adventure in which the rights of the parties to an accounting were of a similar nature to what they would be were it found that a partnership existed. Continuing the trial, the court found the facts substantially as alleged in the complaint, and further found that they did not constitute an agreement of partnership, but did constitute a joint adventure between plaintiff and defendant; that plaintiff complied with his part of the agreement in devoting all of his time, skill, and labor in fulfillment of the terms thereof, and, save and except as prevented by defendant, fully performed the same, until about September 1, 1913, when, during the nighttime, defendant, without just cause, knowledge, or consent of plaintiff, entered the shop where the business was conducted and removed therefrom all of the goods theretofore purchased by defendant pursuant to the agreement to be used by plaintiff in the manufacture of fur garments, including garments made up by plaintiff, and took the same to his storeroom, thus depriving plaintiff of the opportunity to continue the business, and appropriated to his own use and exclusive control the garments which plaintiff by his labor and skill had manufactured, as well as the raw material in stock.

While there is a sharp conflict in the evidence, and proof of the allegations of the complaint is based largely upon the testimony of plaintiff, who, by reason of his lack of acquaintance with the English language, appears to have been somewhat vague and uncertain in expressing himself, it is nevertheless, when taken in connection with other testimony which tended to corroborate his story, sufficient to justify the findings made by the court.

[1] This being true, we are brought to a consideration of the chief error upon which defendant bases his claim for a reversal namely: That the court erred in its refusal to grant the nonsuit upon indicating that the evidence failed to establish the existence of a copartnership. In our opinion, there is no merit in this contention. In his complaint plaintiff alleged facts which he claimed created a copartnership. These facts were found to be true. But the court also found that they did not constitute a partnership, but a joint adventure. It is sometimes a close question whether a transaction constitutes a partnership or a joint adventure. Jackson v. Hooper, 76 N. J. Eq. 185, 74 Atl. 130, and cases cited. A joint adventure, however, is similar to a partnership, and, being of a similar nature, the right to an accounting of profits in accordance with the agreement therefor and the obligations growing out of such agreement between the parties are governed by the same rules of law. 23 Cyc. 453; Petrie v. Torrent, 88 Mich. 43, 49 N. W. 1076;

Causten v. Barnette, 49 Wash. 659, 96 Pac. 225; Claflin Co. v. Gross, 112 Fed. 386, 50 C. C. A. 300.

[2] Whether the parties were technically partners or not, an accounting was necessary to determine their respective rights. Garr v. Redman, 6 Cal. 574. Clearly plaintiff by reason of contributing his labor and skill in the common venture was, under the agreement, entitled to his share of the net profits of the business the conduct of which, being terminated by defendant, could only be ascertained upon an examination and settlement of the accounts of the business, precisely the same as though a partnership had existed. Since the facts alleged and found entitled the plaintiff to an accounting for the purpose of determining what were the net profits of the venture, the fact that the agreement and transactions had between the parties did not, as found by the court, constitute a copartnership in the strict sense, is wholly immaterial. In no event, even were error conceded, could defendant be prejudiced by reason of the ruling.

[3] As a result of the accounting had and taken, the court also found that defendant was indebted to plaintiff in the sum of $343.55 for his share of the net profits of the business during the time it was conducted, and that plaintiff was damaged in the sum of $250 by reason of defendant's breach of the agreement in wrongfully taking possession of and removing from plaintiff's shop the stock of goods and manufactured fur garments on September 1, 1913, thus preventing a continuance of the business to January 1st in accordance with the agreement. These findings are based upon conflicting evidence as to which the determination of the trial court must be deemed conclusive.

The order denying defendant's motion for a new trial is affirmed.

We concur: MELVIN, J.; WILBUR, J.

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178 Cal. 171

GRAFF v. UNITED RAILROADS OF SAN FRANCISCO. (S. F. 7338.)

(Supreme Court of California. April 16, 1918.)

1. Carriers 🔑348(13) — Passengers — Personal Injury — Misleading Instruction.

In an action for injury when thrown from the front platform of an electric car to the ground, an instruction that where an injured passenger is riding in an unusual position, which increases his danger, the doctrine of res ipsa loquitur does not apply, and no presumption arises that the resulting injury was due to the carrier's negligence, was misleading, in view of possible proof that the injury arose from the operation of the car.

2. Carriers 🔑316(1) — Personal Injury — Burden of Proof.

Where personal injury to a passenger arises from carrier's operation of car, there is a prima facie case of negligence, and burden is on the carrier to show that the thing done by it causing the injury was not the result of its negligence.

3. Carriers 🔑348(11)—Cause of Injury—Question for Jury.

Whether the injury arose from the manner of operating electric car or from a passenger's carlessness in standing too near the edge of the platform *held* a question for the jury.

4. Carriers 🔑347(7) — Personal Injury — Contributory Negligence—Question for Jury.

In a passenger's action for personal injury when thrown from the front platform of an electric car while rounding a curve, the question of contributory negligence *held* for the jury.

5. Carriers 🔑347(7) — Injury to Passenger—Contributory Negligence.

Independently of statute, it is not negligence per se for a passenger to stand on the front platform of a moving electric car.

6. Carriers 🔑348(5) — Personal Injury — Refusal of Instruction.

In an action for personal injury when thrown from the front platform of an electric car while rounding a curve, a requested instruction that if the passenger voluntarily and for his own convenience was riding on the platform, exposed to greater danger than if he had remained in the car, and he could have entered the car a reasonable time before the accident, he assumed responsibility for the increased risks, and, if injured in consequence thereof, could not recover, was properly refused, as it charged the passenger with the assumption of all increased risks, including any misconduct on the part of the motorman in the operation of the car.

7. Carriers 🔑348(5) — Personal Injury — Refusal of Instruction.

In such case a requested instruction that, if plaintiff was thrown from the car by any swaying motion or sudden jerk ordinarily incident to the running of cars, under the circumstances of the case verdict should be for defendant was properly refused, as it made him assume the risk of such jerk, even if it arose from the motorman's reckless operation of the car with knowledge of plaintiff's presence on the platform.

8. Carriers 🔑348(13) — Personal Injury—Instruction — Contributory Negligence.

An instruction that as matter of law, notwithstanding the passenger's place of added peril on the platform, a legal presumption of negligence arose against the carrier from the fact of his injury was erroneous.

9. Courts 🔑90(1) — Former Decisions — Scope — General Approval of Instructions.

The Supreme Court's general approval of the instructions is not a specific approval of an instruction not criticized.

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Warren Graff against the United Railroads of San Francisco. Judgment for plaintiff, accepted by plaintiff as reduced, motion for a new trial denied, and from the order and judgment defendant appeals. Reversed.

Wm. M. Abbott and Wm. M. Cannon, both of San Francisco (Kingsly Cannon, of San Francisco, of counsel), for appellant. Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for respondent.

SHAW, J. [1, 2] In the decision of this case in department the judgment was reversed because of the instruction which appears in the latter part of the opinion upon the subject of the presumption arising from an injury to a passenger while on board a railroad car. In commenting upon this instruction the opinion contained the following:

> "The rule of law is that where an injured passenger is riding in an unusual position, which position increases his danger, the doctrine of res ipsa loquitur does not apply, and no presumption arises that resulting injury was due to the negligence of the carrier."

The rehearing was granted because it was considered that this statement might be misleading. The concluding sentence of the opinion is also misleading. It is obvious that the proof may show that the passenger was riding in an unusual position which increased his danger, and may also show that the injury arose from something done by the carrier in operating the car. In such a case a prima facie case of negligence is made, and the burden rests upon the carrier to show that the thing done by it which caused the injury was not the result of its negligence. The true rule on the subject is stated in the Steele Case, cited in the opinion, and in Wyatt v. Pacific, etc., Co., 156 Cal. 174, 103 Pac. 892.

[3] It is true that this instruction has been approved in a number of cases decided by this court, but it will be found that in each case there was no dispute over the proposition that the injury arose from the manner of operating the car. When that is the case, the instruction, although it does not fully state the doctrine, is correct when applied to such a case, and the court would not reverse the judgment because of the failure to give the modifications which might be necessary if the evidence were of a different character. In the present case there was a dispute over the question whether the injury arose from the manner of operating the car, or from the plaintiff's carelessness in standing too near the side thereof, and the question as to which was the cause of the injury should have been left to the jury instead of being taken from them by the absolute character of the instruction given.

With this explanation of the concluding sentence, and the passage above quoted and the authorities cited in support of it eliminated, we adhere to the opinion rendered in department. It is as follows:

> "Plaintiff charged that while a passenger upon an electric car of the defendant and riding on the front platform thereof the motorman propelled the car around a curve at a greatly excessive speed, causing him, the plaintiff, to be thrown violently from the car to the ground, the car passing over both of his legs, necessitating amputation of both. Defendant answered by denial, and affirmatively charged that the injuries sustained by plaintiff were due to his own negligence. The jury rendered a verdict for plaintiff. On defendant's motion for a new trial the court reduced the verdict, and plaintiff accepted the reduction. The motion for a new trial was then denied, and defendant appeals from the judgment and order so doing.
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> [4] "Defendant's first contention is that plaintiff's own evidence establishes his contributory negligence beyond doubt, and that the court erred in refusing to instruct the jury to return its verdict in favor of defendant. Plaintiff, it appears, was familiar with the tracks over which he was traveling and with the curves thereon. He was on the front platform of the car near an open door on the right-hand side of the car which permitted the ingress and egress of passengers. He was in conversation with a friend. He turned his head slightly to speak to this friend, when the car took the curve and hurled him through the open door. He was standing next to another door opening into the body of the car, and so far as he remembered, though his memory was not good, he was not leaning against it nor holding to anything. He was accustomed to ride on electric cars and on the cars of that particular line, and was standing, balancing himself. The evidence was conflicting as to the speed with which the car took the curve. It will be assumed that the jury believed that it was at an undue speed, and that the motorman was guilty of negligence, in view of the fact that to his knowledge passengers were standing on the front platform. Though witnesses for the plaintiff testified that plaintiff was, or apparently was, holding on to the iron gate or a handrail of the car, and that he also was leaning with his back against the door, it is said that by virtue of plaintiff's own testimony this evidence is not sufficient to raise a conflict. We think, however, that it is, and that we are bound to assume that the jury concluded that the plaintiff was doing both of these things, and this is so because it is a part of common experience that a man who has received so tremendous a shock as that which this plaintiff sustained frequently comes through his injuries with no clear memory of the accident itself or the events that occurred immediately antecedent thereto. This truth is one of common knowledge, and is universally recognized in the medical books. Plaintiff's own testimony in this regard is, 'At the present time, since this accident, my memory is pretty bad.'
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> "It is said that it was plaintiff's duty, even if obliged to stand temporarily on the front platform, to enter the body of the car and thus make his position safe when opportunity presented itself so to do; that such opportunity did present itself, and plaintiff was guilty of contributory negligence in not making use of the opportunity. Upon the question of the condition of the car, however, the evidence is in dispute; that of the plaintiff going to show that in the body of the car every seat was occupied, that passengers were crowded in the aisle and six or seven more were standing on the platform where he was. Under these circumstances again, the determination of these disputed facts is for the jury.
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> [5] "Authorities are cited by appellant declaring that the mere presence of a passenger upon an electric car on the platform when there is space for him within the body of the car is conclusive upon the contributory negligence of the plaintiff, and to this effect it is contended are Hodler v. Public Service Ry. Co., 85 N. J. Law, 346, 88 Atl. 1071, and Ward v. International R. Co., 206 N. Y. 83, 99 N. E. 262, Ann. Cas. 1914A, 1170, but whatever may be the rule in these jurisdictions, such is not the rule in this state, nor in the majority of states, nor yet do we conceive it to be the rule independently of statute in the state of New York, for it is said in Nolan v. Brooklyn City, etc., Ry., 87 N. Y. 63, 41 Am. Rep. 345: 'The rule is settled that independent of the mandate of the statute * * * it is not, even in the case of steam cars, negligence per se for a passenger to stand on the front platform of a moving car.' Kelly v. Santa Barbara R. R. Co., 171 Cal. 423, 153 Pac. 903, Ann. Cas. 1917C, 798; Pruitt v. Santa Barbara, etc., R. R. Co., 161 Cal. 29, 118 Pac. 223, 36 L. R. A. (N. S.) 331; Holloway v. Pasadena, etc., Ry. Co., 130 Cal. 177,

62 Pac. 478; Babcock v. L. A. Traction Co., 128 Cal. 173, 60 Pac. 780; Seller v. Market St. Ry. Co., 139 Cal. 268, 72 Pac. 1006; Lynn v. Southern Pac. Co., 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710; 6 Cyc. p. 653; 3 Thompson, Negligence, § 2954.

[6, 7] The defendant proffered and the court refused to give the following instructions:

"'(1) If the plaintiff voluntarily and for his own convenience was riding on the platform of the car at the time and place in question, and was thus exposed to dangers which he would not have encountered had he entered and remained within the car, and that he could have entered the car a reasonable time before the accident and remained therein until the time of the accident, I instruct you that the plaintiff assumed responsibility for the increased risks, if any, which he thus voluntarily exposed himself to, and if he was injured solely in consequence of such increased risk, I instruct you that he cannot recover, and your verdict must be in favor of the defendant.

"'(2) If you find that the plaintiff was thrown from the car either by any swaying motion or any sudden jerk, and that such motion or jerk is ordinarily incident to the running of cars under the circumstances of this case, you are instructed that your verdict must be in favor of the defendant.'

"It was justified in so doing, for both of these instructions contain a declaration not warranted in law. By the first the jury would have been told that the plaintiff 'assumed responsibility for the increased risks' occasioned by his presence on the platform, and 'if he was injured solely in consequence of such increased risk,' he could not recover. Something of what has heretofore been said points out the error in law here declared. Specifically the vice of the instruction is that it charges the plaintiff with the assumption of all increased risks, whereas, the only increased risks which he assumed were those occasioned by his position and arising from the due operation of the car by the motorman who had knowledge of that position. He did not assume the increased risks of any misconduct upon the part of the motorman in such operation. The specific legal flaw of the second instruction justifying its refusal is that it charges the jury that plaintiff assumed the responsibility of injury from any 'sudden jerk ordinarily incident to the running of cars under the circumstances of this case,' and here again is the implication, if not the statement, that the plaintiff assumed the risk of such a jerk even if it arose from the reckless operation of the car by the motorman who had knowledge of his presence on the platform. Making reference to the discussion of this question in Kelly v. Santa Barbara R. R. Co., 171 Cal. 415, 153 Pac. 903, Ann. Cas. 1917, c. 67, nothing further need here be added.

[8, 9] "Finally, the court instructed the jury in the following language: 'Contributory negligence on the part of a passenger cannot be presumed from the mere fact of injury, but must be proved. On the other hand, the proof of an injury to a passenger on the car of a common carrier casts upon the common carrier the burden of proving that the injury was occasioned by inevitable casualty or some other cause which human care and foresight could not prevent, or by the contributory negligence of the passenger, unless the proof on the part of the passenger tends to show that the injury was occasioned by the contributory negligence of the passenger, or by inevitable casualty, or some other cause, which human care and foresight could not prevent. A consideration of Steele v. Pacific Elec. Ry. Co., 168 Cal. 375, 143 Pac. 718, will establish the inapplicability and the injury of this instruction. * * * Froeming v. Stockton Elec. R. R. Co., 171 Cal. 401, 153 Pac. 712, is relied on by respondent as authority for the giving of this instruction under these circumstances. It is true that this instruction was there given. It is also true that this court declared that the jury was ably and painstakingly instructed, but no objection was made to the giving of this instruction, and under familiar principles the court's general approval of the instructions was not a specific approval of an instruction not criticized. The injury worked by this instruction is most apparent. It directed the jury in its deliberations by telling them that as matter of law, notwithstanding the place of added peril which the plaintiff had voluntarily assumed, a legal presumption of negligence arose against the defendant by virtue of the fact that he sustained injury."

The judgment and order appealed from are reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; MELVIN, J.; RICHARDS, Judge pro tem.

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178 Cal. 166

GUMPEL v. SAN DIEGO ELECTRIC RY. CO. (L. A. 4136.)

(Supreme Court of California. April 16, 1918.)

1. CARRIERS 🔑314(1) — PERSONAL INJURY—SUFFICIENCY OF COMPLAINT.

An amended complaint, alleging that plaintiff was a passenger for hire on defendant's street car; that while it was rounding a curve, at a speed of 20 miles and more per hour, he was thrown from the car, and alleging negligence in respect to excessive speed and failure to provide straps for passengers; and that as the car ran on to the curve it gave a sudden and violent jerk by which he was thrown from the car and injured—stated a cause of action.

2. CARRIERS 🔑320(19)—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In such case *held*, on the evidence, that defendant's negligence was for the jury.

3. CARRIERS 🔑347(7) — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In such case plaintiff's contributory negligence in not guarding himself from being thrown from car *held*, on the evidence, a question for the jury.

4. DAMAGES 216(8) — PERSONAL INJURY—FUTURE SUFFERING AND LOSS OF EARNING POWER.

In such case an instruction to consider the extent of plaintiff's injury, the pain and suffering he had undergone by reason of the injury resulting from defendant's negligence, and any future pain and suffering traceable to and resulting from the injury and to consider the loss of time and earning power resulting from the injury, and any future loss resulting from the injury, correctly stated the elements of damages and those permissible under Civ. Code, § 3283.

5. TRIAL 🔑260(1) — REFUSAL OF INSTRUCTIONS—GIVEN INSTRUCTIONS.

The refusal of instructions is not error, where the subject-matter was sufficiently covered by the instructions given.

Department 1. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Arnold Gumpel against the San Diego Electric Railway Company. From a judgment for plaintiff and from an order denying its motion for a new trial, defendant appeals. Judgment and order affirmed.

Read & Dilworth and Titus & Davin, of San Diego, for appellant. James E. O'Keefe and C. H. Van Winkle, both of San Diego, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment in plaintiff's favor and from an order denying the defendant's motion for a new trial, in an action for damages for personal injuries sustained by the plaintiff through being thrown from a street car of the defendant while it was rounding a curve at the corner of First and Spruce streets in the city of San Diego.

[1] The appellant assails the plaintiff's amended complaint as not stating a cause of action. The plaintiff in his said complaint, after averring that he was a passenger for hire upon the defendant's car, goes on to allege that the said car "proceeded in a northerly direction on its said street car line, and at that certain point on the corner of First and Spruce streets, while said car was rounding said curve, and while the same was traveling at a rate of speed of 20 miles per hour or thereabouts, plaintiff was thrown from said car and injured as hereinafter set forth." The plaintiff then proceeds to allege:

> "That the said defendant company was negligent in the premises, in this: * * * (b) In rounding said curve at an excessive rate of speed, to wit, 20 miles per hour or thereabouts; (c) in its failure to provide straps or other facilities for passengers standing to hold on to. * * * That by reason of the negligence aforesaid plaintiff was thrown from said car, as hereinbefore alleged, and struck the ground with great force, and by reason thereof, and by reason of said negligence, received a severe injury," etc.

At the trial the plaintiff further amended his complaint by alleging that as the car ran onto the curve "it gave a sudden and violent jerk, by reason of which and at which time plaintiff was thrown from said car and injured." We are of the opinion that the complaint as thus amended sufficiently stated a cause of action.

[2] The appellant next contends that the evidence is insufficient to justify the verdict, in that it fails to show that the accident was the result of any negligence on the part of defendant company. The plaintiff himself testified in relation to the accident that he had boarded defendant's car at the corner of B and Third streets at some time after 11 o'clock on the night of his injury. It had been raining. The car was very crowded. Persons were standing on the front and rear platforms and on the steps of the car. He gained standing room on the rear platform, and, as some of the passengers got off, was able to step over to the door of the car, but could not get inside because of its crowded condition. He was standing leaning against the door when the car came down the steep hill above the curve going very fast, about 20 miles an hour. He had a package under his right arm, and was trying to get hold of the piece that runs down from the roof to the floor. The car made a terrible jerk at the curve and threw him off. The plaintiff also testified that he had been accustomed to ride on this car along this portion of its route, and knew that the hill and curve were there. There was other testimony supporting plaintiff, to the effect that the car was going at a more rapid rate of speed than usual as it approached the curve. There was also evidence on the part of the defendant, contradicting that of the plaintiff as to the rate of speed of the car and as to a jerk at the curve, which it is not necessary to recite in detail, for it is evident that there was sufficient evidence presented in support of the plaintiff's case to make it a proper case for the jury, upon the authority of Babcock v. Los Angeles, etc., Co., 128 Cal. 173, 60 Pac. 780, and Graff v. United Railroads, 172 Pac. 603.

[3] It is next contended by the appellant that the plaintiff was guilty of contributory negligence as a matter of law, in not taking proper precautions to guard himself from the danger of falling or being thrown from the car as it approached a curve, the existence of which he knew, and at a rate of speed of which he was aware. Appellant cites numerous cases from this and other jurisdictions which it claims supports this position. But upon this point also the most recent and approved decisions of this court are to the effect that under like circumstances to those disclosed in the case at bar the question of the plaintiff's contributory negligence is one which should properly be submitted to the jury. The most recent utterance of this court upon the subject, citing and sustaining earlier cases, is that of Graff v. United Railroads, supra.

[4] The appellant further urges that the court erred in giving the following instructions:

> "In fixing the compensation you take into account, if you find that he, by reason of the negligence of the defendant, had been injured, then you take into account the extent of his injuries, and whatever pain and suffering, either physical or mental, he has undergone by reason of that injury, resulting from the negligence of the defendant, and what pain and suffering he will yet undergo which can be traced and is the result of that injury.
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> "You also take into account his loss of time, that is, his inability to earn money, which has resulted from the injury which he received by the negligence of the defendant, whatever loss of time, loss of ability to earn money, has resulted up to this time, and whatever loss of time or loss of ability to earn money will result in the future, and which can be traced by you to the result of this injury, and due to the negligence of the defendant."

It is the appellant's contention that these instructions violate the rule laid down in the case of Melone v. Sierra Railway Co., 151 Cal. 117, 91 Pac. 522, in that they permit the jury to speculate upon the future pain and suffering of the plaintiff, and also as to his loss of time and ability to earn money, and do not confine these elements of damage to that detriment which would be certain to result from the plaintiff's injury. The difference between the instructions which were the subject of the court's criticism in the Melone Case and those above quoted is clear upon a comparison of the two sets of instructions. In the Melone Case the instructions as to the plaintiff's future injuries were phrased in the subjunctive, and it was in this that their vice consisted; while in the case at bar the court instructed the jury that, in estimating the compensation which the plaintiff could recover as a result of his injuries, it could take into account "what pain and suffering he will yet undergo, which can be traced and is the result of that injury"; and, as to the plaintiff's future loss of time and of ability to earn money, the court confined the jury to that "which can be traced by you to the result of this injury and due to the negligence of the defendant." These are, in effect, instructions to the jury that the plaintiff was to be limited in his right to recovery as to these elements of damage to such damages as it was reasonably certain he would suffer in the future, and they are thus within the rule declared to be the correct rule for the admeasurement of such elements of damage in the Melone Case, and to such as are permissible under section 3283 of the Civil Code.

[5] The appellant finally contends that the court erred in its refusal to give certain instructions requested by the defendant and dealing with particular phases of the evidence in the case. It is not necessary to set forth in detail these instructions nor refer to the argument or authorities cited by the appellant in their support, for the reason that the court, after a careful examination of the whole body of instructions given by the trial court, is of the opinion that they sufficiently cover the points emphasized by the defendant in its suggested instructions, and that, upon the whole, the jury were fully and fairly instructed as to the rules of law by which they were to be governed in arriving at their verdict; and hence that there was no error committed in refusing to give the instructions requested by the defendant.

Judgment and order affirmed.

We concur: SLOSS, J.; SHAW, J.

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178 Cal. 145

LEVI v. CHESLEY. (L. A. 4178.)

(Supreme Court of California. April 15, 1918.)

APPEAL AND ERROR 🔑1011(1)—REVIEW — FINDINGS ON CONFLICTING EVIDENCE.

The Supreme Court will not disturb the findings of the trial court when the evidence is in substantial conflict.

Department 1. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Edgar B. Levi, as receiver, against James A. Chesley. From a judgment for plaintiff, defendant appeals. Judgment modified, and trial court directed to modify its finding and judgment in accordance with the views expressed.

Hoff & Chatterson, of San Diego, for appellant. Riley & Heskett, of San Diego, for respondent.

RICHARDS, Judge pro tem. This is an appeal by the plaintiff in the action to recover possession of personal property in which judgment went for the defendant, and a motion for a new trial was denied. The facts of the case were these: One Paul E. Lavoice, who was a tenant upon the ranch of the defendant Chesley, purchased from one Adolph Levi 30 cows, giving a mortgage to secure the purchase price of said cows upon them, and also upon some 43 other head of cows upon said ranch, and of which he was as such tenant of Chesley in possession, but which in fact belonged to the defendant. Not long after this transaction the defendant Chesley discovered that his tenant Lavoice was disposing of the cattle upon his ranch, and he accordingly ousted him from it, and obtained his conviction and incarceration in the state prison. Subsequently, upon foreclosure of the mortgage, the plaintiff, Edgar B. Levi, was appointed receiver, and as such commenced this action against the defendant Chesley, for the alleged conversion of 21 of the 30 cows for the purchase price of which the said mortgage was given. The defendant denied having possession of or having converted said cattle, except that he admitted being in possession of one of said cows which he had offered to deliver to the plaintiff prior to the institution of the action and still stood ready to deliver. Upon the trial of the cause the evidence was conflicting as to the identity of the cows, for the conversion of which the plaintiff sought to recover, with the exception of the one cow which the defendant conceded and the court awarded to the plaintiff, and with the exception also of one other cow which the plaintiff, we think, sufficiently showed to have been one of those included in the mortgage.

[1, 2] The only points which the appellant presents upon appeal relate to the sufficiency of the evidence to sustain the findings of the court. Under the well-established rule, this court will not disturb the findings of the trial court when the evidence is in substantial conflict. This disposes of every question in the case except as to the right of plaintiff to the possession or value of the one red Durham cow, which, we think, the proofs sufficiently showed plaintiff to be also entitled.

The judgment will therefore be modified so as to award this additional cow to the appellant, or its value, which the trial court determined to be the sum of $100; and, the respondent having in his brief suggested and consented to such modification, the trial court is hereby directed to modify its finding and judgment in accordance with the views expressed in this opinion, each of the parties to this appeal to pay his own costs.

It is so ordered.

We concur: SLOSS, J.; SHAW, J.

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178 Cal. 199

RUSHTON v. REEVE et al. (L. A. 4234.)

(Supreme Court of California. April 17, 1918.)

1. Justices of the Peace 🔑162(1)—Judgment—Enforcement Pending Appeal.

Where an appeal is taken from a justice's judgment to the superior court on questions of law alone, and no stay bond is filed, it is competent for the justice, even before disposal of the appeal, to proceed to enforce the judgment by execution.

2. Pleading 🔑8(3)—Conclusion of Law—Character of Appeal.

In an action to enjoin defendants from enforcing a justice's judgment against plaintiff, the complaint, alleging that at time of issuance of the execution complained of the judgment of the justice "had been fully vacated, voided, and set aside," plaintiff having taken an appeal from the judgment to the superior court, which, on motion, dismissed the appeal, and ordered all the papers returned to the justice, did not allege, as matter of fact, that the appeal was taken on questions of law and fact, which would have avoided the judgment, the allegation being a mere conclusion.

3. Justices of the Peace 🔑135(4)—Execution—Injunction.

Where the superior court had jurisdiction of an appeal from a justice's judgment, and had power to dismiss it and make the necessary orders to dispose of it on the ground that it had not been duly perfected, its judgment, dismissing the appeal, is conclusive in an action to enjoin enforcement of the justice's judgment on ground that dismissal was erroneous and execution could not be issued by the justice court.

Department 1. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Julia E. Rushton against Sidney N. Reeve, Charles R. Thomas, E. R. Parmelee, and George H. Kelch. From judgment for defendants, and from an order denying a preliminary injunction, plaintiff appeals. Judgment and order affirmed.

Oliver O. Clark and George M. Pierson, both of Los Angeles, for appellant. George H. Kelch, of Los Angeles, for respondents.

SHAW, J. The complaint in this case purports to state a cause of action to enjoin the defendants from enforcing a judgment alleged to have been rendered in July, 1914, for the defendant Kelch against the plaintiff. The court below sustained demurrers to the complaint, and thereupon gave judgment for the defendants. A preliminary injunction had been issued upon the filing of the complaint, and the court, also prior to rendering the judgment, made an order dissolving such preliminary injunction. The plaintiff appeals from the judgment and from the order denying the preliminary injunction.

It appears that Kelch recovered judgment in the court of Sidney N. Reeve, then a justice of the peace of Los Angeles township, against the plaintiff Julia E. Rushton and others; that Julia E. Rushton took an appeal from said judgment to the superior court of the county; that thereafter the superior court on motion of Kelch, the plaintiff in said judgment, dismissed said appeal, and ordered all the papers to be returned to the justice's court, and thereupon the justice proceeded to issue an execution upon said judgment.

[1, 2] The complaint does not state whether the appeal was taken on questions of law alone or on questions of law and fact. There are decisions of this court to the effect that when an appeal is taken on questions of law and fact, and before its final disposition in the superior court the judgment stands vacated, and that during that period no execution upon such judgment can be allowed. Bullard v. McArdle, 98 Cal. 359, 33 Pac. 193, 35 Am. St. Rep. 176. We have no decisions, however, which purport to declare that where an appeal is taken upon questions of law alone and no stay bond is filed, it is not competent for the court below, even before the disposal of the appeal, to proceed to enforce the judgment by execution, and unquestionably the court has power to do so. If the appellant contends that after the disposal of the appeal on questions of law and fact, and after upon a dismissal thereof in the superior court, the judgment of the justice's court cannot be enforced by execution, and that the same stands vacated, the complaint is fatally defective in not alleging that the appeal in controversy was taken on questions of law and fact. There is an allegation that at the time of the issuance of the execution complained of the judgment of the justice "had been fully vacated, avoided and set aside." The context shows, however, that this is a mere conclusion of law. It cannot be taken as an allegation of fact, or as sufficient to supply the omission to allege that the appeal was taken on questions of law and fact. This omission was sufficient to uphold the order sustaining the demurrer.

[3] With respect to the dissolution of the restraining order the facts stated in the answer are proper for consideration. It is there shown that Kelch, the plaintiff in the justice's court, moved to dismiss the appeal on the ground that it had not been perfected by the necessary proceedings on behalf of the said appellant, and that this motion was sustained by the superior court, and that an order was made therein that the said appeal be dismissed, that the clerk of the superior

court forthwith transmit the papers in the action to the justice of the peace, and that said justice proceed to enforce the collection thereof. The superior court had jurisdiction of the appeal, and had power to dismiss it and make the necessary orders to dispose of it on the ground that it had not been duly perfected. This judgment is conclusive upon collateral attack, and is sufficient to dispose of the application for the injunction. It justifies the order dissolving the preliminary injunction.

The judgment and order appealed from are affirmed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

178 Cal. 190

ACKERMAN v. SCHULTZ et al.

(L. A. 4214.)

(Supreme Court of California. April 17, 1918.)

1. Appeal and Error 🔑345(1) — Time for Appeal—Statute.

Under Code Civ. Proc. § 939, before its amendment in 1915, providing appeal may be taken from any judgment or order of a superior court within 60 days from entry, where judgment was entered January 27, 1914, appeal therefrom, dated, served, and filed January 20, 1915, was taken too late; pendency of proceedings on motion for new trial not extending the time.

2. Stipulations 🔑18(3)—Preclusion from Raising Question—Stipulation.

In a suit on claim and delivery, defendant, who entered into a written stipulation with the other parties whereby he acknowledged due service upon him of the summons in the cross-complaint, together with a copy, waived the right to demur to the cross-complaint, and agreed that his answer to the amended complaint might be deemed an answer to the cross-complaint, is precluded from raising the question whether a cross-complaint, in an action on claim and delivery, is improper.

3. Replevin 🔑72—Warranty—Sufficiency of Evidence.

In an action on claim and delivery, evidence *held* to justify a finding that defendant and his cross-defendants, as an inducement to the cross-complainant to purchase the automobile in which defendant falsely claimed an interest, agreed that if cross-complainant would purchase the car they would warrant and defend the title.

4. Fraudulent Conveyances 🔑179(1) — Right to Invoke Statute.

In an action on claim and delivery involving an automobile sold, where a third person, who originally sold the car to plaintiff, was not a party, a defendant, not being one of his creditors, could not invoke Civ. Code, § 3440, as to transfers of personalty presumptively fraudulent, by objecting that plaintiff was not shown to have ever had possession of the car.

5. Replevin 🔑84—Fraud—Award for Repairs.

Where, after transfer of possession, and before discovery of the fraud worked upon him, the buyer of an automobile expended or became indebted in a certain amount for repairs on the car, he was properly awarded judgment for the sum in an action of claim and delivery, wherein he was made defendant and cross-complained against his vendor.

6. Appeal and Error 🔑1151(2) — Support by Pleadings—Modification.

A sum awarded by the judgment on a cross-complaint for a particular item should agree with the allegations and prayer of the cross-complaint, and judgment will be modified to that extent.

Department 2. Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Charles M. Ackerman against Cleveland Schultz, W. J. Hittson, and Bert T. Demmitt and others. From a judgment against him on the cross-complaint of defendant Demmitt, and from order denying his motion for new trial, defendant Schultz appeals. Judgment as modified affirmed, and order denying motion for new trial affirmed.

Cleveland Schultz, of Los Angeles, in pro. per. Andrew J. Copp, Jr., Charles Ackerman, Clyde E. Cate, and W. J. Hittson, all of Los Angeles, for respondents.

MELVIN, J. Cleveland Schultz sought to appeal from a judgment against him on the cross-complaint of Bert T. Demmitt, and from an order denying his motion for a new trial.

[1] Respondent says that the appeal from the judgment was taken too late. Judgment was entered January 27, 1914. Appeal therefrom was dated, served, and filed January 20, 1915. Under section 939, Code of Civil Procedure, before its amendment in 1915, this was too late, as the pendency of the proceedings on motion for new trial did not extend the time for appeal from the judgment. We are therefore limited to a consideration of the appeal from the order denying the motion of appellant for a new trial, and that, too, upon a record which does not contain a copy of the original complaint of Ackerman. The judgment and findings upon the cross-complaint, however, refer to Ackerman's suit as one on claim and delivery, and appellant insists that there may be no cross-complaint in such an action. To support this contention certain authorities from other states are cited which refer to counterclaims and not to cross-complaints. One Californian case is referred to, and in the opinion in that case (Lovensohn v. Ward, 45 Cal. 8) it was merely held that the subject-matter of litigation in replevin being the property mentioned in the complaint, defendant may not in his answer allege that plaintiff has taken from him other property and ask for its return. In this case the cross-complaint dealt with the very property in suit and appellant's conduct in relation to it. This is in accordance with section 442, Code of Civil Procedure.

[2] In any view of the matter appellant is precluded from raising the question, because he entered into a written stipulation with the other parties to the litigation by which he acknowledged due service upon him of the summons in the cross-complaint, together

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

with a copy thereof, waived his right to demur to the cross-complaint, and agreed that his answer to the amended complaint of Ackerman might be deemed an answer to the cross-complaint.

[3] The court found Schultz guilty of fraud. Among the findings is one to the effect that he and his cross-defendants, as an inducement to the cross-complainant to purchase the automobile in which Schultz falsely claimed an interest, covenanted and agreed that if Demmitt would purchase the car, they would warrant and defend the title to said property. This finding is attacked upon the ground that the bill of sale given to respondent Demmitt was signed by Bruce Masse alone. But there was other testimony to the effect that Schultz said he was the owner of the property, and that the automobile was free and clear of all incumbrances. There were also other circumstances in proof tending to support the finding. It was thoroughly justified by the evidence.

Appellant also objects to the finding that joins his name with that of Masse in making "a purported transfer of title" because the bill of sale was not signed by him. However, he did assert title in himself, and the mere fact that record title did not purport to come from him did not relieve him of responsibility for his instrumentality in aiding in the purported transfer of title.

[4] Another finding was to the effect that the representations of appellant to respondent that the automobile was free and clear of all incumbrances were knowingly false, and were made with intent to deceive the respondent. The attack upon this finding is that Ackerman was not shown to have ever had possession of the chattel, and that therefore its purchase by him from one Van Tongel was fraudulent and void under section 3440 of the Civil Code. This contention is without merit. Van Tongel is not a party to this action, and appellant, not being one of his creditors, is not in a position to invoke that statute. Moreover, Ackerman testified that he did take possession of the property on the date of the execution of the bill of sale. This finding is also attacked on the ground that respondent employed an attorney to investigate the records to discover if any liens against the property existed, and that therefore he did not rely on the false representations. The obvious answer to this is that appellant's fraud, as found by the court, was not limited alone to false pretenses as to title.

[5] After transfer of possession and before discovery of the fraud the respondent, as the court found, expended or became indebted for a certain amount for repairs on the motorcar. Judgment for this sum was properly awarded.

[6] In the prayer of the cross-complaint judgment is asked for punitive damages in a named sum and $574.99, together with interest from December 28, 1912. This latter sum is made up of the two amounts, $275 alleged to have been paid cross-defendants for the automobile, and $299.99 expended by way of repairs. In the judgment as given the sum of $303 is awarded as the amount expended for repairs, making, when added to the $275, a total of $578. This should be reduced to agree with the allegations and prayer of the cross-complaint; and it is ordered that the judgment be modified to that extent.

The judgment as modified must be affirmed; and it is so ordered. The order denying appellant's motion for a new trial is affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

36 Cal. App. 627

Ex parte HART. (Cr. 591.)

(District Court of Appeal, Second District, California. March 29, 1918. Rehearing Denied by Supreme Court May 9, 1918.)

LICENSES ⚿7(6)—DISCRIMINATION—LICENSING BUSINESSES.

Provisions of a city ordinance for the licensing of certain businesses, imposing a fee of $60 a year on every person selling or contracting to sell certain articles, but excepting persons having regularly licensed places of business in the city, were void as an attempted protective tariff for the benefit of businesses located in the city.

Original application of George Hart for writ of habeas corpus. Petitioner discharged from custody.

Hutton, Fogel & Coffin, of Los Angeles, for petitioner. Charles W. Lyon, City Atty., and Fredericks & Hanna, all of Los Angeles, for respondent.

WORKS, Judge pro tem. The petitioner operates a mercantile business at an establishment within the city of Santa Monica and sells his commodities in the contiguous city of Venice; sales and deliveries being made by him after the manner which is employed by dealers in articles of the same character, which dealers have their places of business located within the limits of Venice. An ordinance of the last-named city provides for the licensing of certain businesses and contains a section to the following effect:

> "For every person * * * selling or contracting to sell articles" of various kinds, including the commodities dealt in by the petitioner, "to persons not regularly engaged in carrying on such lines of business, whether by sample or otherwise, * * * not otherwise provided for herein, $60.00 per annum; provided that this shall not apply to persons having regularly licensed places of business, in the city of Venice, taking orders for or selling, goods handled by them in their respective business."

The petitioner was arrested and imprisoned for making sales within Venice, without having taken out the license required by the section; it being conceded that his case is "not otherwise provided for" in the ordinance. It appears that persons whose places of business are within the boundaries of Venice, and who conduct establishments similar to that of the petitioner, pay a license fee of only $12 per annum under the ordinance.

The petitioner contends that the ordinance unjustly discriminates against him in that it requires from him a license fee of $60 per year, while it exacts but $12 per year from others similarly situated, except that his place of business is without, while theirs are within, the city of Venice. He points to section 21 of article 1 of the Constitution of California, providing that no "citizen, or class of citizens" shall "be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens," and to the Fourteenth Amendment to the Constitution of the United States, section 1, to the effect that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Questions similar to the one now propounded to us have been before the courts of this state several times. The respondent claims that the ordinance now in question, so far as the provisions quoted from it are concerned, is constitutional under the decision in Ex parte Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527. The ordinance involved in that case was an ordinance of the city of Chico, and the person imprisoned pursuant to its terms was a traveling salesman for a concern in Oakland. It was insisted that he could be required, constitutionally, to pay a higher license than that exacted from merchants selling from a fixed place of business within the municipality. The Supreme Court upheld this view in the following language:

> "The very power to license for purposes of regulation and revenue involves the right to make distinctions between different trades and between essentially different methods of conducting the same general character of business or trade. And that is all that is done here. While it may be true, as suggested by petitioner, that Haskell is, in a sense, a merchant equally with those having a fixed place of business, it is nevertheless true that the manner in which he conducts and carries on his business is so distinct from that of the merchant of the latter class as to make it essentially a different business."

The petitioner relies upon the Matter of Hines, 33 Cal. App. 45, 164 Pac. 339. In that case one who operated and maintained a laundry wagon was under imprisonment for a failure to take out a license under an ordinance of the city of Venice. He delivered laundry work in Venice from an establishment outside the corporate limits of the city, in the same manner that laundry work was delivered to the people of the city from laundries within its limits. A greater license fee was sought to be required from him for operating and maintaining his wagon than from those conducting laundry businesses within the city, for the conduct of such businesses. In the opinion in the case we said:

> "We are of the opinion that the provisions of the ordinances under which petitioner has been convicted attempt to create and enforce a discrimination not based upon differences in the nature of the business being transacted or differences in the manner of conducting the same business, or any other difference other than the mere fact of difference in destination of the goods collected and delivered by wagons collecting for laundries located outside of the city and the destination of goods collected for delivery to laundries within the city. The license provisions in question are plainly devised as a protective tariff for the benefit of laundries located in the city of Venice, or laundry wagons doing business with laundries located in the city of Venice, and apparently they have no other purpose."

We then declared the assailed provisions of the ordinance to be void. We are convinced that the provisions which are attacked of the ordinance now before us are also "devised as a protective tariff for the benefit" of businesses located in the city of Venice, and that "apparently they have no other purpose." Ordinance provisions having their origin in such a purpose cannot stand. This proceeding is ruled by the Matter of Hines, and not by Ex parte Haskell.

The petitioner is discharged from custody.

We concur: CONREY, P. J.; JAMES, J.

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36 Cal. App. 463

SHELL CO. OF CALIFORNIA v. INDUSTRIAL ACCIDENT COMMISSION et al.

(Civ. 2360.)

(District Court of Appeal, First District, California. March 6, 1918. Rehearing Denied by Supreme Court May 3, 1918.)

1. MASTER AND SERVANT 🔑405(1) — WORKMEN'S COMPENSATION ACT—CAUSE OF INJURY—SUFFICIENCY OF EVIDENCE.

In a workmen's compensation case, evidence *held* to support finding that employé's second injury, while exercising his leg by walking under direction of his surgeon, arose from a condition produced by his first injury, which broke the neck of his femur.

2. MASTER AND SERVANT 🔑412—WORKMEN'S COMPENSATION ACT—HEARSAY EVIDENCE.

Under Workmen's Compensation Act, § 77a (St. 1913, p. 313, as amended by St. 1915, p. 1102, § 28), making hearsay evidence admissible in cases of death, where the hearsay testimony relates directly to the injury in question, on petition for writ of review against Industrial Accident Commission to review award for death of an employé, his declarations that his crutch slipped and that he fell, injuring him the second time, which second injury was the direct outcome of the first, and resulted in his death, were admissible.

3. MASTER AND SERVANT 🔑417(7) — WORKMEN'S COMPENSATION ACT — CAUSE OF DEATH—SUFFICIENCY OF EVIDENCE.

On petition for writ of review by an employer against the Industrial Accident Commission to review award for death of an employé evidence *held* to sustain award on point whether death was caused by operation, made necessary by second injury resulting from first received in employment.

4. Master and Servant ⚷405(1) — Workmen's Compensation Act — Degree of Proof.

The Workmen's Compensation Act does not require demonstration as to the cause of death, but only that degree of proof which produces conviction in an unprejudiced mind.

Proceedings under Workmen's Compensation Act by Catherine Fleming, individually and as guardian ad litem of John Fleming, opposed by the Shell Company of California, employer, and others. There was an award by the Industrial Accident Commission, and the employer petitions for writ of review. Petition dismissed.

Redman & Alexander, of San Francisco, for petitioner. Chris. M. Bradley, of San Francisco, for respondent Industrial Accident Commission. Henry S. Richmond, of Coalinga, for respondent Fleming.

BEASLY, Judge pro tem. Petition for writ of review by the Shell Company of California against the Industrial Accident Commission and Catherine Fleming, individually, and as guardian ad litem of John Fleming. The undisputed facts of this matter are briefly these: On July 8, 1916, the husband of the respondent Catherine Fleming, and father of John Fleming, received an injury while in the employ of the petitioner, the Shell Company of California, by which the neck of his femur was broken. He made a slow recovery, and on January 11, 1917, while exercising his leg by walking in his yard, under the special direction of his surgeon so to do, he slipped and refractured the bone at the same point. The bones never united after this second fracture except by a fibrous connection, and on April 27, 1917, the doctor decided that an open operation was necessary to readjust the bone. This was performed, and while the operation seemed to be a success, it transpired that within a few hours thereafter his stomach filled with gas and became greatly distended, his heart collapsed, and he died. The Industrial Accident Commission awarded a death benefit to the respondents, Catherine Fleming and John Fleming, and the petitioner applies to this court to have this award set aside upon the usual grounds.

The points made against the award are two: The first is that the second accident was independent of the first, and that therefore no award can be made therefor; and the second point is that Mr. Fleming died from causes not in any way connected with the original accident.

[1] We are satisfied that both points must be decided upon the facts, and that the award must be sustained, and we will briefly give our reasons for this conclusion.

The undisputed facts are as above stated; and, it appearing therefrom that Fleming at the time of his second injury was obeying his doctor's instructions to exercise his leg, that he fell and that the fibrous connection which had been established was torn loose at the point of the previous fracture are circumstances which seem to us to be conclusive to the effect that this second injury arose from a condition produced by the first injury.

Petitioner, however, contends that this is not so, and it is therefore proper to state that in addition to the circumstances above specified there was other evidence which must be satisfying to any one that the condition did arise from the condition produced by the original accident. This evidence consists of declarations of the deceased to the effect that his crutch slipped and that he fell. He made other statements of the circumstances connected with the accident, but none which, it seems to us, are inconsistent with this statement, and, even if they may be so considered, this court will not say that the Industrial Accident Commission was not correct in adopting this statement that his crutch slipped, and that he thus fell and refractured his bone.

[2] The petitioner further contends with respect to this testimony that it was hearsay, and therefore not admissible. It insists that the rule in the cases of Englebretson v. Industrial Accident Commission, 170 Cal. 793, 151 Pac. 421, and Employers' Assurance Corporation, 170 Cal. 800, 151 Pac. 423, against the same defendant, still obtains in this state; but since those cases were decided section 77a of the Workmen's Compensation Act has been amended (St. 1915, p. 1102) so as to make hearsay evidence admissible in cases of death, where the hearsay testimony relates directly to the injury in question. Petitioner contends that this statute is not broad enough to cover the present case, in that, as it claims, the evidence as to the manner of occurrence of the second accident does not directly relate to the injury which the statute seeks to compensate. We cannot concede so narrow a construction to the amendment. Its purpose was to permit hearsay evidence to be given in support of a claim in case of death, and as this second injury was the direct outcome of the first, we think the statute broad enough to cover it and to permit hearsay evidence of the manner in which it occurred to be given in this case.

[3, 4] In support of its second point, that death was caused by extraneous circumstances and not by the surgical operation, the petitioner insists that the evidence is so conflicting and inconclusive that it will not sustain the award. The facts as to the manner of Mr. Fleming's death, that is, that he was operated upon by the opening of his hip and the readjustment of its bones, and that some hours later he died from inflation of his stomach caused by an accumulation of gas pressing against the diaphragm and causing the heart to collapse, there seems no reasonable ground to dispute, but the doctors differed somewhat in their opinions as to what caused the accumulation of the gas,

and whether Fleming died from the failure of a weak heart, or whether the heart collapsed as a result of the action of the gas. Dr. Gibbon, the medical adviser of the Industrial Accident Commission, gave it as his opinion that the condition stated by the attending physicians reasonably showed that death was due to the operation, and added that this opinion was not based upon possibilities, but upon the probabilities of the case. He believed that the death was caused by the condition produced by the anæsthetic, or operation, or both. He admitted that other causes might operate to cause the accumulation of gas, but, after examining the entire record, including the testimony of the other doctors, and having all the facts available before him, he stated that no other factor was disclosed by the record which might have produced the condition referred to except the anæsthetic and the surgical operation.

It is conceded that other causes may be followed by an accumulation of gas in the stomach, and also that the heart might have collapsed from natural causes, and counsel for petitioner therefore urges that the evidence is not sufficient to sustain the finding upon this point. But Dr. Gibbon may be said, in the language of the Supreme Court in Santa v. Industrial Accident Commission, 165 Pac. 689, to have been "giving what on the facts before him and in the light of medical science, appeared to be the most probable explanation of the event." We can therefore see no distinction between that case and this, and, besides, the law does not require demonstration, but only that degree of proof which produces conviction in an unprejudiced mind, and surely no unprejudiced mind, reading the statements of these physicians as to the manner of this man's death, could come to any other reasonable conclusion than that Fleming died as the result of this surgical operation. The commission found in accordance with Dr. Gibbon's opinion on this point, and this finding in the state of the evidence we may not disturb.

For the reasons given, the petition is dismissed.

We concur: ZOOK, Presiding Judge pro tem.; KERRIGAN, J.

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36 Cal. App. 500

HALSTED et al. v. CENTRAL SAV. BANK et al.

SAME v. FIRST SAV. BANK et al.

(Civ. 2302, 2304.)

(District Court of Appeal, First District, California. March 12, 1918. Rehearing Denied by Supreme Court May 9, 1918.)

1. BANKS AND BANKING ⚷301(1)—JOINT ACCOUNTS—SURVIVORSHIP.

Where deceased deposited money in savings bank to joint account of himself and another, payable to their survivor, his heirs were not entitled to the moneys as against the survivor, where the intent to provide for her was clearly manifest.

2. BANKS AND BANKING ⚷301(1) — JOINT ACCOUNTS—SURVIVORSHIP.

Where deceased deposited money in savings bank to joint account of himself and another, payable to their survivor, further provision in deposit agreement that "the parties agree to become partners" therein did not affect the right of survivorship, when the contract was construed as a whole.

Appeals from Superior Court, Alameda County; W. H. Thomas, Judge.

Two actions by James D. Halsted and others against the Central Savings Bank, substituted for the Union Savings Bank, and Anna M. Collins, and against the First Savings Bank and Anna M. Collins. Judgment in each case adverse to plaintiffs, and they appeal. Both judgments affirmed.

O'Neill & O'Neill and Chapman & Trefethen, all of Oakland, for appellants. Harry E. Leach and Abe P. Leach, both of Oakland, for respondents.

BEASLY, Judge pro tem. These two cases arose out of the deposit of certain moneys in the defendant banks by James Mandeville Halsted, deceased, in the names of himself and his foster sister and housekeeper, Anna N. Collins.

On the 8th day of March, 1913, the deceased deposited with the Union Savings Bank the sum of $12,915.87, and at the time signed with Mrs. Collins an agreement relating to this deposit which in substance provided that all moneys then on deposit or at any time thereafter to be deposited by either of them to the credit of this account were to be received by the bank on condition that the amounts thereof and all dividends thereon should be paid by the bank to the depositors, or either of them, or to the survivor of them, or to the personal representatives or assigns of such survivor, without reference to the original ownership of the moneys. This deposit was made in the names of James M. Halsted and Mrs. Anna Collins. Halsted at the time of making this deposit was in perfect health. He told Mrs. Collins, as she testified in response to questions by appellants' attorney, that this money was for her; that he wanted her to have it just as soon as anything happened to him; that he gave it to her, and it further appeared that what he meant by "anything happening to him" was his death. Of another witness, Mr. Furniss, he asked whether, in the event of his making a joint account in the bank, there would be any question about Mrs. Collins getting the money if anything should happen to him, and Mr. Furniss replied that there was no question about it. He told the witness De Pue that he had just been down to the bank and turned over or transferred a book carrying a $10,000 deposit to Mrs. Collins, and he added, "Now, if anything happens to me Anna is provided for."

The deceased suffered a paralytic stroke in the month of March, 1911, and died on the 25th day of October, 1914. There seems to have been no change in the account until the day previous to his death, when Mrs. Collins transferred the account to her own name.

The court found that the claim to these funds made by the plaintiffs, as executors of Mr. Halsted's will, was without foundation and invalid; that the estate of the deceased had no interest in the money, and that the same was the sole and separate property of Mrs. Collins, to the possession of which she was entitled. It was conceded at the argument that the only difference between the facts of the case against the Union Savings Bank and the companion case against the First Savings Bank is in the language of the agreement signed at the time the deposit was transferred to the account of Mr. Halsted and Mrs. Collins. In the case of the First Savings Bank this agreement authorized and directed the corporation to open an account in the names of James M. Halsted and Anna Collins, payable to either or the survivor, and by this instrument the two persons named agreed with each other to become and be partners in the ownership of the moneys and of all interest thereon and all other moneys to be deposited to said account; and they agreed with each other that either and each of them and the survivor of them might at any and all times draw and receive from the bank the whole or any part of the money, and empowered each to sign their respective names to any receipt, check, or voucher for the money so drawn.

[1] The deceased was a man of few words apparently, and he said little at the time of making these changes in the deposits of his funds; but, as was said in Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370, there can be no doubt of the intention of Mr. Halsted in this matter, and that intention should be carried out if the law will permit it. We do not deem it necessary to discuss the writings made for the purpose of giving a particular character to these deposits, or the facts of these cases at length. The facts showing an intention on the part of Mr. Halsted to create a trust in favor of Mrs. Collins in these funds are far stronger than were the facts in the case of Booth v. Oakland Bank of Savings, supra; and the findings of the court and the evidence supporting them bring the cases clearly within the ruling in that case, and also within the rule of the following cases: Estate of Harris, 169 Cal. 725, 147 Pac. 967; McCarthy v. Holland, 30 Cal. App. 495, 158 Pac. 1045; McDougald v. Boyd, 172 Cal. 753, 159 Pac. 168; Waters v. Nevis, 31 Cal. App. 511, 160 Pac. 1081; and numerous other cases which have been decided by the Supreme Court and by this court in which similar instruments have been construed.

[2] The expression that "the parties agree to become partners" in the case of the First Savings Bank account, when this agreement is held "by its four corners" and read and construed as a whole, does not change its meaning from that given it by the trial court. The intention is plainly the same as in the case of the Union Savings Bank, and we are not disposed to split hairs over definitions of words, but to hold that the intention so plainly indicated by all the acts and words of Mr. Halsted shall be carried out.

The judgment is affirmed in each of the cases above entitled.

We concur: LENNON, P. J.; KERRIGAN, J.

36 Cal. App. 816

HALSTED et al. v. OAKLAND BANK OF SAVINGS et al.

SAME v. CENTRAL SAV. BANK et al.

(Civ. 2301, 2303.)

(District Court of Appeal, First District, California. March 12, 1918. Rehearing Denied by Supreme Court May 9, 1918.)

Appeals from Superior Court, Alameda County; W. H. Thomas, Judge.

Actions by James D. Halsted and others against the Oakland Bank of Savings and another, and by James D. Halsted and others against the Central Savings Bank and another. From the judgments rendered, plaintiffs in each case appeal. Judgment in each case affirmed.

O'Neill & O'Neill and Chapman & Trefethen, all of Oakland, for appellants. Harry E. Leach and Abe P. Leach, both of Oakland, for respondents.

PER CURIAM. The facts of these two cases are such as to present the same question that we have this day decided in James D. Halsted et al. v. Central Savings Bank, 172 Pac. 613, numbered in this court No. 2302. In all the cases the plaintiffs, as executors of the last will of James M. Halsted, deceased, are seeking to establish an interest in certain savings bank deposits belonging to the deceased in his lifetime, but in which he had created an interest in favor of Anna N. Collins amounting upon his death to absolute and sole ownership.

Upon the authority of the above-mentioned case of Halsted et al. v. Central Savings Bank, No. 2302, the judgment in each of these cases is affirmed.

36 Cal. App. 531

SOUTHERN CALIFORNIA IRON & STEEL CO. v. MAIER. (Civ. 2115.)

(District Court of Appeal, Second District, California. March 15, 1918.)

PLEADING 🔑380—EVIDENCE—ADMISSIBILITY.

In action on a corporation debt against a stockholder, where upon the allegations of the complaint as they stood admitted there was no issue as to the number of shares the corporation had outstanding when the debt was incurred, plaintiff was not entitled to raise such issue by introducing evidence contradicting the allegations of the complaint as to the number of shares.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by the Southern California Iron & Steel Company against Edward R. Maier. From judgment for plaintiff, defendant appeals. Reversed.

A. L. Abrahams, of Los Angeles, for appellant. A. P. Michael Narlian and N. B. Nelson, both of Los Angeles, for respondent.

CONREY, P. J. The defendant appeals from a judgment entered against him in the sum of $171.40 as a stockholder in Maier Pier Company, a corporation, on account of a contract whereby merchandise was sold to that corporation at the agreed price of $857.04.

There is only a typewritten transcript of the record. The quotations from pleadings and from evidence, as printed in the briefs, are less complete than they should have been. But by piecing together a scrap found in one brief with other scraps found here and there in the other briefs, together with positive admissions of fact by counsel, we find enough, although barely enough, material for a decision on the merits. It is a dangerous practice for attorneys in preparing their briefs to neglect the provisions of section 953c, Code of Civil Procedure. We have referred to this matter in many recent decisions.

It was alleged in the complaint "that at the time said debts were contracted, the total number of shares of the capital stock of said corporation, Maier Pier Company, issued, subscribed and outstanding, was 77,941 shares." Without denying this allegation, the defendant denied that at the time mentioned he was a shareholder in the corporation, and alleged that at that time he had no stock therein. Nevertheless the court, in finding No. 6, declared:

> "That at the time said contract was made said defendant Edward R. Maier was the owner of 1 share of stock, and that the total number of shares of stock subscribed for at that time was 5."

If appellant is right in his contention that finding No. 6 is unsupported by any evidence, the judgment must be reversed. Counsel for respondent contend that the pleadings were amended at the trial in such a manner as to eliminate the above-stated allegation as to total number of shares of stock outstanding at the time in question and to substitute an allegation conforming to finding No. 6. It seems to be true, according to a quotation from the transcript as made by them, that the court allowed the parties to amend their pleadings to conform "to the facts and proof in the matter." But the more complete quotation given by counsel for appellant limits the amendment made at the trial to the following:

> "That the plaintiff amends and alleges the contract to have been made on August 14th, and that the answer is amended to show that the defendant alleges that he had no stock on that date."

Counsel for respondent do not suggest that any proof was made on the subject before us, except that they introduced in evidence the articles of incorporation of Maier Pier Company, executed eight days before the making of the corporation's contract with the plaintiff, with the statement made by counsel that, as shown by those articles, 5 shares of the stock of the corporation were subscribed, of which the defendant Maier subscribed for 1 share. They admit, however, that these articles "were not copied into the record by the reporter, but this no doubt was through an oversight on his part." There has been no suggestion of diminution of the record, and it does not appear that respondent made any effort to have the record completed so as to have presented before this court this evidence which is vital to his case. However, we are of the opinion that upon the allegations of the complaint, as they stood admitted by the defendant, there was no issue upon the subject of number of shares of the corporation then outstanding. The plaintiff was not entitled to raise such an issue by introducing evidence, to which defendant duly objected, contradicting the allegations contained in its own complaint.

The judgment is reversed.

We concur: JAMES, J.; WORKS, Judge pro tem.

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36 Cal. App. 512

Ex parte CORREA. (Cr. 599.)

(District Court of Appeal, Second District, California. March 14, 1918.)

OBSCENITY 🔑11—COMPLAINT—SUFFICIENCY.

Under Pen. Code, § 311, providing that every person who willfully and lewdly exposes his person or the private parts thereof in any public place, or in any place where there are present other persons to be offended or annoyed, is guilty of a misdemeanor, a complaint charging that defendant at the time and place named did "willfully and unlawfully expose his person," etc., was insufficient, in that it did not allege that the acts were done "lewdly."

In the matter of the application of Jose Correa for a writ of habeas corpus. Granted, and applicant ordered discharged from custody.

N. D. Meyer, of Santa Ana, for petitioner. L. A. West, Dist. Atty., and Arthur E. Koepsel, Deputy Dist. Atty., both of Santa Ana, for respondent.

PER CURIAM. Habeas corpus. Jose Correa is in the custody of the sheriff of the county of Orange under a commitment issued out of the justice's court of Anaheim township, Orange county. In that court Correa was convicted of an alleged misdemeanor pursuant to a complaint which charged that the defendant at the time and place named did "willfully and unlawfully expose his person," etc. It is admitted that by the complaint it was attempted to charge the offense described in section 311 of the Penal Code. That section, so far as applicable to this case, is as follows:

> "Every person who willfully and lewdly, either: One. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; * * * is guilty of a misdemeanor."

It is manifest, upon an inspection of the complaint, that it failed to charge the offense described in the statute. It was not alleged that the acts described were done "lewdly," nor were any words of equivalent meaning used in the complaint. An essential element of the crime being thus omitted, the complaint did not state a public offense.

It is ordered that the prisoner, the said Jose Correa, be discharged from custody.

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36 Cal. App. 469

JOHNSTON v. MURPHY. (Civ. 2324.)

(District Court of Appeal, First District, California. March 7, 1918.)

1. Mortgages 🔑40 — What Constitutes — Form.
   A letter accompanying a note, which read, "This is to certify that there is due you a sum of $4.000 secured by a lien upon certain land," when not accepted or received or treated by the recipient as a mortgage, and in the absence of showing that it was so intended by the sender, would not be considered a mortgage.

2. Equity 🔑65(2) — Clean-Hands Doctrine.
   Where defendant deceived the mortgagee into giving him a deed for the land and then deeded it to his wife, he was in no position to defeat recovery on the note later given, on the ground that an instrument, not on its face a mortgage, was such in fact, and that the suit should have been for foreclosure thereof, especially where the bar of limitations could have been invoked against a later suit on the note, since unconscientious conduct, even without fraud or illegality, precludes resort to equity.

3. Evidence 🔑588—Cross-Examination—Reconciling Conflicting Statements.
   Where statements of witness on cross-examination, though apparently contradicting his statements on direct examination, were capable of reconciliation therewith, it was the duty of the court to reconcile them.

4. Appeal and Error 🔑984(5)—Review—Attorney's Fees—Discretion.
   In action on note empowering court to fix attorney's fees, the court has a discretion which will not be disturbed, in the absence of abuse as to the amount to be awarded.

Appeal from Superior Court, Alameda County; J. O. Moncur, Judge.

Action by James A. Johnston against Herman Murphy. Judgment for plaintiff, and defendant appeals. Affirmed.

Edward C. Harrison and Maurice E. Harrison, both of San Francisco, for appellant. Daniel O'Connell, of San Francisco, for respondent.

BEASLY, Judge pro tem. This is an action begun December 31, 1914, on a promissory note given by defendant to plaintiff. The principal defense is that the note was secured by a mortgage, and that the action should have been one of foreclosure.

The note was dated January 23, 1909. The alleged mortgage consists of a letter from the defendant to plaintiff, the body of which reads as follows:

> "I hereby certify that there is due to you the sum of $4,000. Said sum is secured by a lien upon that certain land comprising 937 acres in the rancho Los Positos, being the same land conveyed to me by Louis Aurrecoechea. The indebtedness is a prior claim to any lien I may have."

The letter was not acknowledged nor recorded.

The transactions between the parties of which this letter formed an incident may be stated more at large as follows: The defendant, Murphy, during or perhaps before the year 1902, acting for one Aurrecoechea, borrowed $4,000 from plaintiff, and Aurrecoechea executed a mortgage on a ranch belonging to him to secure payment of the loan. In 1904 Murphy purchased the ranch from Aurrecoechea, and on July 19, 1906, he conveyed it to his wife. This deed was not recorded until June 30, 1908. Some time in the early summer of 1908—so Johnston testified—Murphy induced him to sign what he, Johnston, supposed was a release of a part of the ranch from the lien of the Aurrecoechea mortgage, but what turned out to be a deed of the entire ranch to Murphy. This deed was not recorded until November, 1906. Johnston did not learn until January 23, 1909—the date of the note in suit—of the true character of the paper he had signed in 1906, namely, of the deed to Murphy of the whole ranch, nor that this deed released the ranch from the lien of the mortgage; nor was anything said by Murphy even at that time about the deed to Mrs. Murphy, and it appears from Johnston's evidence that although the letter which defendant now seeks to have construed to be a mortgage is dated November 1, 1906, it was actually received by Johnston through the mail and after the execution of the note in suit. It also appears that Johnston kept this letter but made no reply to it; that is to say, it does not appear that he accepted it or treated it as a mortgage.

[1, 2] Upon the facts, the defendant desires to defeat recovery on this note by claiming that the letter in question is a mortgage, and argues that if it is not as a matter of law such, it should be so construed in equity. We cannot agree with him, for the reason, among others, that it is evident that Johnston did not receive or accept or treat it as a mortgage; nor does it appear upon its face, nor from the surrounding circumstances in evidence, that Murphy ever so intended it. Counsel suggests that it is "an imperfect attempt to create a mortgage" which will be considered a mortgage in equity, but it seems to us, in view of the defendant's conduct throughout these transactions, that he is in no position to invoke the aid of equity to have this paper declared a mortgage, a result which would defeat the collection of the note in this action. And it could not be collected in a new action should the defendant plead the bar of the statute of limitations. It is quite plain from the evidence that the trial court decided that Murphy had deceived Johnston into releasing the Aurrecoechea mortgage in full, and that the latter was not undeceived until after the note sued on here was executed. At that time Murphy's mortgage would have been of no value, for Mrs. Murphy owned the property, and Murphy refused to let her even sign the note. Upon these facts Murphy cannot be permitted to call upon a court of equity and conscience to indirectly relieve him from the payment of a just debt by holding this mere letter to be a mortgage. "It is not alone fraud or illegality which will prevent a suitor from entering a court of equity; any really unconscientious conduct connected with the controversy to which he is a party will repel him from the forum whose very foundation is good conscience." 1 Pomeroy's Eq. Juris. (3d Ed.) § 404.

[3] Defendant claims that the amount of interest included in the judgment is excessive. Without going into the computation here it is sufficient to say that we find no error in the amount allowed by the trial court under this head. The plaintiff testified clearly as to the payments, and they were not disputed. It is claimed, however, that the plaintiff contradicted this testimony on cross-examination; but his testimony on cross-examination was susceptible of reconciliation with that on direct examination, and it was accordingly the duty of the court to reconcile this testimony. This it patently did.

[4] The judgment provides for $700 attorney's fees, which defendant objects is excessive. Under the provisions of the note the duty of fixing a reasonable fee for plaintiff's attorney rested upon the trial court; and its judgment in that matter will not be disturbed unless its discretion has been abused. Berkeley, etc., v. Miller, 23 Cal. App. 315, 137 Pac. 1101. The court's discretion does not seem to have been abused in this case considering the work of counsel evidenced by the record.

Judgment affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

36 Cal. App. 511

Ex parte SCHWITALLA. (Cr. 597.)

(District Court of Appeal, Second District, California. March 13, 1918.)

1. CRIMINAL LAW ⚷238—PRELIMINARY EXAMINATION—PROBABLE CAUSE—UNCORROBORATED ACCOMPLICE TESTIMONY.

The uncorroborated testimony of an accomplice may be sufficient to establish probable cause for the magistrate's action in holding accused to answer for trial, and in committing him.

2. CRIMINAL LAW ⚷238—PRELIMINARY EXAMINATION — UNCORROBORATED ACCOMPLICE TESTIMONY.

While a defendant cannot be convicted upon the uncorroborated testimony of an accomplice, the testimony of an accomplice is sufficient to make it appear that there is a "probability" that defendant has been guilty of the offense charged.

Application by Alexis M. Schwitalla for a writ of habeas corpus. Writ discharged, and petition remanded.

Harry A. Chamberlin, of Los Angeles, for petitioner. Thomas Lee Woolwine, Dist. Atty., and Asa Keyes, Deputy Dist. Atty., both of Los Angeles, for respondent.

JAMES, J. Habeas corpus. Petitioner asks to be discharged from the custody of the sheriff of Los Angeles county to which he was heretofore committed by a magistrate. A complaint in sufficient form, charging defendant with the crime of arson, was filed before the magistrate and after examination had, at which testimony was taken, the order holding defendant to answer for trial to the superior court was made and commitment issued.

[1] One contention urged is that the evidence was insufficient to establish probable cause for the holding of the defendant. The principal evidence against the defendant was furnished by an accomplice in the alleged crime. This accomplice very fully narrated the acts which the defendant did and which were participated in by the witness, all of which showed that the fire was the result of a deliberate plan of the defendant. There was the further testimony of a witness who was not an accomplice, wherein it was shown that the defendant, some months prior to the time the building was burned, solicited the co-operation of that witness to the end that the building which was ultimately destroyed should be set fire to. We are not prepared to concede, notwithstanding the holding made by the Supreme Court of Nevada in Ex parte Oxley, 38 Nev. 379, 149 Pac. 992, that the uncorroborated testimony of an accomplice may not be sufficient to es-

tablish probable cause. We think that it may be sufficient.

[2] While a defendant cannot be convicted upon the uncorroborated testimony of an accomplice, the testimony of an accomplice is admissible and is proper to be considered, and we think is sufficient to make it appear that there is a "probability" that a defendant has been guilty of the offense charged against him. Our Supreme Court, in People v. Cokahnour, 120 Cal. 253, 52 Pac. 505, held that the unsworn written confession of a defendant, which constituted the entire evidence submitted to the committing magistrate, was sufficient to justify an order determining that probable cause existed upon which the defendant was held to answer. See, also, Ex parte Heacock, 8 Cal. App. 420, 97 Pac. 77. And we may add that, to our minds, the testimony of the independent witness who gave evidence of the plan of the defendant to burn the building several months prior to the time the fire actually occurred furnished some corroboration, slight though it was, of the testimony of the accomplice.

The writ is discharged, and petitioner remanded to the custody of the sheriff of Los Angeles county.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

36 Cal. App. 479

JOLLY v. McCOY. (Civ. 1524.)

(District Court of Appeal, Third District, California. March 11, 1918. Rehearing Denied by Supreme Court May 9, 1918.)

1. HUSBAND AND WIFE ⇨131(1) — OWNERSHIP—BURDEN OF PROOF.

In a wife's action against the sheriff for the conversion of personalty taken and sold under writ of execution pursuant to judgment rendered against her husband, the burden to prove her ownership of the property was upon plaintiff wife.

2. HUSBAND AND WIFE ⇨262(1)—COMMUNITY OR SEPARATE PROPERTY—POSSESSION OF HUSBAND—PRESUMPTION—STATUTE.

Where personalty was in the possession of the husband, and treated by him as though it were community or his own separate property, from the circumstances a disputable presumption follows, under Code Civ. Proc. § 1963, subd. 12, that such was its character.

3. APPEAL AND ERROR ⇨1064(1)—HARMLESS ERROR—INSTRUCTION—"ACQUIRE."

In a wife's action against the sheriff for the conversion of personalty under execution pursuant to judgment against her husband, the wife claiming the property was her separate estate, the instruction that in determining the question as to who was the owner the jury had a right to consider the manner in which the property was acquired and by whom, where it was kept, how it was handled, and by whom controlled, etc., though open to criticism as lying close to the line between law and fact, and being somewhat confusing, was harmless to plaintiff, since the word "acquire" has not only the meaning of to obtain as one's own, but also the meaning of "procure," in which sense the jury may have understood it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Acquire.]

4. TRIAL ⇨191(4)—INSTRUCTIONS—ASSUMPTION OF QUESTION IN ISSUE.

Instructions that the use of the property by the husband, and his control of it, or any part of it, did not change its status from the wife's separate property, etc., and that the mere fact that the property was seemingly in the possession and apparent control of the husband did not estop the wife from claiming the stock, or deprive her of her separate property, were objectionable, as assuming the property was the separate estate of the wife, the question in issue.

5. TRIAL ⇨260(6)—INSTRUCTIONS—REQUESTS—MATTERS COVERED.

Where the court instructed that certain insurance money with which the property was purchased was the wife's separate property, and that, if the money was used by her to buy some or all of the property sued for, such property also became the wife's separate property, she could not ask for more as to such feature of the case, and her proposed instruction that the deposit of the insurance money by her in bank in her own name and the name of her husband was not a gift to him, unless she intended to give, could have been of no greater benefit to her.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Mrs. Minnie Jolly against Chas. J. McCoy. From a judgment for defendant, plaintiff appeals. Affirmed.

John M. Fulweiler, of Auburn, and E. Ray Manwell, of Marysville, for appellant. W. H. Carlin, of Marysville, for respondent.

BURNETT, J. The action was for damages for conversion of certain personal property of the alleged value of $1,871. The defendant is the sheriff of the county, and he justified his taking and sale of the property under a writ of execution issued in pursuance of a judgment rendered in the superior court of said county against A. Jolly, the husband of the plaintiff herein.

The claim of appellant was and is that said property sold under said execution was her separate estate, and therefore not liable for the debts of the husband. Plaintiff, her husband, and their son all testified to facts from which the jury might legally have drawn the inference that her claim was just, and, if the verdict had been in her favor, we should have no hesitation in affirming it as amply supported. But the jury distrusted these witnesses, and it is apparent, also, that the trial judge was not convinced that they were entitled to full credit, as he denied the motion for a new trial. Since we have not had the witnesses before us, we cannot say that such attitude of the court and jury was unwarranted. Indeed, we may add that the printed record of their testimony reveals certain circumstances that tend to justify the suspicion with which their statements were undoubtedly received by the jury. These we need not stop to particularize.

[1, 2] As to the support for the verdict, unless the jury believed the story told by said witnesses, it was their duty to find for

the defendant, since the burden of proof was upon the plaintiff. The peculiar province of the jury in such matters is fully considered by this court in Clark v. Tulare Lake Dredging Co., 14 Cal. App. 414, 112 Pac. 564, and in this connection it is sufficient to refer to that decision. Besides, the evidence showed that all of the property was in the possession of said A. Jolly, and treated by him as though it were community or his own separate property. From this circumstance, the presumption—disputable, it is true—would follow that such was its character. Code Civ. Proc. § 1963, subd. 12.

The observation may not be out of place that fraudulent claims as to the ownership of property under similar conditions are often made, and the court or jury should scrutinize with care an asserted right, which has been quiescent until credit may have been extended on the faith that such right does not exist. No doubt such claims are sometimes genuine, and, where so established, they should be protected; but it is hardly to be expected that they will be regarded without some suspicion. We may add that, as to a portion of the property which plaintiff claims she obtained from her husband, the jury was justified in concluding that there was not an immediate delivery and continuous change of possession within the contemplation of section 3440 of the Civil Code. Upon the whole it cannot be said that the verdict of the jury lacks legal support.

[3] Another question seriously argued arises over the action of the court in reference to the instructions. Most of them are unobjectionable, however, and therein were presented quite fully the legal principles bearing upon the theory of plaintiff as well as of defendant, and the general axioms that should be regarded by the jury in every case. The following, though, is somewhat open to criticism:

> "I instruct you that, in determining the question as to who was the owner of the property claimed by plaintiff herein at the time of the levy of the writ of execution therein by the defendant, you have a right, and it is your duty, to consider the manner in which said property was acquired and by whom, where it was kept, how it was handled, and by whom controlled, whether or not it was mingled with other property admittedly belonging to the husband of plaintiff, whether or not there was anything about the use, possession, or control of said property, or anything at all about the use, possession, or control of said property, or anything at all in connection with the property, to indicate that it belonged to any other person other than the husband of plaintiff, and all the facts and circumstances bearing upon the question, as the same is made to appear to you from the evidence; and if, from the consideration of all thereof, you are not satisfied by a preponderance of the evidence that said property was the separate property of plaintiff at the date of the levy of the writ of execution, your verdict should be in favor of defendant."

The instruction lies close to the line between law and fact. It is not strictly a direction as to the weight of the evidence, but it seems rather objectionable as emphasizing certain features that were developed by the testimony in the case. No doubt, respondent in his argument to the jury, laid particular stress upon the facts suggested in the instruction, and the peculiar phraseology thereof might be seized upon by the jury as an argument in favor of the defendant. In other respects, also, the instruction is somewhat confusing. The jury was directed "to consider the manner in which said property was acquired and by whom." One meaning of the word "acquire" is to "obtain as one's own." An ultimate fact to be determined by the jury was really, "By whom was the property acquired?" The instruction, however, puts this ultimate fact upon the same footing as certain evidentiary matters, and directs the jury to consider this in connection with other facts, to determine who was the owner of the property; whereas it would seem to be true that, if they were satisfied as to who had "acquired" the property, that would be equivalent to a determination as to who was the owner. If the instruction had declared that in the determination of "who had acquired or owned the property the jury should consider the manner in which the property was obtained, where it was kept, how it was used, and whether mingled with other property of the husband," etc., there would be less ground for criticism. But it is fair to say that the word "acquired" has also the meaning of "procured," and it is not unreasonable to hold that the jury so understood it. Indeed, while we think the instruction is somewhat obscure and of doubtful propriety, the common understanding would probably accept it as a direction to consider the manner in which the property was procured and how it was used, with other circumstances disclosed by the evidence, in the determination of the ownership of the property. Besides, the other instructions were so clear and favorable to appellant that we are satisfied she suffered no prejudice in this matter.

[4] Among certain instructions requested by the plaintiff and refused by the court was the following:

> "The use of the property by the husband, and his control of the same, or any part of said personal property of the wife, did not change the status of the property from the plaintiff's separate property, or make it liable to levy and sale to pay the debt of Jolly & Son, or either of them."

This was also refused:

> "The mere fact that the property was seemingly in the possession and apparent control of the husband does not estop the wife from claiming the stock, or in any wise deprive the wife of her separate property therein."

Both instructions were objectionable in assuming that the property was the separate estate of the wife—the very question which the jury was to determine. If appellant had requested the court to instruct the jury that the mere possession, use, and control of the property by the husband was not inconsistent with the ownership of the wife, or was not sufficient to transfer title, it would probably have been given. To say that it "did not change the status of the property from the plaintiff's separate property" was, of course, to assume that it had such status. If the phrase "would not" had been used, the situation might be different.

[5] Another instruction refused was this:

> "The deposit of the insurance money by the plaintiff in the bank in her own name and in the name of the husband was not a gift to him, unless she then intended to give the same absolutely to him; and it is the intent with which that deposit was made in the bank that must appear by a preponderance of the evidence to have been to divest herself of all interest in the money and make it the money of her husband, and so long as she held the bank book, and the control of the money, it could not in law be a gift to her husband."

It appears from the evidence without any question that plaintiff had received something over $2,500 as insurance money and had deposited it as suggested in said proposed instruction. It was the claim of appellant that with this money she purchased the property in controversy here, and, to meet the possible conclusion that the money became community property by reason of the form of the deposit, the instruction was requested. The court, however, virtually instructed the jury that the money was the separate property of the wife, and also:

> "That if this money thus received by plaintiff was by her or under her instructions used to buy some or all of the personal property described in the complaint, then such personal property, thus purchased, became and was her separate property, and was not liable to levy and sale to pay the debts of her husband, A. Jolly & Son, Raphael Jolly, or that of either of them."

As a matter of law, therefore, the court instructed the jury that under the evidence this money was the separate property of the plaintiff. She could not ask for more as to this feature of the case, and the proposed instruction could have been of no greater benefit to her. Indeed, it is quite apparent that, since the court instructed the jury that this insurance money was the separate property of the wife, and, that, if she used it in the purchase of any of the property in controversy, that property was also her separate property and not liable for the debts of her husband, it left only one question for the jury to determine and that is whether she so purchased it. If they believed she did purchase it with said money, under this instruction of the court, they must have found for the plaintiff, notwithstanding any possession, use, or control by the husband. It appears clear, therefore, that no specific instruction as to a change of title by virtue of the use of the property could have been of any avail to appellant, and also that the instruction given on behalf of respondent, to which we have adverted, could only have been considered by the jury in deciding whether any of the property was actually purchased with the insurance money. It is thus to be seen how exceedingly favorable to appellant was the law presented by the court.

The question of the intention of the wife to make a gift to the community or to her husband, and the consideration of the use and control of the property, were entirely eliminated, and the jury were expressly told that, if any of the insurance money was used to purchase any of said property, they must find it to be plaintiff's separate property and not subject to execution. Respondent might have some cause to complain of this instruction, but not so the appellant. While the case is not altogether free from difficulty, we think it cannot be said that the verdict is unjust.

The judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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36 Cal. App. 503

TURNER v. WATKINS. (Civ. 2114.)

(District Court of Appeal, Second District, California. March 12, 1918.)

1. PLEADING 🔑122—ANSWER—SUFFICIENCY.

Denial in answer predicated upon a lack of information only, and not upon a lack of information and belief, is insufficient under Code Civ. Proc. § 437, providing that, if defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground.

2. TRIAL 🔑25(4)—OPENING AND CLOSING—AFFIRMATIVE DEFENSE — ANSWER — SUFFICIENCY.

In action for commission for furnishing one ready to exchange land, affirmative allegations in answer that the exchange was not "consummated," that defendant was at all times ready to exchange and failure was not his fault, and that the deal fell through because of misrepresentations of the broker, did not amount to a traverse of anything averred in the complaint, and where the denial was insufficient, the court properly required the defendant to go forward at the opening of the trial with his affirmative defenses.

3. BROKERS 🔑51 — EXCHANGE OF LANDS — "CONSUMMATE."

Where broker agrees to "consummate" an exchange of land within 30 days, he has done his part by bringing the parties together so that his principal could have carried through the deal in such time.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Consummate; Consummated Sale.]

4. BROKERS 🔑86(7)—EXCHANGE OF LANDS—COMMISSION—SUFFICIENCY OF EVIDENCE.

In action by broker for furnishing one ready to exchange lands, evidence *held* sufficient to sustain finding that deal did not fall through by reason of false representations of the broker.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by E. C. Turner against Roy S. Watkins, administrator of the estate of W. C. Watkins, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

A. T. Roark, of San Diego, for appellant. John F. Greer and W. P. Cary, both of San Diego, for respondent.

WORKS, Judge pro tem. This is an action for the recovery of a broker's commission for an exchange of real property, under a contract between the plaintiff and the defendant's intestate, W. C. Watkins. The plaintiff had judgment, and the defendant appeals.

[1] At the opening of the trial the respondent contended that the denials of appellant's answer were insufficient to present a defense, and asked the court to rule that the appellant should go forward with his proof in support of certain affirmative defenses set up in the answer. The court ruled accordingly, and the ruling is assigned as error. The claim that the denials of the answer were insufficient was based upon the fact that they were preceded by the following statement, ending with a colon:

> "Not having sufficient information on which to base his answer, defendant denies:"

Section 437 of the Code of Civil Procedure contains this language:

> "If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground."

It will be observed that the denials in the answer in this action were predicated upon a lack of information only, and not upon a lack of information and belief. A denial in that form is insufficient; for section 437 permits a denial only upon the want of both information and belief, and not upon a want of information alone. Humphreys v. McCall, 9 Cal. 59, 62, 70 Am. Dec. 621.

[2] The appellant insists, however, that the affirmative allegations of his answer present a state of facts inconsistent with the allegations of the complaint, and that for that reason the answer amounted to a traverse of the complaint; and he accordingly contends that the respondent should have been compelled to go forward with the introduction of evidence in support of the complaint. The affirmative matter in the answer was to the effect that the exchange for the bringing about of which the respondent claimed a commission "was not consummated within the 30 days set apart for that purpose, nor during any other period of time, nor has said exchange yet been consummated by the parties to said deal," and that the failure to consummate it was not due to any fault of appellant's intestate, but that he was always "ready and anxious" to carry out the arrangement. It is also alleged that the failure to consummate the deal was occasioned by the fact that the respondent made certain misrepresentations to the parties on the other side; the misrepresentations having to do with the matter of the value of and the income derived from his principal's property. The allegation that the exchange was not consummated within 30 days arose from the fact that there was a provision in the commission contract to the effect that it was to be consummated within that time; but that allegation, as well as the allegation that it was never consummated at any time, negatived nothing in the respondent's pleading, for respondent does not contend that the deal ever went through, and it is his theory of the case that he is entitled to a commission because he brought the parties together, the other side, as he alleges, having at all times been ready, able, and willing to make the exchange. The allegation of the answer that the failure to consummate the exchange was not due to any fault of appellant's intestate, and that he was at all times desirous of carrying it out, is a plain allegation of new matter, as there was no averment upon the subject in plaintiff's pleading. The statement of the answer that the deal fell through because of misrepresentations made by the respondent is, of course, not responsive to anything in respondent's pleading. It is plain, then, that the affirmative allegations in the answer did not amount to a traverse of anything averred by respondent in his pleading.

[3] The contract upon which the action was based provides, in part, that appellant's intestate "agrees to pay E. C. Turner a commission * * * on account of above exchange; said exchange to be consummated on or before thirty days from date first above written." As already remarked, the respondent does not contend that the deal ever was completed. He claims that the commission was earned when he presented to his principal the parties on the other side, one Brown and one Anderson, and by his principal having entered into an agreement with them for the exchange, within the 30 days limited in the commission agreement, which the record shows he did. The appellant insists, however, that the deal could have been consummated, in the sense intended by the commission agreement, only by the passing of deeds between the parties, and that therefore no commission was earned. Our courts have long adhered to the rule that a broker who contracts to sell has earned his commission when he has presented to his principal one who is ready, able, and willing to buy (Phelps v. Prusch, 83 Cal. 626, 23 Pac. 1111; Purcell v. Firth [Sup.] 167 Pac. 379); and in the latter case the commission was to have been paid, under the written agreement between the parties, when the sale was "consummated." The only difference, then, between that case and this lies in the fact that in the one the broker was to be paid upon the consummation of a sale, while in the other he was to be paid upon the consummation of an exchange, which, to our minds, is, in legal effect, no difference at all. The exchange was consummated to the extent that such a result could have been brought about by the respondent. The parties principal or

both sides had entered into an agreement for the exchange, and over the performance of the terms of that agreement he could exercise no control. All the services he could have performed in the premises were completely rendered, and his commission was earned.

[4] Upon the issue as to whether the failure to complete the deal between the principals was because of misrepresentations made by the respondent to Brown and Anderson, the trial court found with the respondent. The appellant contends that the finding lacks support in the evidence, but the contention is untenable. It is enough to say, without making a more detailed statement of the evidence, that: First, the respondent never had any dealings with Anderson in the matter of the proposed exchange; and, second, if it be conceded for the purpose of the argument that misrepresentation was made by the respondent to Brown, the latter testified that the statements were not ascertained to be incorrect until "after the deal was turned down."

In his opening points and authorities A. T. Roark, the counsel for the appellant, quotes language as coming from a certain reported case, but it is found only in the brief of the party unsuccessful on the appeal which is there decided; he cites two cases to a proposition of law stated within quotation marks, the language not being found in the report of the case first cited, and being stated in a dissenting opinion in the report of the second; he cites four cases to a statement within quotation marks, and the quoted language is found in none of them; he quotes from the opinion in another case, but omits from his quotation an important clause found in the opinion, and without indicating the omission in any way; he quotes certain language as being in the case last mentioned when it is not to be found in the opinion, and he later commits the same offense as to another reported case. Counsel for the respondent calls attention in his points and authorities to all these derelictions, and, in addition, specifies two or three other faults of the same character. We have not examined into these latter charges because of the length of the reports of the cases in which they are involved. In his reply points and authorities Mr. Roark has only this to say upon the subject which now interests us:

> "Respondent, after offering a great variety of criticisms to citations of law quoted by appellant bearing on the point as to what constitutes consummation of a real estate broker's contract, was charitable enough to concede that the laws of the states of Maryland and Georgia dealing with contracts of this character support appellant's contention."

The amazement with which we view the conduct of Mr. Roark in the matter of the erroneous citations and quotations in his points and authorities is heightened by the cavalier manner in which he seeks to dismiss the subject. If in fact these misquotations were no more than the result of gross carelessness, he should have admitted the facts, with an apology and a suggestion of any excuse that he might have for committing such errors. Nothing less was due to the court, which is entitled to rely upon counsel for a true statement of the language contained in quoted decisions. He has left himself in a very poor position to urge the charge made in his reply brief that opposing counsel has pursued a certain course in framing his argument, "for the purpose of confusing this court."

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

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36 Cal. App. 508

UNWIN v. BARSTOW-SAN ANTONIO OIL CO. (Civ. 2121.)

(District Court of Appeal, Second District, California. March 12, 1918.)

1. ATTORNEY AND CLIENT 🔑75(1) — WITHDRAWAL OF ATTORNEY—NOTICE OF SUBSTITUTION.
Code Civ. Proc. § 286, requiring that when an attorney withdraws the party for whom he is acting must, before further proceedings are had against him, be required by the adverse party in writing to appoint another attorney or appear in person, does not apply when, at the time of the withdrawal, the client serves notice that he appears in person, since giving notice would then be a futile thing.

2. COSTS 🔑203—TAXATION—KEEPER'S FEES.
Since, under Code Civ. Proc. §§ 1033, 1035, costs cannot be determined until disposition of pending motion to tax, an order just prior to denial of a motion to tax, fixing keeper's fees in favor of the sheriff, as permitted by Pol. Code, § 4300b, was in time, and such item was properly included in the cost bill.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by B. V. Unwin against the Barstow-San Antonio Oil Company. From a judgment for plaintiff, and an order denying defendant's motion to tax costs, defendant appeals. Judgment and order affirmed.

Fred A. Wilson, of San Bernardino, for appellant. C. C. Haskell and John A. Hadaller both of San Bernardino, for respondent.

WORKS, Judge pro tem. This cause is before us on two appeals by the defendant; one being from the judgment, and the other from an order denying the defendant's motion to tax the costs in the action.

There is but one point presented on the appeal from the judgment. The first appearance of appellant in the action was by a demurrer to the complaint, filed in its behalf by an attorney at law. In the due course of procedure in the action the demurrer was overruled and time was allowed to answer. On a certain day thereafter the appellant served and filed a notice to the effect that its attorney had withdrawn from the case. The notice was attached to a document signed by the appellant and by its retiring attorney, which stated that it was "stipulated and agreed" between them that the attorney "may, and he does hereby, withdraw from said action as attorney for said defendant therein, and that the said defendant may, and it does hereby, appear in said action in person and without attorney." In addition to its appearance, thus formally entered by the appellant in person, it did, on the same day, serve and file its answer in the action, signed by itself by its resident agent. Thereafter the respondent caused the case to be set down for trial. Upon the date set, the appellant having employed new counsel in the interim, it was objected by him that the court had no jurisdiction to proceed with the trial on the ground that respondent had not complied with the provisions of section 286 of the Code of Civil Procedure, which provides:

> "When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action, for whom he was acting as attorney, must, before any further proceedings are had against him be required by the adverse party, by written notice, to appoint another attorney, or to appear in person."

[1] The court overruled the objection, and it is complained that the ruling was erroneous. The contention cannot be sustained. The only object of the notice contemplated by the statute is to require of a party whose attorney has ceased to act that he appoint a new attorney or appear in the action in person. In this case the appellant had voluntarily appeared in person on the same day that respondent had notice that the attorney had ceased to act. It would be useless, in any situation, and speaking generally, to require one to do a thing which he had already done. The statute, in this instance, does not require the commission of such an act of folly.

[2] On the appeal from the order the question which is presented has to do with the taxing, as costs, of an item of keeper's fees under an attachment. Section 4300b of the Political Code provides that there shall be allowed the sheriff, as keeper's fees, "such sum as the court may fix." The respondent served and filed his cost bill, and in it he included a certain sum for keeper's fees. The appellant made its motion to tax the costs specified in the cost bill by striking out the sum charged for keeper's fees on the grounds that the item was not legally chargeable as costs, that it was not necessarily incurred, that it had not been legally fixed as required by law, and that it was prematurely charged and included as costs. On the day that the motion to tax came on for hearing, the court made an order fixing the amount charged in the cost bill for keeper's fees as a proper sum to be charged for the service rendered. The court then made its order denying appellant's motion to tax.

Appellant contends that the item was not properly included in the cost bill for the reason that the order of the court fixing it as a proper charge was not made before the cost bill was filed. No authorities are cited which support this contention, although several decided cases are presented which are to the effect that keeper's fees are not recoverable as costs where there is an entire absence of such an order as was here made on the day the motion to tax was passed on. These cases are in no way helpful in the solution of the question now presented, and we are unable to see why, in such a case, the order need be made earlier than it was made in the present instance. The amount in question had no standing as an item of chargeable costs, even though it appeared in the cost bill, until the order was made disposing of appellant's motion to tax, for the costs in an action are not determined, and the amount of them cannot be inserted in the judgment until disposition is made of any pending motion to tax. Code Civ. Proc. §§ 1033, 1035. The order fixing the amount of the keeper's fees was in time.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

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36 Cal. App. 529

REYNOLDS v. E. CLEMENS HORST CO.

(Civ. 1731.)

(District Court of Appeal, Third District, California. March 15, 1918.)

1. Appeal and Error 🔑1188—Remittitur—Powers of Court.

The appellate court has inherent power to grant application for stay of issuance and transmission of remittitur in order to permit application to Supreme Court of the United States for certiorari, where a jurisdictional question is involved.

2. Appeal and Error 🔑1188—Remittitur—Powers of Court.

Where there is ground on which the United States Supreme Court might issue a writ of certiorari to review a state court decision, though there is some doubt, stay of issuance and transmission of remittitur to the trial court pending application for such writ will be granted, where no prejudice will result, and otherwise irreparable injury might be done.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Susan M. Reynolds against the E. Clemens Horst Company. On defendant's application for stay of issuance and transmission of remittitur. Application granted.

See, also, 170 Pac. 1082.

Harrison & Harrison, of San Francisco, and H. P. Andrews and W. A. Fish, both of Red Bluff, for appellant. Frank Freeman, of Willows, and James T. Matlock, of Red Bluff, for respondent.

PER CURIAM. This is an application by appellant for a stay of the issuance and transmission of the remittitur from this court to the superior court of the county of

Tehama. The application is made in order that appellant, before execution of the judgment, may have an opportunity to apply to the Supreme Court of the United States for a writ of certiorari; it being contended that said superior court had no jurisdiction of appellant by reason of its residence in another state. The judgment of the lower court was affirmed by this court on December 28, 1917 (170 Pac. 1082), and a petition for a rehearing was denied. On February 25, 1918, the Supreme Court denied a petition to have the cause heard by that court, and the judgment has therefore become final as far as the state courts are concerned.

[1] There is no doubt this court has inherent power to grant the application. The same principle is involved as in the exercise of the power of courts of common law to temporarily stay execution of their judgments, whenever it was necessary to accomplish the ends of justice. Eaton v. Cleveland Ry. Co. (C. C.) 41 Fed. 421. Indeed, it is not disputed by counsel for respondent that the power exists. Attention is called to the fact that the Supreme Court has exercised control over remittiturs even after their issuance to prevent wrong and injustice. Trumpler v. Trumpler, 123 Cal. 248, 55 Pac. 1008.

[2] Respondent, however, contends with much learning and the citation of numerous decisions of the United States Supreme Court that there is no substantial ground for the belief that said court will entertain the writ. It has undoubtedly been decided by that tribunal that where, as herein, an action has been begun in a state court and then transferred to a federal court, and by the latter remanded to the state court, an appeal or writ of error will not lie to the Supreme Court of the United States. However, it is the contention of appellant that the rule has been changed by an amendment passed by Congress September 6, 1916, to the Federal Judicial Code (U. S. Comp. St. 1916, § 1214), and that the remedy of certiorari may be invoked.

We think appellant is in error, but courts do not always agree, and the Supreme Court of the United States might, of course, find merit in appellant's position. At least, there is some room for candid disputation, and, since it does not appear that respondent will suffer any injury by a short delay in the execution of the judgment, whereas appellant might suffer irreparable damage if the judgment should be carried into execution, and thereafter the Supreme Court of the United States should hold that the superior court was entirely without jurisdiction, we think the application should be granted. It must be understood, though, that this court will not voluntarily extend the time allowed unless some extraordinary reason should appear.

The remittitur will be stayed for 30 days.

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36 Cal. App. 486

TOWN OF CALISTOGA v. ADAMS, Town Clerk. (Civ. 1833.)

(District Court of Appeal, Third District, California. March 11, 1918.)

MUNICIPAL CORPORATIONS 🔑919—BONDS.

The act relating to the incurring of indebtedness by municipalities (St. 1901, p. 28), requiring municipal bonds to be payable annually in parts not less than one-fortieth part of the whole indebtedness, does not require annual payments to be uniform in amount.

Original application by Town of Calistoga for writ of mandamus against I. C. Adams, as Town Clerk of the Town of Calistoga. Writ granted.

Wallace Rutherford, of Napa, for petitioner.

PER CURIAM. The petitioner prays for the writ of mandate of this court commanding the respondent, as town clerk of the town of Calistoga, to countersign certain bonds issued under the authority of an ordinance passed by the town of Calistoga. The ordinance provided that:

> "Said bonds shall be called 'Waterworks Bonds', shall be forty in number, of the denomination of one thousand dollars each, and shall be numbered consecutively from one to forty, both inclusive, and shall be payable in numerical order consecutively, commencing with number one, in the manner following, that is to say: Bond No. 1 shall be paid on January 1st, 1919, bond No. 2 shall be paid on January 1st, 1920, bond No. 3 shall be paid on January 1st, 1921, bond No. 4 shall be paid on January 1st, 1922, bond No. 5 shall be paid on January 1st, 1923."

Bonds Nos. 6 and 7 were made payable on January 1, 1924, bond No. 8 January 1, 1925, and so on throughout the series, payments being at regular period but in irregular amounts, sometimes one bond maturing and sometimes two, bringing the final payment on January 1, 1939, 21 years after the issuance of the bonds.

Section 5 of the act relating to the incurring of indebtedness by municipal corporations, etc. (Stats. 1901, p. 28) reads, in part, as follows:

> "All municipal bonds issued under the provisions of this act shall be payable substantially in the manner following: A part to be determined by the legislative body of the municipality, which shall be not less than one-fortieth part of the whole amount of such indebtedness, shall be paid each and every year on a day and date, at the city treasury, to be fixed by the legislative branch of the municipality issuing the bonds, together with the interest on all sums unpaid at such date. * * *"

The objection now made to the manner in which the payments are to be made is that they do not conform to the statute, in that the annual installments are not uniform in amount. We see nothing in the act, either expressly or by implication, requiring that the payments shall be made at annual consecutive periods in equal amounts. The only limitation, apparently, is that payments shall not to be less than one-fourtieth part of the whole amount of the indebtedness.

At the argument the following cases were cited by petitioner which seem to support its contention: Simonton on Municipal Bonds, § 102; Turpin v. Madison Co., Fiscal Court, 105 Ky. 226, 48 S. W. 1085; Board of Com'rs of Kearney Co. v. Vandriss, 115 Fed. 866, 53 C. C. A. 192; Keith Co. v. Citizens' Svgs. & Loan Ass'n, 116 Fed. 13, 53 C. C. A. 525; City of Venice v. Lawrence, 24 Cal. App. 350, 141 Pac. 406.

In our opinion the provisions of the ordinance are authorized by the statute, and therefore it is ordered that the writ prayed for in the petition be granted.

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36 Cal. App. 472

LANTERMAN v. ANDERSON et al.

(Civ. 2407.)

(District Court of Appeal, Second District, California. March 8, 1918. Rehearing Denied by Supreme Court May 7, 1918.)

1. CERTIORARI 🔑28(1)—SCOPE OF REMEDY—RECORD.

The office of the writ of certiorari is to determine only whether the inferior board or court has acted in excess of jurisdiction, and the investigation of the trial court will go no further than to inspect the record as it appears written and to determine from that whether there has been action unwarranted by the powers given to the board or court whose proceedings are under review.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Certiorari.]

2. CERTIORARI 🔑5(1)—RECORD—REMEDY BY APPEAL.

The writ of certiorari cannot be used to take the place of an appeal or to add to or modify a record with respect to any jurisdictional fact therein determined.

3. CERTIORARI 🔑56(2)—SCOPE OF REVIEW—CONTRADICTION OF RECORD.

In certiorari to review order of board of medical examiners, revoking license of the petitioner to practice medicine, where the record recital was that a quorum of the board was present on the hearing, petitioner could not make a showing that one of the board absented himself for a time from the session.

4. CONSTITUTIONAL LAW 🔑80(2) — DIVISION OF POWERS—JUDICIARY—BOARD.

St. 1915, p. 184, providing for revocation of a physician's license to practice for professional misconduct, is not unconstitutional as conferring upon a board powers belonging strictly to the judicial department.

5. PHYSICIANS AND SURGEONS 🔑11(3)—REVOCATION OF LICENSE—COMPLAINT TO BOARD—SUFFICIENCY.

A complaint to the board of medical examiners, charging a physician in the language of St. 1915, p. 198, § 12, subd. 1, with attempting a criminal abortion, was sufficient, without stating the acts of the offense, since Pen. Code, § 950, requiring such statement, does not apply to proceedings before the board of examiners.

6. PHYSICIANS AND SURGEONS 🔑11(3)—REVOCATION OF LICENSE—EVIDENCE—TESTIMONY OF ACCOMPLICES.

Since a proceeding to revoke the license to practice of a physician is not criminal, the rule that a person may not be convicted upon the uncorroborated testimony of an accomplice does not apply in such proceeding.

7. PHYSICIANS AND SURGEONS 🔑11(3)—REVOCATION OF LICENSE — EVIDENCE—SUFFICIENCY.

Evidence *held* to warrant revocation of physician's license to practice on the ground that he aided in performing a criminal abortion.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Proceeding for writ of review by R. S. Lanterman against Harry E. Anderson and others. From a judgment affirming the proceedings and determination of the board of medical examiners revoking petitioner's license to practice medicine, petitioner appeals. Affirmed.

W. H. Dehm, Frank Dominguez, and W. J. Ford, all of Los Angeles, for appellant. John W. Hart, of Los Angeles, for respondents.

JAMES, J. This is an appeal from the judgment of the superior court rendered upon hearing of a writ of review and which judgment affirmed the proceedings and determination of the board of medical examiners of the state under and by which the certificate and license authorizing petitioner to practice medicine and surgery was revoked.

In the court below, by his petition, appellant set up a very complete record of the evidence and proceedings had before the respondent board. Respondents, not questioning the correctness of the record as there pleaded, objected to the legal sufficiency of the facts shown. The board further filed in the superior court affidavits to meet one allegation made in the petition of appellant. By that allegation it was asserted by petitioner to be the fact that one of the members of the board absented himself during the hearing, and that therefore no quorum was present at all times while the evidence was being taken. The charge made, and upon which the order revoking the license and certificate of petitioner was based, was that petitioner had been guilty of unprofessional conduct as defined by the state medical act. Stats. 1915, p. 184; Deering's Gen. Laws, 1915, p. 877. In section 12 of that act it is provided that the certificate of a physician may be revoked or suspended. It is first required that there shall be filed with the secretary of the board a sworn complaint, charging the holder of the certificate with "having been guilty of unprofessional conduct." It is then provided that the secretary shall issue a citation, requiring the certificate holder to appear at the next session of the board of medical examiners, which shall occur at least 30 days after the filing of the complaint. It is further provided that after issue has been joined by answer, the board shall proceed to determine the matter, and may hear such "proper" evidence as may be adduced before it. In the same section the things which shall constitute unprofessional conduct authorizing suspension or revocation of the certificate are specifically set forth. Appellant was charged under the first subdivision, which reads as follows:

> "The procuring or aiding or abetting or attempting or agreeing or offering to procure a criminal abortion."

The complaint made, in its charging part, was as follows:

> "That on or about June 19, 1916, the said R. S. Lanterman did, in the county of Los Angeles, state of California, procure, aid, and abet, and attempt, agree, and offer to procure a criminal abortion upon a pregnant woman, to wit, Elizabeth Johnson."

[1, 2] The first point made by appellant is that the trial court erred in refusing to take testimony upon the alleged issue as to whether one member of the board had absented himself during the taking of evidence. As before noted, the record of the proceedings had and testimony taken was made a part of the petition of the petitioner, and as to the correctness of that record or its completeness respondents made no issue. The office of the writ of certiorari is to determine only as to whether the inferior board or court has acted in excess of jurisdiction, and the investigation of the trial court will go no further than to inspect the record as it appears written and to determine from that whether there has been action taken unwarranted by the powers given to the board or court whose proceedings are under review. The writ may not be used to take the place of an appeal or to add to or modify a record with respect to any jurisdictional fact determined therein. In re Grove Street, 61 Cal. 453; De Pedrorena v. Superior Court, 80 Cal. 144, 22 Pac. 71. Petitioner in no case is permitted to contradict the record as to the jurisdictional facts shown thereby.

[3] Examining the petition filed herein, we note at once that the exhibit attached to the petition purports to be an exact record of the proceedings had at the hearing of the charge made against petitioner before the medical board. That record contains this recital:

> "At the hour of 11:00 a. m. of the above day, there being a quorum of the board present, the following proceedings were had."

Nowhere in that record—and the whole thereof is given as from a reporter's transcript—is it shown that any member of the board absented himself during the hearing of the charge. The assertion made by the record is that a quorum of the members was present, and we cannot presume in the face of that recital that any other condition existed throughout the hearing. There was a recital that an adjournment was taken at one point until 4 p. m., and at 4 p. m. continued until 8 p. m. of October 5, 1916, and the opening paragraph of the record made shows that at the convening of the evening session a quorum of the board was again present. The allegation in the petition, charging that a quorum was not present at some time during the hearing, is directly in conflict with the record, and the record must prevail. Therefore, upon the face of appellant's petition, the trial judge was compelled to hold that no issue was tendered as to that matter which required the taking of evidence.

[4] The point is suggested, too, that the act under which petitioner was prosecuted is unconstitutional. The particular ground of this objection is that powers are conferred which belong strictly under the Constitution to the judicial department. Acts of the nature here under consideration have been repeatedly sustained as a proper exercise of the legislative grant. Various boards performing legislative and ministerial functions have the incidental and necessary power, sometimes referred to as quasi judicial, to determine facts and enter their judgment thereon; such as boards of supervisors, boards of equalization, boards of police commissioners, and many other unnecessary to name. Referring specially to medical acts, it is said in Hewitt v. Board of Medical Examiners, 148 Cal. 590, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750:

> "Legislation of the character embraced within the general scope of the act in question, in so far as it provides for the revocation of the certificate of a physician, * * * is sustained upon the ground that the Legislature has authority under its general police power to provide all reasonable regulations that may be necessary affecting the public health, safety, or morals, and with this object in view to provide for the dismissal from the medical profession of all persons whose principles, practices, and character render them unfit to remain in it. As the duty of determining whether such profession or moral unfitness exists must necessarily be vested in somebody other than the Legislature, it is usually committed by appropriate legislation to boards composed of men learned in their profession."

See, also, Ex parte McNulty, 77 Cal. 164, 19 Pac. 237, 11 Am. St. Rep. 257; Ex parte Whitley, 144 Cal. 167, 77 Pac. 879, 1 Ann. Cas. 13; Meffert v. State Bd. of Medical Registration, 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811.

[5] The principal contention made, however, is that the complaint filed before the board of medical examiners was insufficient in its statement of facts to sustain the determination based thereon. The charge, as we have already quoted it, was phrased exactly in the language of that portion of the act defining the particular unprofessional conduct of which it was charged petitioner had been guilty. Counsel for appellant argue that because the statute refers to a "criminal abortion," and that because in order to determine what a criminal abortion is one must look to the Penal Code, the charge would be insufficiently laid unless the acts defined in the Penal Code as constituting the crime of abortion are set forth. Appellant was not charged with a crime, nor was he

subject, upon the adverse determination made, to any penalty except the revocation of his license to practice medicine and surgery. The contention of counsel would be entitled to more serious consideration were we considering here a criminal offense with its attendant penalties, as the same is understood under any of the penal laws of the state. Where an indictment or information is drawn under the Penal Code, it must, of course, comply with the provisions of section 950 of that Code, in that it must contain "a statement of the acts constituting the offense, in ordinary and concise language. * * *" No similar provision appears in the medical act. It must be said, we think, that the language of the statute is sufficiently explicit to advise a person charged thereunder of the particular kind of unprofessional conduct which it is proposed to prove against him, and that, we think, is all that need be said upon the question. The case cited by appellant, where the Supreme Court of Oregon held a complaint before the medical board to be insufficient because not alleging sufficient facts (Board of Medical Examiners v. Eisen, 61 Or. 492, 123 Pac. 52), presents a case under a law different from that before us. In the decision it is recited that:

> "Before a license can be revoked by said board for unprofessional or dishonorable conduct under the provisions of this act a complaint of some person under oath must be filed in the office of the secretary of said board, charging the acts of unprofessional or dishonorable conduct and facts complained of against the licentiate accused, in ordinary and concise language."

That provision which finds place in the Oregon law is practically identical with the provision of section 950 of our Penal Code, but, as has been just stated, is entirely absent from our medical act. It has been held that an accusation made under Penal Code, § 772, having as its object the removal of a public officer, is not required to conform to the provisions of section 950 et seq. of the Penal Code. Woods v. Varnum, 85 Cal. 639, 24 Pac. 843.

[6] The last contention which we shall notice is that there was no legal or sufficient evidence authorizing the medical board to make the order complained of. The force of this objection rests chiefly upon the assertion that all the material testimony furnished against the appellant was that given by accomplices. The action not being criminal in its nature, it is again apparent that the statutory mandate that a person may not be convicted upon the uncorroborated testimony of an accomplice has no application here. We feel satisfied that any witness whose testimony as to competent facts was convincing to the board engaged in the hearing of the charge would be legally sufficient. It is said in Tinn v. U. S. District Attorney, 148 Cal. 774, 84 Pac. 152, 113 Am. St. Rep. 354, that certiorari will not review a decision rendered upon "insufficient evidence" or through irregular method of procedure not going to the question of jurisdiction. The statement in the opinion to that effect is no doubt subject to the qualification that an entire want of evidence may present a case showing a lack of power to render a judgment or make a finding. We have expressed the conclusion, however, that the testimony of persons who might be accomplices could be received and might be considered by the board trying the charge.

[7] There was ample testimony coming from the persons concerned in the commission of the act charged to sustain the determination made by the medical board. That the facts here may be made more fully to appear, we will briefly state in an abstract way the substance of the testimony: A young drug clerk had engaged in illicit intercourse with a girl of about 18 years. He testified that when he concluded, by reason of the cessation of the menstrual act, that she had become pregnant, he gave her certain drugs to take, which did not produce the desired effect. He testified that he then took her to petitioner's office, and that a young woman named Smith accompanied them. Miss Smith remained in the anteroom while a conversation was had with petitioner; that he told petitioner that the young woman was in trouble, and wanted to know whether he could get her out of it; that petitioner responded that the young woman would have to be given an anesthetic and be curetted; that she would be in a hospital 24 hours, and the service would cost $55; that no examination was made of the young woman, but that petitioner gave her a card with the address of a Mrs. Purcell upon it, and told the young man to take the young woman out there. The girl testified that she went to the place and presented the card and was admitted; that in the afternoon petitioner arrived and she was taken down and placed upon a table and given an anesthetic and operated upon. The young man in question testified that he carried the girl back to her room from the operating table. The operation was admitted to have been made in the place of Mrs. Purcell, and it was shown that a sister of Mrs. Purcell administered the anesthetic. The appellant and Mrs. Purcell and her sister all testified that no abortion was performed, but that the girl came to the house suffering from an excessive flow, and that Dr. Lanterman operated upon her for that trouble. Another physician testified that he made an examination of the girl some weeks after the operation had been made and found a condition showing that there had been a dilation of the sexual organs. The petitioner further admitted that the girl had appeared at his office, but denied that he had agreed to perform any abortion upon her, stating that he had advised that the pregnancy be allowed to run its full period. In the face of this evidence, it cannot be said that the findings made by the

medical board were wholly wanting in proof to sustain them.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

37 Cal. App. 53

EWING v. RICHVALE LAND CO. et al.

(Civ. 1841.)

(District Court of Appeal, Third District, California. April 24, 1918. Rehearing Denied by Supreme Court June 20, 1918.)

MORTGAGES 🔑559(3)—DEFICIENCY JUDGMENT —AUTHORITY OF CLERK.

In an action on notes secured by mortgage, prayer being for foreclosure and deficiency judgment, a distinct adjudication and judgment against defendant in a sum named is equivalent to judgment that defendant is personally liable to plaintiff for amount found to be due, and sufficient to authorize clerk, after commissioner's return showing deficiency, to enter deficiency judgment under Code Civ. Proc. § 726, providing that if it appears from the commissioner's report that the proceeds are insufficient and a balance still remains due, judgment must then be docketed by the clerk in the manner provided "against the defendant or defendants personally liable for the debt."

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Samuel Ewing against the Richvale Land Company and others. From a deficiency judgment entered for plaintiff by the clerk of court, defendant named appeals. Affirmed.

See, also, 167 Pac. 876.

J. Oscar Goldstein, of Chico, for appellant. James A. McGregor, of Oronville, and Karl C. Partridge, of San Francisco, for respondent.

CHIPMAN, P. J. This is an appeal by defendant Richvale Land Company from a deficiency judgment entered by the clerk of the superior court on the coming in of the commissioner's return in an action to foreclose a mortgage executed by appellant to plaintiff.

It is alleged in the complaint in the action that the defendant company executed and delivered to plaintiff two certain promissory notes each for $4,593; that plaintiff is the owner and holder of said promissory notes, neither of which nor any part thereof except certain interest on one of said notes has been paid; that to secure payment of said notes defendant company executed and delivered to plaintiff its mortgage on certain described land, describing it, which was duly acknowledged and recorded; that defendant Jones claims some interest in said land, but that such interest is subordinate to said mortgage; that by the terms of said mortgage a reasonable attorney's fee was allowed for the foreclosure, should foreclosure become necessary. Upon the foregoing averments the prayer of the complaint is that plaintiff have "judgment against defendant

(Richvale Land Company) in the sum of," stating the amount of each note together with interest thereon for attorney's fees in the sum of $1,000; that "said mortgage be foreclosed, and that each of said defendants and all persons claiming under them, or either of them, may be foreclosed of all right * * * and that the usual decree may be made * * * for the sale of said mortgaged premises by the sheriff * * * or by a commissioner to be appointed by said court, and that the proceeds of said sale may be applied to the payment of said note, interest, attorney's fee, and costs of suit and sale"; that each of said defendants and all purchasers subsequent to the execution of said mortgage be foreclosed of all, etc., "and that plaintiff may have judgment and execution against the defendant Richvale Land Company, a corporation, for any deficiency which may remain after applying all the proceeds of the sale of said property properly applicable to the satisfaction of the said judgment"; that plaintiff may become the purchaser at such sale. The rights of defendant Jones are not involved, and he does not appeal. The answer of defendant Richvale Land Company admits all the averments of the complaint except as to attorney's fees, and as to that the denial is that $1,000 is a reasonable fee. The cause came on for trial December 21, 1915, and a minute order was made which stated, among other things:

> "Matter submitted to the court, and the court orders that a decree be entered for the plaintiff of foreclosure and counsel fees at $500."

On the 25th day of February, 1916, the court made and entered its decree. It is entitled, "Decree of Foreclosure," recites that the cause came on to be heard December 21, 1915, both oral and documentary evidence was submitted, and "the court now finds the following facts": That defendant Richvale Land Company is a corporation duly organized; that it executed and delivered to plaintiff the promissory notes set out in the complaint, and "that the plaintiff ever since has been and still is the owner and holder of said promissory notes, and that neither the sum mentioned therein, or any part thereof, has ever been paid," nor any interest except as stated; that defendant Richvale Land Company executed the mortgage mentioned in the complaint to secure payment of said notes and described the property mortgaged; that said mortgage provided for the payment of a reasonable attorney's fee, which is found to be $500 (the finding as to defendant Jones is immaterial). The findings of fact here end. It is then stated:

> "It is hereby ordered, adjudged, and decreed that a judgment be entered against the defendant Richvale Land Company in the sum of $4,593, with interest at the rate of 10 per cent. per annum from the 1st day of March, 1914, and for the sum of $4,593, with interest at the rate of 6 per cent. per annum from the 1st day of March, 1913, to the 1st day of March, 1915, and at the rate of 10 per cent. per annum from the 1st day of March, 1915. For attorney's fees in the sum of $500 and for all costs of suit and sale."

It is further stated:

> "That said mortgage be foreclosed, and that said defendant Richvale Land Company, a corporation, be foreclosed of all right, claim, or equity of redemption of its interest in said mortgaged premises, or any part thereof, and that John Myers be, and he is hereby, appointed a commissioner to conduct said sale and apply the proceeds thereof to the payment of said notes, interest, attorney's fees, and costs of suit and sale, and that before qualifying as such commissioner, the said John Myers gives a bond in the sum of $100."

The commissioner duly made return of his proceedings, from which it appeared that there was a deficiency of $6,617.30 after disposing of the proceeds of the sale in accordance with the decree. The clerk made the following entry in judgment docket:

> "Judgment for deficiency of $6,617.30 as shown by commissioner's return of sale."

It will appear from the foregoing that the findings of fact are a part of the decree, and that no conclusions of law as such are stated. In the paragraph, immediately following what purport to be findings of fact, is the order and decree. There is no provision in the decree for entering a deficiency judgment.

It is upon this condition of the record that appellant makes the following contentions:

> "(1) Section 726, Code of Civil Procedure, providing for foreclosure of mortgages of realty, does not give the clerk power to docket a deficiency judgment unless a judgment is entered adjudicating the defendant personally liable for the debt. (2) The mere recital, preceding the judgment, or as contained in the judgment and decree of the court, that judgment be entered against defendant Richvale Land Company in the amount of the debt sued for, with interest, costs, and counsel fees, is not the entry of a judgment that defendant Richvale Land Company is personally liable for the debt, or permitting a deficiency judgment to be docketed by the clerk against them."

The provision of section 726 touching the question here is as follows:

> "If it appear from the sheriff's return, or from the commissioner's report, that the proceeds are insufficient, and a balance still remains due, judgment must then be docketed by the clerk in the manner provided in this code for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases in which execution may be issued."

It is undoubtedly true and the cases all so hold, that the deficiency judgment contemplated by section 726 can only be docketed by the clerk "against the defendant or defendants personally liable for the debt" for such is the express language of the statute. Scamman v. Bonslett, 118 Cal. 93, 50 Pac. 272, 62 Am. St. Rep. 226; Herd v. Tuohy, 133 Cal. 55, 65 Pac. 139; and among the earlier cases may be cited Cormerais v. Genella, 22 Cal. 116; Leviston v. Swan, 33 Cal. 480. In the case last cited the court stated what is still true, for the forty-sixth section of the Practice Act was substantially the same so far as concerned the deficiency judgment, as is section 726 as we now have it. The court speaking of the judgment in a foreclosure case, said:

> "All that it need or should contain is a statement of the amount due the plaintiff a designation of the defendants who are personally liable for the payment of the debt, and a direction that the mortgaged premises, or so much thereof as may be necessary, be sold according to law and the proceeds applied to the payment of the expenses of the sale, the cost of the action, and the debt. Nothing further is required. All else is ministerial, and is expressly regulated by the statute, which is not made clearer or more binding by being copied into the judgment. * * * Under our system, the sheriff is furnished with a certified copy of the judgment. Armed with this process, he proceeds to sell the mortgaged property in the mode and manner, and at the place designated in the Practice Act for the sale of real estate under judicial process, and makes a return of his proceedings as in the case of an execution upon a money judgment. If it appears from his return that the amount due the plaintiff has not been fully paid by the sale, the clerk then dockets the judgment, for the balance due, against those defendants named in the judgment as being personally liable for the payment of the debt, without any order from the court."

Herd v. Tuohy, 133 Cal. 55, 65 Pac. 139, is relied on by appellant. That was a foreclosure case in which the defendant recovered judgment against the plaintiff for the foreclosure of a mortgage. It was stated by the court in its opinion:

> "In the judgment as originally entered, there was no adjudication that the plaintiff was personally liable, or provision for a deficiency judgment against him."

On an ex parte application of defendant's attorneys, the judgment was amended by adding thereto a paragraph, adjudging the plaintiff to be personally liable on the mortgage, and that on the commissioner's return of the sale, deficiency judgment should be docketed against him; and accordingly such a judgment was docketed against him. This action was brought to obtain relief against this judgment as amended and the deficiency judgment entered thereon, and resulted in a judgment for plaintiff, in effect canceling both judgments. The appeal was from this judgment. Among other points, appellant urged:

> "That the complaint does not purport to set forth all of the original decree, and non constat that it was not sufficient to authorize * * * a deficiency judgment."

Said the court:

> "As to the second point, the complaint purports to set out the whole judgment, but in fact, as appears from the findings, does not do so. But the omitted portions contain no provision for a deficiency judgment; nor is there any adjudication that the plaintiff, then defendant, was personally liable, unless, as claimed by the appellant, the following recital may be so construed, viz.: 'That the interest on said note to November 30, 1895, has been paid; that no other * * * part of said note, principal, or interest has been paid, and there is now due and owing to the plaintiff from the defendants John Herd, Jr., and R. Linder on said note the sum of $91,101.85, etc., and that the said defendants John Herd, Jr., and R. Linder are personally liable * * * for said sums so found due from them to plaintiff as aforesaid.' But this is merely the recital of a fact preceding the actual judgment, and cannot be regarded as an adjudication of personal liability; which alone could authorize the clerk to docket a judgment for deficiency"—citing cases.

In that case it will be observed that there was found as fact what amounted to a liability on the part of defendants Herd and Linder, but the finding was not followed by an adjudication of personal liability. In the present case the complaint set out the indebtedness and called for a deficiency judgment. The answer admitted the averments of the complaint. The court in its findings found the amount due on the promissory notes to plaintiff from defendant Richvale Land Company, and that no part thereof had been paid, except certain interest on one of the notes. Upon the findings the court entered judgment against the defendant Richvale Land Company in the sum so found to be due plaintiff. Herein lies the important feature distinguishing it from the case of Herd v. Tuohy relied upon by defendant. In that case the recital was but a finding of fact, and was not followed up, as was done in the present case, by an adjudication and judgment. It was not necessary that the judgment should in express terms state that defendant Richvale Land Company is personally liable for the debt. It is sufficient if from the findings and judgment such fact clearly appears. Judge Sanderson in Leviston v. Swan, supra, pointed out all that the judgment need contain. "All else," he said, "is ministerial, and is expressly regulated by the statute, which is not made clearer * * * by being copied into the judgment." See Hooper v. McDade, 1 Cal. App. 733, 739, 82 Pac. 1116. In MacNeil v. Ward, 2 Cal. Unrep. Cas. 174, the court said:

> "The judgment in this case is not amenable to the criticism of counsel for appellant, that it is erroneous because there is no direction in it that a judgment be docketed for deficiency. In this respect it [the judgment] accords with Leviston v. Swan, 33 Cal. 480, where the question is considered and correctly determined. The only point in which the judgment seems to be defective is in not expressly adjudging that * * * Ward is personally liable to the plaintiff for the money found to be due. This is inferentially done."

The court directed that on the going down of the remittitur, the judgment be amended, "inserting words remedying this defect, and, as thus modified the judgment will stand affirmed." The record of the case does not give the form of the judgment, and it may not have, except as the court said, "inferentially" adjudged that Ward was liable for the debt. Here there is a distinct adjudication and judgment "against the defendant Richvale Land Company in the sum of," etc. It seems to us that this is the equivalent of saying that defendant Richvale Land Company is personally liable to the plaintiff for the money found to be due, and is sufficient. By no possibility could there have been a liability other than by defendant company. The statute does not prescribe the form of the judgment. All that it requires is that it shall appear from the judgment that the defendant is personally liable for the debt, and we think that this may appear without in express terms adjudging the defendant to be personally liable. Language used which unmistakably means this should be held to be, and we think is, sufficient.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

178 Cal. 95

In re TURNER'S ESTATE. (S. F. 8693.)

(Supreme Court of California. April 10, 1918.)

Prohibition 🔑10(1)—Grounds for Relief —Excessive Jurisdiction.

Prohibition runs only against excess of jurisdiction on the part of the tribunal whose proceedings are sought to be arrested thereby.

In Bank. In the matter of the estate of Mary Elizabeth Turner, deceased. Petition for writ of prohibition against the superior court of the state and county of San Francisco. Denied.

Herbert S. Herrick, for petitioner.

PER CURIAM. Petition for a writ of prohibition.

Prohibition runs only against *excess of jurisdiction* on the part of the tribunal whose proceedings are sought to be arrested thereby. No showing whatever of excess of jurisdiction on the part of the superior court of the city and county of San Francisco is made by the petitioner. The petition filed herein contains much matter that is absolutely immaterial, in view of the nature of the application, impertinent, and scandalous. Certainly this is true of all of paragraphs 24 to and including paragraph 30 thereof.

It is ordered that paragraphs 24 to and including paragraph 30 be and the same are hereby stricken from the petition, and that the petition be and the same is hereby denied.

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36 Cal. App. 533

DODGE v. AVERY. (Civ. 2246.)

(District Court of Appeal, Second District, California. March 18, 1918.)

Landlord and Tenant 🔑57(2) — Assignment of Rent—Breach of Contract—Sufficiency of Evidence.

Where landlord entered into contract whereby a creditor was to collect the rent from a tenant and apply a certain amount on the indebtedness each month, evidence *held* insufficient to show that landlord interfered with collection of such rent.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Julia C. J. Dodge against J. F. Avery. Judgment for plaintiff, and defendant appeals. Reversed.

Geo. M. Harker, of Los Angeles, for appellant. Ira L. Brunk and Silas Cobb, both of Los Angeles, for respondent.

WORKS, Judge pro tem. The defendant and one Ira L. Brunk entered into a written agreement in which it was recited that the former, the party of the first part, was indebted to Brunk, the party of the second part, in the sum of $1,200. The agreement then provided:

> "In order to secure the * * * payment of said sum of money, the first party hereby sells, assigns, and sets over to the second party * * * an interest in and to that * * * lease made and executed * * * by and between the first party * * * and John H. Strickler * * * wherein the said Strickler becomes obligated to pay * * * the sum of $9,000 as rent for a certain property, * * * and the first party herein assigns, sells, and sets over to the second party * * * an interest in and to said rents due and to become due * * * under and by virtue of said indenture of lease to the amount of $1,200, with the understanding that the second party herein shall collect from the lessee * * * the said $9,000 of rent, payable in monthly installments of $150 per month, and shall retain for his own use and benefit the sum of $20 out of each monthly installment of rent, the said $20 to be applied upon the said sum of $1,200 until the whole of said $1,200 is fully paid."

The rights of Brunk under this agreement descended to the plaintiff through a chain of several assignments, all of which were accepted by the defendant, and the present action was commenced to recover for an alleged breach of its terms. Let us say at the outset that, while the agreement and the assignments of it may possibly be construed as vesting in the plaintiff the right to maintain an action against the defendant upon the original obligation of the latter to pay Brunk $1,200, that question does not arise in this action, for the complaint is plainly based upon the agreement as one which lodged in the plaintiff the right to collect the rents and to retain from each monthly collection the sum of $20 until the payment of the full $1,200 was accomplished.

After setting up the agreement and the assignments, the complaint alleges that $180 had been collected on the agreement at the monthly rate of $20 before the assignment to the plaintiff, and that after that assignment she collected $20 monthly for a period of 23 months, up to and including April 1, 1914, or an added sum of $460. Then occur the following allegations, omitting formal verbiage:

> "That thereafter plaintiff continued to try to collect the rent, * * * but was unable to do so, by reason of the fact * * * that the defendant herein began to interfere with the collection of said rents by this plaintiff, by endeavoring to collect the rents himself, and * * * forbidding the tenant in possession * * * to pay to the plaintiff any of the rents, * * * and demanding the payment of said rents to himself. * * * That by reason of said interference, this plaintiff has been unable to collect any rent since the 1st day of April, 1914, although this plaintiff has endeavored to collect said rents and all of them since said 1st day of April, 1914."

It was also alleged that the defendant had collected some or all of the rents since April 1, 1914. The complaint then proceeds:

> "That said defendant has not paid to this plaintiff the $20 per month, according to the terms of said agreement, * * * or any part thereof, although plaintiff has demanded payment of the same from defendant. * * * That there is now due, owing, and unpaid from said defendant to this plaintiff, upon said written agreement hereinbefore set forth, the sum of $560, being the balance of the amount set forth in said agreement, after the payment of the said $180 and the said $460."

These were all the material allegations of the complaint. The answer categorically denied all the allegations we have included within quotation marks, except the allegation as to demand made by plaintiff upon defendant. The allegation, the effect of which we have given, without quoting, that defendant had collected some or all of the rents since April 1, 1914, the defendant answered by admitting that he had collected $750 up to and including December 15, 1914; but he denied that he had made the collections under the agreement between him and Brunk and made certain affirmative allegations as to the terms on which collections had been made.

Judgment went for plaintiff for the full amount prayed for, and the defendant appeals.

The court found that all the allegations of the complaint were true. This finding is assailed as not being supported by the evidence, and the appellant specifies the particular respects in which it is claimed that the finding lacks support. At the outset of the trial the court, evidently overlooking the denials contained in the answer, announced that the burden of proof was upon the defendant and required him to proceed. The only evidence in the case, therefore, was evidence offered by the defendant, and it shows, without dispute, that the respondent, being about to depart from Los Angeles, where all these questions arose, left a Mrs. Anderson to act for her in her absence in the matter of the rents mentioned in the agreement; that before she left she requested the tenant of the property in question to pay only the $20 per month to Mrs. Anderson and to pay the remaining $130 per month to the appellant; that the respondent left Los Angeles in February or March, 1915, and returned in May or June of the same year; that Mrs. Anderson collected $20 per month from the tenant for either one or two months, and that, for the same period, the tenant paid $130 per month direct to the appellant; that from that period forward, for some months, the appellant was paid various amounts by the tenants on account of the rent, but he never again received as much as $130 in any month, or for any month, the payments always being from $40 to $70 short, each month, of either the $130 or the $150, the evidence not showing which. The evidence fails to show that the respondent ever made any change in her direction to the tenant that he pay over to the appellant $130 per month, or that he pay to Mrs. Anderson only $20 per month. The evidence plainly fails to support the allegation of the complaint to the effect that the appellant interfered to prevent the collection of rents by respondent, and it fails to support the allegation that, in effect, the appellant collected any moneys whatever which it was his duty, under the theory advanced by the complaint, to repay to respondent. We need not mention other specific allegations of the complaint, denied by the answer, which are unsupported by the evidence.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

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36 Cal. App. 536

BLISS v. SOUTHERN PAC. CO. (Civ. 2139.)

(District Court of Appeal, Second District, California. March 18, 1918. Rehearing Denied by Supreme Court May 17, 1918.)

1. CARRIERS ⇨218(11)—SHIPMENT OF LIVE STOCK—WRITTEN NOTICE OF LOSS—WAIVER.

Under contract for intrastate shipment of live stock, providing that shipper should give written notice of loss within 10 days after unloading, the carrier waived the right to notice, where after less formal notice it gave directions as to care and disposition of injured stock.

2. Carriers 🔑218(10) — Shipment of Live Stock—Notice of Loss—Time.

Shipper of live stock was not required to give written notice of loss within 10 days as specified by contract, where the extent and character of the damage could not be ascertained within such time.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by R. L. Bliss against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellant. Guy E. Maurice, of Los Angeles, for respondent.

WORKS, Judge pro tem. This is an action for the recovery of damages alleged to have been suffered by plaintiff through injuries to certain of his cattle while in transit over the railroad of defendant; the point from which and the point to which the shipment was made both being within the state. Judgment was awarded to the plaintiff and the defendant appeals. The appeal is upon the judgment roll, and there is no bill of exceptions.

The findings of fact show that the cattle were shipped under a written agreement between the parties and that it contained the following provision, which we have liberally shortened by ellipsis:

> "Second party * * * agrees that in case any loss or damage shall have been sustained * * * demand or claim for such loss or damage will be made * * * in writing, within 10 days after unloading; * * * and that in event of failure so to do, all claims for loss or damage * * * are hereby expressly waived, released and made void, and it is * * * agreed by second party that the amount to be by him claimed * * * shall be adjusted on basis of value at time and place of shipment, not exceeding the declared value as hereinbefore set forth, * * * and in no event is there to be any recovery * * * for any loss of or damage to said live stock * * * in excess of the declared value hereinbefore set forth."

It is also found that the respondent made no such written claim or demand within the time limited; but it is further found, in effect, that within 48 hours after unloading the cattle the respondent telephoned an agent of the appellant that they were damaged and then made demand to be compensated for the damage, and stated that he intended to slaughter the cattle and that he would, after killing them, send a claim for damage; that the agent said, "All right," stated that he would send one of the appellant's claim inspectors to be present at the time of the slaughtering to ascertain the amount of the respondent's damage; that the inspector did appear for that purpose and then requested the respondent to so handle the cattle that the least loss would result to the respondent; that it was then and there agreed between the inspector and the respondent that, by reason of the damage suffered by them, the cattle were then unfit for slaughter and that if they were slaughtered immediately an increased loss to the respondent would result; that the inspector requested of the respondent that the cattle be allowed to stand in the respondent's stockyard until such times as, in the judgment of the respondent, the least loss to him would be occasioned; that the respondent assented to the request and used just, fair, and reasonable discretion in determining the time the cattle should so stand and did not complete their slaughter until the closing time of the respondent's plant on the afternoon of the tenth day after the unloading of the cattle from the appellant's train; that prior to the making of the agreement under which the damaged cattle were shipped the parties had frequently executed similar agreements, containing the language above quoted from the agreement now in question; that the respondent had suffered damage to cattle shipped under such agreements; that in each and every instance of such loss the appellant required the respondent, when presenting his written claim for damages, to state his actual loss, and to ascertain the amount thereof by deducting from the local market value of the cattle when slaughtered, if they were in an undamaged condition, their local market value as damaged; that respondent did so, and in many instances he was unable to ascertain the difference in market value until after, and did not present his written claim for damage until after, 10 days from the time of unloading; that appellant did, notwithstanding the delay in presenting written claim for damage, make equitable settlements of respondent's claims; that appellant has repeatedly demanded that respondent make all his claims for losses upon the above mentioned basis and has notified respondent that unless all claims are so presented appellant will not pay them; that, in the present case, it was impossible to ascertain the market value of the cattle as damaged until after they were slaughtered; that by reason of the aforesaid facts respondent did not, within 10 days after the cattle were unloaded, ascertain the total amount of his damage; that except for the aforesaid facts he would have presented a written claim within the required 10 days; and that he did present such a written claim 24 days after the last of the cattle were slaughtered.

The respondent takes the position, and the trial court decided, that, under the circumstances disclosed by the findings, he was excused from presenting a written claim for his damage within the 10 days limited by the terms of the agreement. The authorities which the respondent cites in support of his contention may be grouped under two statements of propositions of law.

[1] The first is that, where parties contract for such a written notice of damage as is provided for in the agreement that is now

before us, the right to notice is waived and excused by the carrier, if, after receiving less formal notice in a given case, it proceeds to investigate the damage suffered and makes suggestion or gives direction as to the care or disposition of the damaged property. Jones v. Quincy, O. & K. C. R. Co., 117 Mo. App. 523, 94 S. W. 735; Lasky v. Sou. Exp. Co., 92 Miss. 268, 45 South. 869; Atchison, T. & S. F. Ry. Co. v. Wright, 78 Kan. 94, 95 Pac. 1132; Clubb v. St. Louis & S. F. R. Co., 136 Mo. App. 1, 117 S. W. 110; Missouri, K. & T. R. Co. v. Hood, 55 Tex. Civ. App. 636, 120 S. W. 236; Gilliland & Gaffney v. Southern Ry. Co., 85 S. C. 26, 67 S. E. 20, 27 L. R. A. (N. S.) 1106, 137 Am. St. Rep. 861.

[2] The other proposition is that, under such an agreement, the notice need not be given within the time limited in a case in which the extent or character of the damage suffered cannot be ascertained within that time. Burns v. Chicago, R. I. & P. Ry. Co., 151 Mo. App. 573, 132 S. W. 1; Pierson v. Northern Pac. Ry. Co., 61 Wash. 450, 112 Pac. 509. The position of the appellant is that a carrier has no power to waive such a provision in a contract of shipment, and several decisions of the federal courts are cited in support of the view, but all of those cases except one derive their force and effect from the fact that the provisions in question were contained in a statute or in a form of bill of lading prescribed by statute and which is in general use by railroads engaged in interstate commerce, and the damage in each case resulted to property in transit in such commerce. The remaining case is Clegg v. St. Louis & S. F. R. Co., 203 Fed. 971, 122 C. C. A. 273. It appears to be somewhat in conflict with the cases we have cited above from the state courts, although it, too, relates to an interstate commerce shipment. However, we are satisfied of the correctness of the rules announced by the state courts to which we have referred.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

36 Cal. App. 553

PEOPLE v. LIMA. (Cr. 720.)

(District Court of Appeal, First District, California. March 20, 1918. Rehearing Denied by Supreme Court May 17, 1918.)

1. SEDUCTION 🔑45—PROMISE OF MARRIAGE—SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to sustain a conviction of seduction under promise of marriage, although there was evidence that defendant threatened to commit suicide and kill prosecutrix.

2. SEDUCTION 🔑45—PREVIOUS CHASTITY—SUFFICIENCY OF EVIDENCE.

Evidence in seduction case *held* sufficient to sustain finding that prosecutrix was previously chaste.

3. SEDUCTION 🔑45—UNMARRIED CONDITION OF PROSECUTRIX—SUFFICIENCY OF EVIDENCE.

In seduction case, evidence *held* sufficient to sustain finding that prosecutrix was unmarried.

4. CRIMINAL LAW 🔑808½ — REASONABLE DOUBT—INSTRUCTIONS.

Code Civ. Proc. § 1826, relating to sufficiency of proof, is applicable to criminal cases, and was properly read to the jury, in connection with instructions on reasonable doubt.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Manuel Lima was convicted of seduction under promise of marriage. From the judgment, and an order denying a new trial, he appeals. Affirmed.

L. Gonsalves, of Oakland, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

BEASLY, Judge pro tem. It is charged in this case that the defendant, a married man, induced the prosecuting witness to accompany him from her home in Alameda county to San Jose, and there seduced her upon his promise to marry her. He was convicted of seduction under promise of marriage, and from the judgment and order denying a new trial he appeals.

The points relied on for a reversal in this case, stated in the language of the appellant's counsel upon the oral argument, are that the evidence does not show that the promise of marriage was the sole inducement which led to the girl's seduction; second, that it does not show that the prosecutrix was of previously chaste character; and, third, that there is no proof in the record that the prosecuting witness was unmarried at the time of her seduction.

[1] Upon the first point the young woman testified that she went to San Jose for the purpose of marrying the defendant and that this was her reason for going there and permitting herself to be seduced by him. She also testified that he threatened to commit suicide and to kill her. Counsel's contention that by these threats the defendant seduced her is not convincing. It is plain from the entire evidence that the means employed by the defendant to accomplish his purpose with her was his promise to marry her reiterated upon many occasions.

[2] Upon the second point, without going into the details of the unpleasant evidence in this case, it may be said that the prosecuting witness testified that she had never had intercourse with any other man previous to her seduction; and the defendant's counsel contends that this testimony did not exclude the possibility that she may have had intercourse with the defendant himself previous to her seduction. Reading the testimony and the other questions asked her, in connection with the question which brought out the foregoing answer, it may be said that the evidence is entirely sufficient to sustain the finding of the previous chaste character of the prosecuting witness.

[3] Upon the third point, the defendant cites People v. Krusick, 93 Cal. 74, 28 Pac.

794, wherein it is held that many of the facts proven in this case were not sufficient in themselves to establish the fact that the woman in that case was unmarried. However, the evidence in this case disclosed other facts and circumstances, in addition to those appearing in the case of People v. Krusick, supporting the finding of the jury that the young woman was unmarried.

It would be better practice—indeed, it is almost the universal practice—to ask the prosecuting witness in such cases as this categorical questions as to her chastity and her unmarried status; but, although this practice was not followed here, it is impossible to read this record without coming to the conclusion that those facts were sufficiently proven. Indeed, it was admitted at the oral argument that no serious question was made at the trial as to the fact that she was unmarried.

[4] We have examined the instructions complained of by the defendant and given by the trial court, and find that they fairly state the law applicable to the case. Section 1826 of the Code of Civil Procedure is applicable to criminal cases, and it was proper for the court to read it to the jury in connection with the usual instructions upon the subject of reasonable doubt.

The instructions requested by the defendant, and refused, either added nothing to those given by the court, or were of such a nature as to be unnecessary, in view of the care with which the defendant's interests were guarded by the instructions given.

The judgment and order denying a new trial are affirmed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

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36 Cal. App. 488

ILARDI v. CENTRAL CALIFORNIA TRACTION CO. et al. (Civ. 1777.)

(District Court of Appeal, Third District, California. March 11, 1918. Rehearing Denied by Supreme Court May 9, 1918.)

1. NEGLIGENCE 🔑93(1) — IMPUTED NEGLIGENCE—PASSENGER IN VEHICLE.

A person riding as a passenger or guest in a vehicle driven by another may not be charged with the negligence of such other which has caused injury to him, unless such passenger or guest has the right to exercise control over the driver of the vehicle, or in the eyes of the law may be said to possess such power of control, or unless it is made to appear that the passenger or guest himself actively participated in the negligence of the driver.

2. NEGLIGENCE 🔑68—PASSENGER OR GUEST IN VEHICLE—DUTY.

One riding in a vehicle as passenger or guest of the driver must exercise ordinary care for his own safety.

3. RAILROADS 🔑346(5)—DEATH AT CROSSING—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In an action against a railroad for death at its crossing of one riding as passenger in the vehicle of another, the burden was on defendant railroad to show deceased failed to exercise such care for his own safety as was required of him.

4. RAILROADS 🔑350(21) — DEATH AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Where a passenger in a vehicle crossing the railroad track said nothing and did nothing, and looked neither up nor down the track before the horse was started across by the driver, such passenger was not negligent per se, and his acts did not justify the conclusion as matter of law that he failed to use due care.

5. RAILROADS 🔑346(5)—PRESUMPTIONS—ABSENCE OF NEGLIGENCE.

There is a disputable presumption that one killed at a railroad crossing in collision exercised due care for his own safety, having in view the surrounding conditions, with which he was familiar.

6. RAILROADS 🔑350(21)—DEATH AT CROSSING — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

In an action against a railroad for a death in a crossing collision, the question whether decedent, a passenger in the wagon of another, was guilty of negligence directly causing his death, *held* for the jury under the circumstances in evidence.

7. RAILROADS 🔑350(33)—DEATH AT CROSSING—LAST CLEAR CHANCE —QUESTION FOR JURY.

In such action, evidence *held* to justify the submission to the jury of the question of last clear chance.

8. RAILROADS 🔑338—DEATH AT CROSSING—LAST CLEAR CHANCE.

If the motorman of an interurban railroad's car saw a wagon on the track at a crossing, and could have stopped without injury to the wagon or its passengers, but neglected to do so, so that a passenger in the wagon was killed, plaintiff, suing for the death, is entitled to verdict under the doctrine of last clear chance.

9. NEGLIGENCE 🔑83—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE.

Where an injured person claiming under the doctrine of last clear chance himself had an opportunity, of which he had knowledge, to escape from the peril into which he had negligently fallen, and with reasonable diligence could have done so and avoided the accident, but failed, his negligence placing him in the position of danger was a continuing, active, or concurring cause of his injury, and he cannot recover on any theory of last clear chance.

10. RAILROADS 🔑324(1)—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE.

The mere act of passing over a railroad's public street crossing is not negligence per se, but only when the attempt is made to pass over without using reasonable care in ascertaining whether there is a train approaching or about to approach.

11. RAILROADS 🔑350(33)—DEATH AT CROSSING—APPLICATION OF LAST CLEAR CHANCE —QUESTION FOR JURY.

In an action against a railroad for death in a crossing collision, whether decedent and the driver of the wagon in which he was riding as a passenger negligently failed to extricate themselves from their position of peril after having placed themselves in it, so that their original negligence was the cause of the death, and the doctrine of last clear chance had no application, *held* for the jury.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Mary Ilardi, an infant, by Alexander Fiore, guardian ad litem, against the Central California Traction Company, a corporation, and Rosa Ilardi. From a judgment for plaintiff, defendant corporation appeals. Affirmed.

Butler & Swisler, of Sacramento, for appellant. Downey, Pullen & Downey and Ralph Smith, all of Sacramento, for respondent.

HART, J. The action was brought to recover from the defendant Central California Traction Company damages for its negligence in causing the death of Gandolfo Ilardi, the father of plaintiff, who at the time of the commencement of the action was about 11 years of age. The defendant Rosa Ilardi is the widow of the deceased and the stepmother of plaintiff. She was joined as a defendant for the reason, as stated in the complaint, that she had refused to join as a party plaintiff. She made no appearance in the action and her default was duly entered, but she is not affected by the judgment, which was against the defendant Central California Traction Company for the sum of $3,500. The appeal is by said company from the judgment.

Appellant owns and operates an interurban electric railroad between the cities of Sacramento and Stockton, carrying passengers and freight between said cities and way stations. Running southerly from Sacramento, for a distance of more than half a mile, trains are operated over a single-track road on the east side of, and parallel with, a public highway known as the Upper Stockton road, which road is paved along its center with asphaltum, the paved portion being about 18 feet in width, while on each side of the pavement the road has a dirt surface about 10 feet in width. The railroad track is immediately along the east side of the dirt road east of the pavement. At a point outside the city limits of Sacramento, a street, known as Vina Vista street, crosses said railroad track at a right angle and intersects with, but does not cross, said Upper Stockton road. The view from Vina Vista street for a distance of half a mile north or toward the city of Sacramento was unobstructed.

The evidence discloses that both Sansone and the deceased, who were brothers-in-law, resided on Vina Vista avenue; that the deceased, who at the time of his death was 34 years of age, had been employed in the shops of the Southern Pacific Company, in the city of Sacramento; that some two months previously to the accident whereby he lost his life he had met with an accident at the railroad shops, a piece of steel having been imbedded in his left eye; that for some time before he was killed he made daily trips to an oculist in the city of Sacramento for treatment, leaving his home in the early morning for that purpose and generally returning in the afternoon with Sansone in the latter's wagon, which was what is known as a "contractor's wagon."

The accident in which the deceased lost his life occurred on the 17th day of January, 1914, at about 4:30 o'clock p. m. Sansone had left his home in said wagon, drawn by a single horse, early in the morning and went to Sacramento city. The deceased had also gone to the city for treatment by the oculist. At about 1 o'clock on the afternoon of that day the deceased joined Sansone at Sixth and D streets, in said city, and the two started together in the wagon for their homes on Vina Vista avenue, the wagon being loaded with lumber. Sansone was the owner of the horse and wagon and Ilardi was riding with him merely as his guest, he having no interest in or control of or over the horse and wagon or the business for which Sansone used them. Sansone, who was driving, sat on the right-hand, and the deceased on the left-hand, side of the seat. They were traveling south and on the west side of the Upper Stockton road until reaching a point within a distance of about two city blocks from Vina Vista street, when a horse and wagon driven by one Fletcher, and proceeding from a driveway on the west side of the road or street, caused Sansone to pull over to the dirt road on the east side and some 8 or 10 feet from the appellant's railroad track. After passing said horse and wagon, Sansone, so he testified, turned back to the west side of the road. Upon reaching Vina Vista street, however, Sansone turned to the left and started to cross the railroad track, and at this instant of time an interurban train of two cars, traveling south from Sacramento, struck the wagon, throwing it, the horse, and the occupants of the wagon a considerable distance from the crossing. As a result of the collision, Ilardi was almost instantly killed.

The evidence further shows that the day upon which the accident occurred was cloudy; that it had been raining during most of the day; and that a heavy southeast wind was prevailing at the time of the accident. Sansone testified that when he reached a point about 25 feet from the Vina Vista crossing he stopped the horse and looked to the north and to the south; that he saw or heard no train coming from either direction and then proceeded on toward the crossing; that when at a distance of 5 feet from the crossing he again halted the horse and again looked in both directions to see if there was a train approaching, and also listened for the noise or some signal of one, but that he neither saw nor heard one and so started across the track, with the result as above described.

A number of witnesses testified that the train, just before it struck the wagon, was traveling at from 30 to 40 miles an hour, and certain witnesses testified that they heard no whistle or other signal proceed from the train, while there were others who said that, a few seconds before the collision they heard a loud, long whistle, followed in close succession by two short, shrill whistles. And while some of the witnesses testified that they could see up and down the track at the time of the accident a distance of five or six blocks, Sansone testified that on account of the darkness of the day, due to the cloudy skies and the lateness of the day, he could see no greater distance, either up or down the track, than 250 feet. He further testified that the deceased did not at any time, before they turned and started to cross the track, say anything or look either up or down the track. He was merely "sitting there," said the witness. The testimony further showed that Ilardi, before he received the injury to his eye, had for a long time almost daily gone to his place of employment and returned to his home on Vina Vista street on the cars of the appellant, and was, of course, familiar with the existence of the railroad track at said street.

The motorman testified that the train at the time of the accident was traveling at the rate of from 15 to 18 miles an hour. He further testified that he possibly could have stopped the train within a distance of 150 feet. He admitted that the last crossing signal he sounded before the collision was at a point between Hartley and Vine streets, and just after leaving the former street, which is north of Vine, and that he did not blow the whistle for the Vina Vista street crossing until he saw the horse and wagon in the act of crossing the track at said street. The motorman, according to his testimony, first observed the wagon in which Sansone and the deceased were riding before he reached Vine street. He said that he noticed the vehicle particularly because it was traveling on the wrong side of the road; that he kept his eyes on the wagon, thinking possibly that it might be turned to pass over one of the street crossings; that when he was near Vine street the wagon was very near Vina Vista street. The horse was traveling at a very slow rate of speed—not over 2 or 3 miles an hour according to his best judgment. It should be stated that Vina Vista street is the next street to Vine street, being south of the latter street. C. M. Elliott, a civil engineer, testified that he measured the distance from the center of Vine to the center of Vina Vista street and found it to be 345 feet.

The witness Currier, whose home was on Vine street on the west side of the Upper Stockton road, testifying for the defendant, stated that he was on his way home on foot from Sacramento and about three blocks from Vina Vista street when the collision occurred; that he heard a loud shrill whistle from the street car when it was about 50 feet from Vine street, but whether about 50 feet above or below he said that he was unable to remember; that almost simultaneously with the hearing of the whistle, he looked down the road and saw the horse driven by Sansone in the act of going upon and across the railroad track at Vina Vista street. He said that it was his best judgment that at the time the train blew its whistle the nose of the horse drawing Sansone's wagon was as far as the track.

The foregoing embraces a statement of the facts and the testimony necessary to have in view and to be considered in passing upon the points urged upon this appeal for a reversal. The grounds urged for the reversal of the judgment, generally stating them, are: (1) That the deceased failed to exercise due care to avoid the accident and was guilty of contributory negligence which proximately caused his death; (2) error in giving, modifying, and refusing to give certain instructions.

[1] 1. We may pretermit any expression of opinion upon the question whether the evidence shows that Sansone, owner and, at the time of the accident, driver of the horse and wagon, was guilty of negligence proximately causing the accident and the consequent injury to and death of Ilardi; for, as we understand counsel for the appellant, they do not claim that the negligence of Sansone is imputable to Ilardi. The cases are quite uniform in the enunciation of the rule that a person riding as a passenger or guest in a vehicle driven by another may not be charged with the negligence of the latter which has caused injury to the former, unless the passenger or guest has the right to exercise control over the driver of the vehicle, or "in the eyes of the law may be said to possess such power of control" (Bryant v. Pac. Elec. Ry. Co., 174 Cal. 739, 164 Pac. 385), or unless it is made to appear that the passenger or guest himself actively participated in the negligence of the driver. See, in addition to case above cited, the following: Wilson v. Puget Sound Co., 52 Wash. 522, 101 Pac. 50, 132 Am. St. Rep. 1044; Howe v. Minneapolis, etc., Ry. Co., 62 Minn. 71, 64 N. W. 102, 30 L. R. A. 684, 54 Am. St. Rep. 616; Clarke v. Conn. Co., 83 Conn. 219, 76 Atl. 523; United Rys. & Elec. Co., etc., v. Crain et al., 123 Md. 332, 91 Atl. 405; Hermann v. R. I. Co., 36 R. I. 447, 90 Atl. 813; Chadbourne v. Springfield St. Ry. Co., 199 Mass. 574, 85 N. E. 737; Perez v. N. O. City & L. R. Co. et al., 47 La. 1391, 17 South. 869; Lininger v. S. F. Railroad Co., 18 Cal. App. 411, 123 Pac. 235; Bresee v. Los Angeles Traction Co., 149 Cal. 131, 85 Pac. 152, 5 L. R. A. (N. S.) 1059; Fujise v. Pac. Elec. R. Co., 12 Cal. App. 207, 107 Pac. 317; Parmenter v. McDougall, 172 Cal. 306, 156 Pac. 460. But it is argued that, because the deceased, before Sansone started to drive across the track, knowing that trains at frequent intervals during the day passed over the track, failed to look up and down the track to ascertain whether or not a train was approaching, but remained passive or quietly in his seat on the wagon, saying nothing and doing nothing, this court is justified in declaring that, as a matter of law, he did

not exercise ordinary care for his own safety, or, in other words, that he was guilty of negligence proximately contributing to his fatal injuries.

[2-6] It is obviously true, as the above-cited cases plainly point out, that, while a guest or a passenger riding in a vehicle with another is not chargeable with the latter's negligence which has directly resulted in injury to the passenger or guest, the law nevertheless casts upon such passenger or guest in such case the duty of exercising ordinary care for his own safety, and the court in this case in clear language so instructed the jury. But unless the evidence shows beyond question that the passenger or guest failed to exercise such care as was necessary for his own safety, then the question whether he was remiss in that respect or was guilty of negligence contributing to his injury is primarily for the jury. The burden was cast upon the defendant to show that the deceased failed to exercise such care for his own safety as was required of him to charge the defendant with legal responsibility for his death. The question here, then, is whether there was any justification for the implied finding of the jury that the deceased was not culpable in that respect. There is no evidence of any overt or affirmative act of negligence on the part of Ilardi or that he participated in the negligence of Sansone, assuming the latter to have been guilty of negligence, by urging him, with knowledge of the near approach of a train, or with knowledge that he (Sansone) had not looked and listened to ascertain whether there was a train near at hand, to proceed on over the crossing. Nor is there any evidence that Sansone was an incompetent or careless driver, or that Ilardi had any reason to suppose that he was not competent to drive the horse properly, or to believe that Sansone was not doing his duty by looking for approaching trains. It is true, if we accept Sansone's testimony as to that matter, that Ilardi said nothing and did nothing and looked neither to the north nor south before the horse was started by Sansone over the crossing; but this did not constitute negligence per se or such acts of omission as to justify the conclusion or declaration, as a matter of law, that he failed to use due care for his own safety, since he was a mere guest of Sansone, riding with the latter by his permission and sufferance, and, having no interest in the plans or purposes for which Sansone was then using the horse and vehicle, and was without any right or power to exercise any control over the latter in the management of the vehicle. Moreover, the deceased knew that Sansone, having been accustomed for some time to driving over the Vina Vista crossing, knew as fully or as well as he did that trains passed frequently over the railroad track every day, and, as there is, as stated, no evidence that Sansone was ordinarily a careless driver or did not know how to manage a vehicle drawn by a horse, the deceased had the right to assume that Sansone would exercise reasonable care and caution in making the crossing.

Furthermore, in considering whether the deceased exercised the care which is required of a person situated as he was, the jury were entitled to and probably did take into account these facts: That the day was more or less darkened by clouds; that the accident occurred at a late hour of a midwinter day; that a strong wind was blowing from the southeast and in the opposite direction from which the train was traveling, the natural effect of which was to drive the noise which usually proceeds from a moving train from the direction and the hearing of himself and Sansone. Besides, the eyesight of the deceased was greatly impaired, and, if the jury believed Sansone when he said that he looked and saw no train approaching (and it cannot be said that they did not), then it is probable that they concluded that if the deceased did look to the north he was no more likely to see the train than was Sansone, and that they had the right to believe, notwithstanding Sansone's apparent statement to the contrary, that the deceased did look to see whether there was a train approaching the crossing over which they were about to pass, there can be no doubt, since it was made to appear that the deceased was perfectly familiar with the conditions existing as to the crossing, having passed over it innumerable times and having almost as frequently ridden on the defendant's cars from that point, and since, furthermore, the presumption is (a disputable presumption, it is true) that the deceased exercised due care for his own safety, having in view the surrounding conditions with which he was familiar. Baltimore & Potomac R. R. Co. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 362; Drouillard v. S. P. Co., 172 Pac. 405. What more the deceased could have done than what he did do under all the circumstances, it is not easy to suggest. He had no right to interfere with Sansone's management of the horse and vehicle, and, as the cases say, in most instances such interference by the passenger or guest where the vehicle is about to be placed in a position of danger might prove to be gross imprudence and so disconcert the driver as to cause the disastrous result which such interference was designed to avoid. See Howe v. Minneapolis, etc., Ry. Co., 62 Minn. 71, 64 N. W. 102, 30 L. R. A. 684, 54 Am. St. Rep. 616, 620, and the other cases above named. The jury were justified in concluding that all he could do under the circumstances was to remain quiet, as he did, and to rely upon the driver, who had exclusive control and management of the horse and vehicle.

In Hermann v. Rhode Island Co., 36 R. I. 447, 90 Atl. 813, supra, the plaintiff was injured as the result of a collision between the automobile in which she was riding as the guest of the owner and driver of the machine with a railroad train of the defendant. The court in that case said:

> "In accordance with both reason and the weight of authority, any negligence on the part of Berghmann (driver of the auto) which may have contributed to bring about the collision cannot be imputed to either of these plaintiffs (husband and wife having joined in the suit), between whom and Berghmann no relation of master and servant, principal and agent, or participators in a common enterprise, existed in fact, or should be implied in law. It is the duty of such guest or passenger, in circumstances similar to the one under consideration, to use reasonable care for his own safety. Whether he has exercised such a degree of care is primarily a question for the jury. It cannot be said, as a matter of law, that such guest or passenger is guilty of negligence because he has done nothing. In many such cases, the highest degree of caution may consist of inaction. In situations of great and sudden peril meddlesome interference with those having control, either by physical act or by disturbing suggestions and needless warnings, may be exceedingly disastrous in its result. While it is true that it is the duty of such guest or passenger not to submit himself and his safety solely to the prudence of the driver of the vehicle, and that he must himself use reasonable care for his own safety, nevertheless, he should not in any case be held guilty of contributory negligence merely because he has done nothing."

The court then proceeds to state certain conditions the existence of which would justly lead to the conclusion that the guest or passenger had not used the requisite care for his own safety and so not be entitled to recover for his injury. None of the suppositious conditions so suggested, however, was shown to exist in this case. The other cases above cited, notably Wilson v. Puget Sound Elec. Ry. Co., 52 Wash. 522, 101 Pac. 50, 132 Am. St. Rep. 1044, supra, express views similar to those above reproduced herein from the Hermann Case.

Our conclusion is that the question whether the deceased was guilty of negligence which directly caused his death was, under the circumstances of the case as presented, one exclusively for the jury's determination.

[7] 2. The complaint against the court's charge is aimed at those portions thereof whereby the question was submitted to the jury whether the defendant, by the exercise of reasonable diligence, could have prevented the accident, and the failure to do so constituted the proximate cause of the accident and its consequences, notwithstanding that the deceased himself might have been guilty of antecedent negligence contributing to the collision. This proposition involves the doctrine known as the "last clear chance" or opportunity, and there was evidence justifying the court in submitting that question to the jury. In substantiation of this statement, we have only to refer to the conduct of the deceased as above described, to the testimony of Sansone that, although just before starting over the crossing he looked up and down the track, he saw no train coming from either direction, and particularly to the testimony of Elliott, the civil engineer, who measured and gave the distance between Vine and Vina Vista streets, to that of the witness Currier, who testified that almost at the very time he heard the whistle of the car near Vine street he saw Sansone in the act of driving over the crossing at Vina Vista street, the horse's nose then being as far as the track, and to that of the motorman who testified that he could possibly have stopped the train at the rate at which it was then going within a distance of 150 feet, and further testified that he saw Sansone and the deceased for several blocks before they reached Vina Vista street and kept close watch of their movements all the way down.

Elliott, it will be recalled, said that the distance from the center of Vine to the center of Vina Vista street was 345 feet. Currier, although not certain whether when he heard the whistle the train was 50 feet north or 50 feet south of Vine street, was reasonably certain that it was not more than 50 feet from said street on either side. Manifestly, if when the train whistled it was 50 feet north of Vine street, there was then an intervening distance between the train and Vina Vista crossing of over 400 feet. If, however, the train was 50 feet south of Vine when it blew its whistle, there was still approximately 300 feet between the train at that point and the Vina Vista crossing and, according to the motorman himself, he could have stopped the train after Sansone had driven partly on the track so as to have avoided the collision. Thus the question whether the defendant could have prevented the accident by the exercise of a proper degree of care and diligence was introduced into the case, and it was obviously proper for the court to instruct the jury upon that issue.

[8] Typical of the several instructions given by the court and addressed to that question is the following:

> "One having knowledge of the dangerous situation of another and having a clear opportunity, by the exercise of proper care, to avoid injuring another, must do so, notwithstanding that the latter has placed himself in such situation of danger by his own negligence. If, therefore, you should find from the evidence that the motorman of defendant's car which collided with the wagon saw the decedent on the wagon on the track, and could have stopped the train without injury to the same or to its passengers, and by so stopping the train within the shortest time and space possible under the circumstances, could have avoided the collision, and neglected to do so, in consequence of which neglect to stop the train, the decedent was killed, the plaintiff is entitled to a verdict."

There can be no doubt that the above instruction involves a correct general statement of the rule.

[9-11] Of course, in a case where the evidence plainly and clearly showed that the injured party himself had an opportunity (of which he then had knowledge) to relieve himself of the perilous position into which he had negligently placed himself, and could

have done so by the exercise of reasonable diligence and thus himself have avoided the accident, then such a situation would be presented as is to be found in several of the cases cited by the defendant. In such a case, it would be no less the duty of the party so placing himself in such a position to prevent the accident than it would be for the other party to do so, and if under such circumstances an accident occurred and damage to person or property resulted, the negligence of the party placing himself in the position of danger would be a continuing, active, concurring cause thereof. But no such a case is presented here. While a railroad crossing over a public street is itself a signal of a danger, and those attempting to make the crossing must always exercise due care and caution, still the public obviously have the right to pass over it. The mere act of passing over the crossing is not negligence per se. There is negligence only when the attempt is made to pass over the crossing without first using reasonable care in ascertaining in the proper way whether there is a train on the track approaching the crossing or about to approach it. There is evidence here that Sansone looked both ways before he started over the track and saw no train before and at the time the horse and vehicle were started over the crossing; that the train suddenly and unexpectedly came upon Sansone and the deceased; and that therefore their position unexpectedly became one of peril only when it was too late for them to withdraw therefrom in time to have avoided the accident. Thus it is clear that upon that question the case was one peculiarly for the jury, or, in other words, not a case where, as is true of the cases cited by the defendant, it can be said, as a matter of law, that the negligence of the deceased was a continuing, active, efficient, concurring cause of the accident and its consequences.

We have found no legal reason for disturbing the judgment, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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36 Cal. App. 540

PEOPLE v. WEBSTER. (Cr. 672.)

(District Court of Appeal, First District, California. March 19, 1918. Rehearing Denied by Supreme Court May 17, 1918.)

1. CRIMINAL LAW 🔑829(1) — REQUEST FOR CAUTIONARY INSTRUCTION.

Requested cautionary instruction, in prosecution for rape, was sufficiently covered by charge to consider the matter calmly, dispassionately, and deliberately, as they would any other accusation, to be very careful, and to weigh, analyze, and consider the testimony carefully and guardedly.

2. RAPE 🔑42 — EVIDENCE — CHARACTER OF ACCUSED.

In prosecution for rape, prosecuting attorney's question whether witness knew that accused had been sentenced to the penitentiary for rape was improper and unfair; the judgment referred to having been reversed.

3. RAPE 🔑42 — EVIDENCE — CHARACTER OF ACCUSED.

In prosecution for rape, the assistant district attorney could properly inquire whether witnesses had heard that accused had been previously accused of rape; such accusations, even if untrue, bearing on reputation.

4. CRIMINAL LAW 🔑718, 722½—CONDUCT OF COUNSEL.

There can be no excuse for flagrantly improper conduct of assistant district attorney, in referring to prior conviction for similar offense after the court had stricken out all reference thereto, and in saying what he would do, had prosecutrix in rape case been his daughter.

5. CRIMINAL LAW 🔑1171(1) — APPEAL — HARMLESS ERROR.

But such error was harmless, where the record of defendant's guilt was very clear and convincing.

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Warren M. Webster was convicted of an attempt to commit rape, and he appeals. Affirmed.

Thos. P. Wickes, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

ZOOK, Acting Presiding Judge pro tem. In this case, upon an information charging him with rape, the defendant was convicted of an attempt to commit rape. No useful purpose would be subserved by a recital of the facts upon which the defendant was convicted; but the evidence, which showed a prompt complaint by the little girl to her mother, an immediate medical examination, followed by the arrest of the defendant on the day of the offense, a straightforward story told by the prosecuting witness on the stand, and a rambling and incoherent tale on the part of the defendant, was amply sufficient to warrant the conviction.

[1] Only two points are urged for reversal of the judgment; one being the refusal of the court to give a cautionary instruction requested by defendant, and the other being misconduct on the part of the district attorney. While the instruction offered might well have been given, we are satisfied that the trial court fully covered the points involved therein when it instructed the jury to consider the matter "calmly, dispassionately, and deliberately," as they would any other accusation, and that they were "to be very careful in any such case," and should "carefully and guardedly weigh, analyze, and consider the testimony against the defendant."

[2, 3] On cross-examination of one of defendant's character witnesses, the assistant district attorney, Mr. McWood, asked the following question:

"Do you know that on the 28th day of February, 1896, he [the defendant] was sentenced to San Quentin for rape?"

As the trial judge stated at the time, the judgment referred to was reversed by the Supreme Court, and the question, in the form put, was manifestly improper and unfair. However, defendant's counsel did not assign the question as misconduct, but made a request that the jury be instructed to disregard it, which request was promptly granted. In the examination of subsequent character witnesses, the district attorney asked them if they had ever heard that the defendant had been accused of rape before. This was proper, as even untrue accusations have their bearing on a person's reputation.

[4, 5] Upon the argument, Mr. McWood, in flagrant disregard of the fact that the court had stricken out all reference to the previous judgment, deliberately referred thereto again, and also made some highly inflammatory statements as to what he himself would have done, had his own daughter been treated as prosecutrix had been. There is, and can be, no excuse for this conduct on the part of the assistant district attorney, and in a case that was at all close such conduct would compel a reversal; but in this case the record of defendant's guilt is so clear and convincing that we are constrained to hold that the misconduct of the assistant district attorney has not resulted in a miscarriage of justice. It is to be noted that the trial judge endeavored to keep the assistant district attorney within bounds in every way, except by fining him for contempt, a procedure which may commend itself to trial courts in the future under similar circumstances.

The judgment is affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

(36 Cal. App. 514)

HAIGHT et al. v. STEWART et al.

(Civ. 1781.)

(District Court of Appeal, Third District, California. March 15, 1918. Rehearing Denied by Supreme Court May 13, 1918.)

1. JUDGMENT 🔑250 — RELIEF — SCOPE OF PLEADINGS.

A party is not only entitled to any and all relief which is appropriately within the scope of his pleading, but may be awarded such relief upon any substantial legal or equitable ground coming within the fair and reasonable import of the averments of his pleading.

2. JUDGMENT 🔑250 — RELIEF — SCOPE OF PLEADINGS.

In a suit to annul a contract for the exchange of real estate for certain lands and corporation bonds, where the complaint alleged that defendant had no title to the lands, and that the bonds were worthless, judgment based on failure of consideration could properly have been rendered within the pleadings, if supported by the evidence.

3. VENDOR AND PURCHASER 🔑44 — FRAUD AND WANT OF CAPACITY—EVIDENCE.

In suit to set aside an exchange of lands by plaintiff's decedent on the ground of fraudulent representations and weakened mental capacity, evidence *held* to warrant a finding that plaintiff's decedent was mentally capable of so conducting the transaction as to protect his own interests.

4. VENDOR AND PURCHASER 🔑44—EVIDENCE.

In a suit to set aside a contract for the exchange of lands between plaintiff's decedent and defendants on the ground that one of the defendants fraudulently represented his interest in the land, evidence *held* to warrant finding that such representations were not false.

5. VENDOR AND PURCHASER 🔑44—MISREPRESENTATIONS—EVIDENCE.

In a suit to set aside a contract made by plaintiff's decedent for an exchange of lands for corporation bonds on the ground of false representation that the bonds were worth $600 each, evidence *held* to warrant a finding for defendant that no such representation was made.

6. VENDOR AND PURCHASER 🔑44—MISREPRESENTATIONS—EVIDENCE — "SPECULATIVE OR TRADING VALUE."

In a suit to set aside a contract made by plaintiff's decedent for an exchange of lands for corporation bonds alleged to be worthless, evidence *held* to warrant a finding that the bonds had a "speculative or trading value," that is, a value following from a possibility or probability dependent on the future management of the corporation, that they would acquire a substantial market value.

[Ed. Note.—For other definitions, see Words and Phrases, Speculative Value.]

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by Samuel C. Haight, executor of the estate of George W. Haight, deceased, substituted as plaintiff, and another, against W. H. Stewart and others. From judgment for defendants and denial of a new trial, plaintiffs appeal. Affirmed.

Leon Martin, of San Francisco, for appellants. Duard F. Geis, of Willow, for respondents.

HART, J. George W. Haight and his wife, Mary Setchel Haight, commenced the action for the purpose of having rescinded a certain contract between the plaintiff, George W. Haight, and the defendant, W. H. Stewart, and to have declared null and void two certain deeds of conveyance. After the trial of the case and before judgment was entered George W. Haight died, and his executor, Samuel C. Haight, was substituted as one of the plaintiffs.

The complaint shows that during the month of November, 1911, George W. Haight and W. H. Stewart were negotiating for an exchange of certain properties. On the 22d of November they entered into a written agreement by which said Haight agreed to convey to Stewart a tract of land situated in Glenn county, consisting of 760 acres, and Stewart agreed to convey to Haight his interest in certain lands in Mendocino county, subject to certain specified incumbrances, and also to deliver to him 27 bonds of the par value of $1,000 each of the Western Consolidated Coal, Gas & Electric Company (hereinafter called "the bonds"). The transaction was consummated on the 27th day of November, 1911, by the delivery to defendant Myrtle J. Stewart, wife of W. H. Stewart, of a deed, executed by George W. Haight and his wife, conveying the Glenn county lands, and by the execution and delivery by said Stewart to George W. Haight of an assignment of all his right, title, and interest in and to the certificate of purchase of the Mendocino county lands, subject to certain incumbrances therein specified, and by the delivery to said Haight of 27 bonds of said corporation. On December 18, 1911, defendants, Myrtle J. Stewart and W. H. Stewart conveyed the Glenn county lands to J. L. Stewart, the father of W. H.

It is charged in the complaint that the above-described transaction was brought about by and through the false statements and representations of W. H. Stewart to Geo. W. Haight; that said Stewart represented to said Haight that he had title to the Mendocino county lands, whereas the title to said lands was never at any time vested in Stewart, but that the same was at the time of the transfer, and still is, in the United States government; that Stewart stated and represented to said Haight that the bonds were of the actual value of $600 each, and that he (said Stewart) had a short time previously to the transaction involved herein sold some of said bonds at that price; that said bonds were then "and now" of no value whatever and are wholly worthless for any purpose. It is alleged that said Haight, believing, accepting, and relying upon the false statements and representations so made to him by Stewart, on the 22d day of November, 1911, entered into and subscribed to the written agreement with said Stewart above mentioned, and, on the 27th day of November, 1911, in pursuance of said agreement, conveyed and transferred his Glenn county lands to said Myrtle J. Stewart. It is alleged that the said Myrtle J. Stewart knew that the statements and representations made by W. H. Stewart to said Haight were false and untrue when they were so made. It is further alleged that the said Haight, at the time of the transaction, was sick, physically and mentally, and that his mental strength had been prior to the time of the said transaction, and was at said time, greatly weakened. The complaint states that the said Haight and his wife, Mary S. Haight, the other plaintiff herein, did not know or have any knowledge that the said statements and representations made by the said W. H. Stewart at the time above mentioned respecting the bonds and the Mendocino county lands were not true until the 14th day of March, 1912, when they learned that said statements and representations were wholly false and untrue, and that the said bonds were absolutely worthless, and that the title to the Mendocino lands was still in the United States government, and not in the said W. H. Stewart. It is alleged that due notice to both W. H. Stewart and Myrtle J. Stewart was thereafter given by said Haight that he rescinded the transfer of the Glenn county lands, and that said Haight offered to restore to the Stewarts everything of value he had received from them under the agreement of November 22, 1911.

A demurrer to the complaint on general and special grounds was overruled, and the defendants thereupon answered, denying specifically the averments of the complaint, and affirmatively stating facts disclosing the nature of the transaction and the circumstances under which it was brought about.

The court, briefly stated, found: (1) That on November 22, 1911, Geo. W. Haight was the owner and in the possession of 760 acres of land in Glenn county, having a market value of $11,400. (2) That on said date W. H. Stewart was in possession of and had an interest in the Mendocino county lands described in the complaint under a certificate of purchase from the state of California numbered 15955, which said interest was of the value of $6,000, and subject to the following incumbrances: A certain mortgage thereon to one V. W. Liston, amounting to $350; a certain trust deed thereon to one H. S. Bridge in the sum of $450; delinquent taxes amounting to $250; the balance of the purchase price due to the state of California on said lands, amounting to the sum of $340; and the sum of $100 due to one H. S. Beadle, constituting a lien upon said premises. (3) That said Stewart, on the 22d day of November, 1911, was the owner and did own 27 bonds of the Western Consolidated Coal, Gas & Electric Company, having a nominal par value of $1,000 each, that said bonds had no cash market value, but that they did have a "speculative or trading value." (4) That George W. Haight and wife conveyed the Glenn lands to Myrtle J. Stewart at the request of W. H. Stewart, and received in exchange therefor the 27 bonds of the Western Consolidated Gas & Electric Company, and a conveyance of all W. H. Stewart's interest in and to the Mendocino lands. (5) That in the negotiations culminating in the agreement of November 22, 1911, W. H. Stewart told George W. Haight that said bonds were of the value of $600 each, and that he (Stewart) believed they were worth $600 each, but that said Stewart did not tell said Haight, as the complaint alleges, that the said bonds were of the reasonable market value of $600 each, and could actually be sold for said sum, and that said Stewart did not tell said Haight, as the complaint charges, that he (Stewart) was well acquainted with the value of the said bonds, and that he had, at a time immediately preceding said 22d day of November, 1911, actually sold said bonds for said sum of $600 each, and that said bonds were then actually being sold and could be sold for said sum. (6) That no fraud was practiced or perpetrated on Haight by Stewart, and that Haight was not induced or influenced to enter into and carry out the agreement of November 22, 1911, through any fraud or misrepresentation on the part of W. H. Stewart. (7) That at the time the above contract was entered into George W. Haight's health and mentality were weakened, but not to such an extent that he did not fully know and understand the details of the transaction referred to herein; that W. H. Stewart was aware of Haight's illness, but did not know that his mentality was impaired in any degree.

The appeal is by the plaintiffs from the judgment and the order denying a motion interposed by them for a new trial.

A reversal is demanded upon the ground that there is no evidence to support these findings: (1) That the said bonds had a speculative or trading value; (2) that W. H. Stewart had an interest in the Mendocino county lands; (3) that W. H. Stewart was not guilty of fraud in the matter of the agreement of November 22, 1911.

The general position of the appellants is that, the said bonds and the said assignment of the interest of W. H. Stewart in the Mendocino lands being the only consideration the plaintiffs received for conveying and transferring the Glenn county lands to Myrtle J. Stewart, if it appears from the evidence that said bonds were wholly valueless, and that W. H. Stewart had no interest in the Mendocino lands, then it must necessarily be held that the Haights conveyed away 760 acres of land, having a value of $11,400, without receiving therefor any consideration whatever; that, in such a situation, a failure of consideration is shown for which there must be a rescission of the transfer of said lands. It is contended that the evidence does show the worthlessness of the bonds, and that W. H. Stewart had no interest in the Mendocino lands, and, furthermore, that George W. Haight was in an enfeebled condition of health when the transfer and the agreement therefor were made, and that he was imposed upon and induced to enter into and consummate the transaction through the fraud of W. H. Stewart.

We may first notice the point made by the respondent that the complaint does not proceed upon the theory that there was a failure of consideration, and that such was not the theory upon which the case was tried in the court below; that the complaint is based solely upon the alleged fraud whereby the transaction was consummated, and that upon that ground alone a rescission was and is demanded; that therefore the position of appellants in this court that there was a failure of consideration is not warranted by their pleading or the essential theory thereof, and that consequently the elaborate argument in their briefs addressed to that proposition is entirely gratuitous and without pertinency or force.

[1] It is, of course, well settled in procedural law that a party is not only entitled to any and all relief which is appropriately within the scope of his pleading, but may be awarded such relief upon any substantial legal or equitable ground coming within the fair and reasonable import of the averments of his pleading. In this case it is plainly manifest that the complaint, assuming its averments to be true, reveals a clear case of failure of consideration.

[2] The statements therein are that the bonds are absolutely valueless for any purpose, and that W. H. Stewart had and has no interest in the Mendocino lands. These constituted the sole consideration for the transfer by Haight to Myrtle J. Stewart of the Glenn lands. If the bonds were worthless, and Stewart had no interest in the Mendocino lands, then surely there was a failure of consideration. The allegations of fraud and of the enfeebled mental condition of Haight were proper for the purpose of showing that thus Haight was imposed upon and induced to transfer his property for nothing or for a purported consideration which it developed was worthless or without any value. The fact is that the failure of consideration is the prominent, and, indeed, the principal factor in the cause of action stated by the complaint.

[3] We are persuaded, however, from an examination of the record, that the challenged findings are sufficiently supported to fortify them against successful attack, and that there was not a failure of consideration. We may with propriety first briefly consider the testimony relative to the mental condition of Haight for some time prior to and at the time of the making of the agreement of November 22, 1911, and the subsequent exchange of the properties above mentioned in pursuance of the provisions of said agreement.

George W. Haight was an attorney at law having offices in the city of Berkeley, and had actively practiced his profession for many years. In late years, prior to his death, in connection with his law practice, he dealt extensively in real estate, buying, selling, and exchanging real properties. While two physicians who had professionally attended him on several occasions and who likewise investigated his condition some time before and at about the time of the transaction concerned herein testified that Haight, at said times, was undergoing a decline in physical and mental strength, that he was suffering from what is known in medical science as bulbar paralysis, and that his tendency was also to a paretic condition, there was also testimony that, save a noticeable impairment of memory, he was capable of transacting business intelligently and with good judgment. His own son, the substituted plaintiff herein, testified that for a considerable period before and down to the time of the execution of the agreement of November, 1911, he was engaged in performing certain duties in his father's office and saw him daily, and that, while he observed that his father's memory was not as good as it had formerly been, he was nevertheless in full possession of his reasoning powers. The defendant W. H. Stewart testified that he had another and different real estate transaction with Haight just prior to the deal with which we are here concerned, and that at that time, as well as in all the negotiations leading to the transfer of the Glenn county lands by Haight to his (Stewart's) wife, he observed nothing either in Haight's actions or his method of transacting business indicating that he was in the slightest degree lacking in judgment or business sagacity.

In addition to the above testimony, it was shown that Haight himself prepared the agreement of November 22, 1911, and the instrument appears to have been drawn as a lawyer of skill would prepare such a document. It is in language which clearly and unambiguously expresses the propositions to which the parties had mutually agreed. There is also medical testimony tending to impeach the medical testimony presented by the plaintiffs upon the question of Haight's mental competency at the time of the making of the said agreement, and also when subsequently he made the transfer of the Glenn lands to Myrtle J. Stewart.

As to the negotiations resulting in the making of the written agreement of November 22, 1911, and the subsequent exchange of properties between George W. Haight and W. H. Stewart, the latter testified:

> That he first met George W. Haight in April, 1911, with reference to a deal for some property in Boston, which was consummated in August or September; that upon the closing of that transaction Haight asked him if he had some other things he was willing to trade; that he (Stewart) said that he had an interest in a 20 per cent. certificate of purchase representing some lands in Mendocino county. Haight asked questions about the location of the lands, the climate, etc., and said: "I want to see if it is a good hunting lodge or summer home proposition and at the same time a healthy investment for the future."

The witness proceeded:

> "Haight said, 'What else have you got, Stewart?' I told him, 'I have some bonds of the Western Consolidated Coal, Gas & Electric Company,' and he said, 'Why, I think I have got some of that kind, too,' and he jumped up out of his chair and opened his safe and brought out a bunch of bonds, and he said, 'Are they like this?' and I said, 'Yes; they are the same thing; do you know anything about the bonds?' and he said, 'I have looked them up, and they represent leases and fee-simple lands and a contract for between 15,000 and 20,000 acres of land,' and I asked him what he thought of them, and he said: 'You can't cash them at the bank. I have tried to; but the reason is the coal companies are fighting among themselves and quarreling and raising money to transport the coal; they have fine mines, and I found they were good.' I asked him where he got them, and he said: 'From Mr. Runnels in trade for West Berkeley property.' I asked him what he allowed him for them, and he said: 'I allowed him full cash value, because I think they are good bonds, although, of course, you will have to wait. What are you holding these bonds at?' and I said: 'Judge, I don't know. I don't know what they are worth. All I know is what they got me. * * * Some of them cost me 30 cents on the dollar and some 25 cents.' The judge jumped out of his chair and said to me: 'These bonds must be valuable. Anything that has any interest in coal mines on the Pacific Coast can't help but be good things.'"

The witness said that Haight gave him a description of his Glenn county lands and asked him if he had an abstract of title to the Mendocino county lands. Stewart produced a certificate of search and handed it to Mr. Haight, who looked it over and remarked: "This shows the property in the name of Marcus D. Hyde." The witness said: "Yes; Mr. Hyde is holding it for me." Haight said: "I will look it over. I am not satisfied about the bonds, but I will look them up, too." In about a week or ten days Stewart returned to the office of Mr. Haight, who said: "I have found out that the 20 per cent. certificate of purchase is prima facie evidence of title, but, of course, the title is not in you. You have no deed or patent, but you will have title in proper time; you will be patent owner of the land. I found that it is a negotiable title, and that a man can buy or sell or borrow money, and I am satisfied." Stewart asked: "Did you look up the bonds any more?" to which Haight replied: "Yes; I looked the bonds up. * * * I am willing to take a chance and wait for them to quit fighting, and when they settle down and get a railroad in the bonds will go up and if I can get them cheap enough I will take them." There was a discussion of values of the different properties and of the timber and tanbark on the Mendocino county lands, and considerable figuring was done. The witness said he figured that there was timber on the land of the value of $6,000, and from 400 to 600 cords of tanbark worth from $4 to $6 per cord, and that with the $6,000 worth of timber "that would make a total valuation of $8,400. We wrote that down," continued Stewart, and he [Haight] asked: "How do you then figure the bonds?" The witness replied: "Judge, that is a question about the bonds. I don't know what they are worth. I am not positive on them. You know about them better than I do." Haight then said: "I have 720 acres at Willows. If you will give me these 27 bonds and your interest in the timber lands, subject to the incumbrances against them, I will give you that land up at Willows, and you can see what you can do with it." Stewart, continuing, testified: "We figured it right here. Judge Haight and I both figured it, and the timber land figured out $8,400, less about $1,500 in debts against it—old incumbrances against it, and I said, 'Now, these bonds would average me between 25 and 50 cents on the dollar, because some cost me 50 cents and some 25 cents on the dollar;' and he said, 'That is as much as I would allow.' " Stewart then said to Haight that he would think it over and see him later, and Haight said, "All right and I will think it over, too, and I will see if I can find out any more information about the bonds, and maybe I will do better." About one week after said conversation, which was on November 22, 1911, Stewart returned to Haight's office and met the judge, who thereupon asked Stewart what he then thought of the proposed deal. Stewart said, "In view of the fact that I had moved away from where I was, I would be willing to trade on the basis that he [Haight] proposed," and the latter replied, "Well, if you want to make the deal, I will call in the stenographer and dictate a preliminary contract so we can tie each other up." The trading agreement was thereupon dictated to the stenographer by Haight, and, being written up, was signed by Stewart and Haight on November 22, 1911. Stewart again called at Haight's office, and the papers transferring the respective properties were executed and exchanged. Among these instruments was an agreement between Stewart and Marcus D. Hyde in which the latter agreed to quitclaim the Mendocino county lands to Stewart upon the payment of $20, which agreement Stewart assigned to Haight.

A timber cruiser and expert testified that he examined the Mendocino lands, either in January or February of the year 1911, and found thereon about 5,000,000 of feet of red fir timber, about 1,000,000 feet of redwood and about 400 cords of tanbark; that prior to making said investigation he was not acquainted with and had never met W. H. Stewart, having made the examination of the lands at the request of one Borden; that in November, 1911, he had business with Geo. W. Haight in his office, and was in the act of leaving the office when he met W. H. Stewart going into Haight's office; that Stewart requested the witness to return with him to the office of Haight and tell the latter what he knew of the lands; that he did so, drew a diagram of the land, and produced some photographs showing how much timber it contained, and told Haight of the quantity and quality of the timber on the land.

Samuel C. Haight testified that he knew very little of the details of the transactions between his father and W. H. Stewart, and that he had no conversation with his father regarding said transactions, except that his father "spoke of his enthusiastic desire to own a piece of timber land."

There is testimony by one witness that the $1,000 bonds were selling for $5 to $10 each, and by another witness that they were worth from $10 to $25 each in November, 1911.

There is also some testimony tending to show that Judge Haight was very desirous of securing the Mendocino lands because he believed they were suitable for a country home, which he appeared to be anxious to have located in the mountains, where there were opportunities for fishing and hunting.

[4, 5] Thus we have presented herein a statement in substance of the testimony upon which the trial court grounded the findings, and nothing more need be said of it than that it is amply sufficient to support the conclusions evidenced by said findings that George W. Haight, at the time of making the agreement and the transfer in question, while not in his usual good health, was nevertheless mentally capable of intelligently, understandingly, and properly conducting those transactions so as to safeguard his own interests, and that there were no false representations by Stewart as to the nature or extent or value of his interest in the Mendocino lands, nor misrepresentations or subreption upon his part as to the bonds in question or their value. As to the bonds, it is quite clear that the court was warranted in finding that Stewart did not represent to Haight that they were of the value of $600 each. Stewart not only denied making any such representation, but the proposition is unreasonable upon its face. It is hardly conceivable—at least it is not consistent with a reasonable view—that a sane man would have the temerity to represent or pretend that securities which, with a valuable equity in a tract of land, he was willing to exchange for a tract of land of the value of $11,400, were actually worth, at the time of the proposed exchange, the sum of $16,400.

[6] It is vigorously argued, however, that the bonds had no value whatever, and that the court's finding that they had a "speculative or trading value" is wholly meaningless. There is some evidence tending to show that the bonds had some value. Haight certainly believed that they had some value, and, according to the findings, based that belief upon his own personal knowledge of them. In discussing the bonds with Stewart, he, in effect, expressed the opinion, founded upon what he knew of the corporation by which they were issued, that they would develop into valuable securities if the affairs of said corporation were properly managed in the future; that is, to be more specific, he said that they would become valuable if the corporation could secure or "take in" a railroad to be used for its purposes. In brief, the general trend of his talk respecting the bonds was that he had some confidence that they would at some future time acquire substantial value. And it was doubtless upon this testimony and the testimony of other witnesses that in November, 1911, the $1,000 bonds were worth from $5 to $10 each, one witness stated, and from $10 to $25 each, another witness stated, that the court based the finding that at the time of the deal between Stewart and Haight they had a "speculative or trading value," that is to say, as

we understand that phrase, that they had a value following from a possibility or probability, dependent upon the future happening of certain contingencies respecting the affairs of the company issuing them, that they would in the future acquire a substantial cash market value.

It is contended, however, that Stewart having no title to the Mendocino lands, the same still being in the United States government, he had no valuable or any interest therein which he could transfer. But, in the first place, it is to be remarked that Stewart testified, and the certificate of search, which, as seen, was examined by Haight, showed, and upon this testimony the court found, that Stewart did not claim nor represent or state to Haight that he was vested with title to the lands, but stated that he had such interest therein only as was embraced within the scope of the certificate of purchase from the state of California. In the second place, it is to be observed that the lands, although the title thereto was still in the federal government, had been duly selected as lieu by the state, was open to sale by the state when Stewart received his certificate of purchase (Pol. Code, § 3513), and that said certificate was subject to sale by the owner or holder thereof by deed or assignment (Pol. Code, §§ 3514 and 3515). Quite clearly the cases cited by the appellants that no title to the public lands of the United States passes to the state or to purchasers from the state until the lands are certified over to the state by the Commissioner of the General Land Office are not in point here, since there is, as seen, no claim that Stewart attempted to convey the title to the Mendocino lands to Haight, nor made any pretense of being able to do so or of doing so when negotiating and consummating the deal between him and Haight.

Thus we find an answer to the contention of the appellants that there was a total failure of consideration for the transfer of the Glenn lands by Haight to Myrtle J. Stewart. There was a consideration, and a valuable one, according to the finding of the trial court. It is true that there is a wide difference between the value of the Glenn lands, as found by the court, and that of Stewart's interest in the Mendocino lands, as likewise found. But it is not necessarily to be held to follow from that fact that there was a failure of consideration or that the consideration moving to the plaintiffs for the transfer of the Glenn lands was so inadequate as to "shock the conscience," and so justify a court of equity in setting aside the transfer as involving an inequitable and unconscionable transaction. The parties to this transaction each had full and an equal opportunity for an independent and thorough investigation of the facts of the proposed transfer, and each exercised and relied upon his own independent judgment in negotiating and consummating the transaction. They sustained no relation of confidence to each other, and dealt with each other at arm's length. It is clear that Judge Haight conducted his end of the transaction with his eyes wide open. He examined the certificate of search of the Mendocino lands which plainly showed the nature of Stewart's interest therein and the incumbrances to which that interest was subject. He owned, and for a long time previously to the transfer had owned and had in his possession, bonds similar to those which he received in the deal from Stewart. He knew as well as did Stewart, if not better than the latter, what those bonds were and what they amounted to. Neither probably considered that they possessed much if any cash value then. As the learned trial judge said in deciding the case:

> Both the "parties probably knew that efforts were being made to place the company on its feet. If these efforts were successful, the bonds would greatly increase in value. They were an inviting investment to one who was willing to take desperate chances of losing a small investment in the hope of repaying a profit of many hundred per cent."

Prof. Pomeroy, in his work on Eq. Juris. (3d Ed.) § 926, says:

> "Where the parties were both in a situation to form an independent judgment concerning the transaction, and acted knowingly and intentionally, mere inadequacy in the price, * * * unaccompanied by other inequitable incidents, is never of itself a sufficient ground for canceling an executed or executory contract."

See, also, the late case of Hallidie v. First Federal Trust Co., etc., 171 Pac. 431.

It is not always readily or easily determinable what is an adequate consideration in a given case for the transfer of property. Many and various elements may be necessary to be considered in determining that question. While, in most instances, the principal criterion is probably the market value of the property or the value for the purposes to which it may the most advantageously be put, yet it is often proper to consider other special motives or purposes, if any there be, of the parties in making and receiving the transfer. Sentimental or peculiar personal reasons, having no reference either to the intrinsic or market value of the property, may be the controlling motive of the sale and purchase. Hence, "as Hobbes says," quoting from Ruling Case Law, vol. 6, § 85:

> "The value of all things contracted for is measured by the appetite of the contractors. Accordingly the courts do not ordinarily go into the question of equality or inequality of considerations, but act upon the presumption that parties capable to contract are capable of regulating the terms of their contracts, granting relief only when the inequality is shown to have arisen from mistake, misrepresentation, or fraud. A different rule would in every case impose upon the court the necessity of inquiring into and of determining the value of the property received by the party giving the promise. Such a course is deemed to be impracticable. In all cases, therefore, where the assumption or undertaking is founded upon the sale or exchange of merchandise or property, or upon other than a money consideration, and the promise has been deliberately made, the law looks no further than to see that the obligation rests upon a consider-

ation; that is, one recognized as legal, and of some value. It is sufficient if it is of only slight value, or such as can be of value to the promisor. Where a party contracts for the performance of an act which will afford him pleasure, gratify his ambition, please his fancy, or express his appreciation of a service another has done him, his estimate of value should be left undisturbed, unless, indeed, there is evidence of fraud. There is, in such a case, absolutely no rule by which the courts can be guided, if once they depart from the value fixed by the promisor. If they attempt to fix some standard, it must necessarily be an arbitrary one, and ascertained only by mere conjecture. If, in the class of cases mentioned, there is any legal consideration for a promise, it must be sufficient for the one made; for, if this is not so, the result is that the court substitutes its final judgment for that of the promisor, and, in doing this, makes a new contract."

In this case as shown, there is evidence that Judge Haight was anxious to secure a country home in the mountains, and that he had an "enthusiastic desire" to own some timber land. His Glenn county lands, as the evidence shows, were what are commonly known as "goose lands," and were so plentifully charged with alkali as to render them unfit for general agricultural purposes. It further appears that he was then and for some time prior had been renting them for $200 per year, a little more than enough to pay the taxes on them. It was probably his desire to get that unproductive and unprofitable tract off his hands and at the same time secure timber land and such a location for a country home as his heart longed for that largely influenced him to make the trade. At any rate, the evidence shows that he received a valuable consideration for his Glenn county lands, and, being perfectly competent to transact business intelligently and understandingly, that he deliberately and intentionally and in reliance upon his own independent judgment entered into and consummated the transaction. He must therefore stand by the bargain of his own making.

The judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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36 Cal. App. 543

PROPHET v. KATZENBERGER.

(Civ. 2152.)

(District Court of Appeal, Second District, California. March 19, 1918.)

1. CONTRACTS 🔑346(8) — SUFFICIENCY OF PERFORMANCE—ISSUES AND PROOF.

In action for damages due to defective drain installed by defendant contractor in building constructed for plaintiff, where defendant admitted that according to plans and specifications he was required to place a galvanized iron drain from the light well as alleged in complaint, and the only difference between such admission and allegations of complaint was that the complaint stated that according to the specifications the drain should have been of vitrified iron, it was unnecessary for plaintiff to introduce in evidence the specifications as a foundation for proof that work as done did not conform thereto, where no issue was raised as to the substitution of galvanized iron.

2. CONTRACTS 🔑350(1)—ACTION FOR DAMAGES—SUFFICIENCY OF EVIDENCE.

In action for damages resulting from settling of building constructed by defendant for plaintiff, it being alleged that settling was due to too narrow footing for foundation and accumulation of water in basement because of defective drain, evidence *held* to support findings for plaintiff.

3. APPEAL AND ERROR 🔑1040(11)—HARMLESS ERROR—OVERRULING DEMURRER.

Assuming that plaintiff's second and third counts were uncertain or unintelligible in some particulars, overruling defendant's demurrer thereto would not constitute any ground for reversal, where by his answer defendant raised all issues necessary for determination of action upon merits.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Action by Charles Prophet against Valentin Katzenberger. Judgment for plaintiff, and defendant appeals. Affirmed.

Robt. T. Linney and Gordon L. Finley, both of Los Angeles, for appellant. Loeb, Walker & Loeb, of Los Angeles, for respondent.

CONREY, P. J. By the findings of the trial court the following facts appear: On September 27, 1912, plaintiff and defendant entered into a contract in writing for the construction by the defendant of a building upon a parcel of land owned by the plaintiff. Defendant was to furnish all necessary materials and labor and to construct and complete the building in a good, skillful, and workmanlike manner, in conformity with the plans and specifications therefor. The building was constructed and paid for within the time prescribed by the contract, but it was not in all respects constructed in accordance with the terms of the contract. By the plans and specifications it was provided that the building should stand upon a concrete foundation placed immediately and continuously under the exterior walls of the building, said concrete foundation or footing to extend below the walls to a prescribed depth and to be of a thickness graduated so that the footing at its base should be of a thickness of 24 inches. Instead thereof the defendant made the foundation or footing in such manner that the thickness at the base thereof was in many places considerably and materially less than 24 inches. The plans provided that the defendant should install an iron drain beginning at the light well of the building, as shown upon the plans, extending from the light well under the cement floor of the north storeroom of the building, passing under the front wall of the building, and extending to the gutter of the street in front of the building. Instead of complying with this term of the agreement, the defendant installed and placed a defective drain, in this: That he installed a drain in which were two holes of the approximate size respectively of 2 and 2½ inches in diameter and occurring at a point in the pipe where the same lay under the cement floor of the north storeroom. The failure and neglect of defendant, as above stated, was unknown to and without the consent of the plaintiff. A little more than one year after the completion of the building, to wit, in February, 1914, there was a heavy fall of rain within the territory in which said building was located, by reason whereof a large quantity of water accumulated in and about the building, and in particular in and about the portions of the footings of the building under the north wall, the northerly portion of the front wall, and the northerly portion of the rear wall thereof, and by reason of said rain a large quantity of water passed into the drain leading from the light well. By reason of the defective character of the drain, the water passing into the drain escaped in large quantities through the above-mentioned holes and accumulated and stood in large quantities under the cement floor, by reason whereof the footing under the north wall and under the northerly portion of the front wall and northerly portion of the rear wall of the building gave way and settled, whereby the building was injured to the damage of the plaintiff in the sum of $927.27. At the time of said injury the north storeroom was rented at the monthly rental of $30; and by reason of the settling of the building the storeroom was vacated and remained vacant for a period of two months, to the special damage of the plaintiff in the sum of $60. At the time when plaintiff paid to the defendant the contract price for the construction of the building, and at all times prior to the time of said rainstorm of February, 1914, the defects of the building were concealed and latent, and were unknown to the plaintiff. In response to an issue raised by affirmative allegations of the answer, the court found that the plaintiff was not at any time during the time of construction of the building superintendent of that work, and did not personally supervise or inspect each or every portion of the work of construction as the same progressed, and did not personally give orders as to the manner of doing said work. The changes made by defendant in the erection, construction, and completion of the building from the plans and specifications were not made by the defendant with any knowledge or consent or at the suggestion of the plaintiff. The defendant's appeal is from the judgment which was rendered against him in the sum of $987.27.

The evidence is sufficient to justify the findings in each and all of the particulars concerning which appellant is now claiming that they were not so justified.

[1] 1. Appellant's first contention, wherein he attacks the sufficiency of the findings, is that the finding that the work was not done in accordance with the plans and specifications is not supported by the evidence, in this, that the specifications were never offered in evidence nor shown to the court nor described by counsel or witnesses. This finding is in accordance with subdivisions (a) and (b) of paragraph IV of the complaint. The answer of the defendant admitted that the plans and specifications contained the terms, conditions, and requirements stated in subdivision (a), and that by the terms of the contract and in accordance with the terms, conditions, and requirements of the plans and specifications the defendant was required to place a galvanized iron drain from the light well as alleged. The only difference between this admission and the allegation of the complaint is that the complaint stated that according to the plans and specifications the drain should have been of vitrified iron. This is not a material issue, since the plaintiff's action is not based upon any defect resulting from the substitution of galvanized iron for vitrified iron. Under this state of the pleadings it was not necessary for the plaintiff to introduce in evidence the specifications as a foundation for proof that the work as done did not conform thereto.

[2] 2. The evidence was sufficient to support the finding that by reason of the heavy fall of rain referred to in the complaint a large quantity of water passed into the drain leading from the light well. There was testimony tending to show that the drainpipe as laid by the defendant was defective by reason of the fact that there were holes in it, as alleged in the complaint, that after the rain the ground in the immediate neighborhood of the opening in the pipe was wetter than at any other part of the premises, and that by reason thereof the quantity of water accumulating under the foundation was increased. The defendant's answer admitted that as a result of said fall of rain a large quantity of water did pass into said galvanized iron drain. The answer further admitted that as a result of said heavy fall of rain and the consequent softening of the ground about and under the said north wall of said building the footing under the north wall and under the northerly portion of the front wall and the northerly portion of the rear wall settled, and the building was thereby damaged. In this connection the defendant's only denial was that the damage to the building was the result of any negligence or failure on the part of the defendant.

3. The evidence was sufficient to justify the finding that by reason of the defective construction of the footing the water which accumulated and stood under the building caused the footing under the walls to give way and settle, whereby the building was greatly injured. In addition to the facts above noted, there is much other evidence tending in the same direction. The witness Norris, who made the repairs after the building had settled, testified to the conditions found by him when he took charge of the

repair work after the building had settled. He uncovered the footing under the front wall and measured its width at several places, whereby it appeared that the width thereof was less than 2 feet; in several places it was only 17 inches. He also found on removing the cement floor that the holes in the pipe had been covered with a piece of tin. He testified as a witness who had many years' experience in repairing buildings, and stated that in his opinion the cause of the damage was that the water came up out of the pipe and soaked the ground, and that the footing was not wide enough.

The real gist of the defense was that the plaintiff had known when the work was being done that the foundation or footing was not of the prescribed width and had agreed to that change from the specifications, and that there were in fact no breaks or imperfections in the drain pipe. Upon competent evidence the court found on these issues in favor of the plaintiff. The contention that the findings as to these matters are not sustained by the evidence is without merit.

[3] The case went to trial upon the second and third counts of the complaint and the answers thereto, after an order sustaining the demurrer to the first count. Appellant now contends that the court erred in overruling his demurrer to the second and third counts of the complaint. Each of these counts undoubtedly stated a cause of action. Assuming without deciding that counts 2 and 3 were uncertain or ambiguous or unintelligible in some of the particulars set forth in the demurrer, those errors would not constitute any proper ground for reversal of the judgment. By his answer the defendant was able to and did raise all the necessary issues for the determination of the action upon its merits. In our opinion, it was so determined.

For these reasons, the judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

178 Cal. 811

In re JONES' ESTATE. (L. A. 5569.)

(Supreme Court of California. May 17, 1918.)

In Bank. Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Proceeding in the matter of the estate of William H. Jones Deceased. From an order adverse to it, the Chicago Boys' Club, Incorporated, appeals. Reversed.

James S. Bennett, of Los Angeles, for Chicago Boys' Club. Robert A. Waring, of Sacramento, and J. W. Carrigan and Edwin H. Pennock, both of Los Angeles, for state controller.

PER CURIAM. In accord with the stipulation of the parties to this appeal, on the authority of the Estate of Fiske, Deceased (L. A. No. 5433) 172 Pac. 390, decided April 12, 1918, the order appealed from, in so far as it in any way affects or relates to the Chicago Boys' Club (a corporation), the sole appellant, is reversed.

PATTEN & DAVIES LUMBER CO. v. DURFLINGER et al. (Civ. 2551.)

(District Court of Appeal, Second District, California. April 1, 1918.)

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by the Patten & Davies Lumber Company, a corporation, against William Durflinger, Charles T. Inman, and another. From the judgment rendered, Inman appeals, and plaintiff moves to dismiss the appeal. Motion denied.

H. C. Millsap, of Los Angeles, for appellant. Behymer & Craig, of Los Angeles, for respondent.

PER CURIAM. Motion to dismiss the appeal of Charles T. Inman, on the ground of failure to file transcript in this court within the time required by the rules, having been presented and submitted heretofore, together with the application of said Inman to be relieved from his default in that particular because of excusable neglect:

It is ordered that the transcript on appeal be filed. The motion to dismiss the appeal of said Inman is denied.

36 Cal. App. 817

Ex parte CARRERA. (Cr. 739.)

(District Court of Appeal, First District, California. March 25, 1918.)

Petition by James Carrera for writ of habeas corpus. Petition denied.

Edwin V. McKenzie and Hyman Levin, both of San Francisco, for petitioner. U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for respondent.

PER CURIAM. Pursuant to the case of Ex parte Lee, on habeas corpus, 171 Pac. 958, it is ordered that the warden of the prison at San Quentin deliver the petitioner to the sheriff of Los Angeles county, to whose custody he is remanded, and that the superior court of that county take such steps as may be necessary to bring the petitioner, James Carrera, before it, and pronounce judgment upon his conviction heretofore had.

178 Cal. 202

ALLEN v. NARVER et al. (L. A. 4246.)

(Supreme Court of California. April 25, 1918.)

1. Mines and Minerals ⟹78(1)—Oil Leases—Failure to Drill—Remedy of Lessor.

Under a lease for extracting oil on royalty, binding the lessees to commence operations by a certain day, and providing that if they fail to do so they will pay lessor $100 per month during continuance of default, the further provision that failure of the lessees to comply with conditions of the lease or to diligently prosecute the work of drilling and producing oil will render the lease null and void and of no effect, does not render the lease a mere option on the part of the lessees, and reduce the lessor's remedy, for lessees' failure to commence operations, to entering and terminating the lease, but gives him an option to do so, and does not prevent him allowing the lease to continue and recovering on the covenant to pay rental during default.

2. Damages ⟹79(5)—Liquidated Damages or Penalty—Oil Lease.

Provision of an oil lease for extracting oil on royalty that if the lessees fail to commence operations by a certain day they will pay the lessor $100 per month during continuance of the default, is for liquidated damages, and not penalty.

Department 2. Appeal from Superior Court, Los Angeles County; Willis I. Morrison, Judge.

Action by F. H. Allen against D. C. Narver and others. From an adverse judgment and order, defendants appeal. Affirmed.

A. A. Kidder, Jr., and Schweitzer & Hutton, all of Los Angeles, for appellants. Kimball Fletcher, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. The question presented on this appeal from a judgment in favor of plaintiff and an order of court denying defendants' motion for a new trial involves the interpretation of a lease made by plaintiff to defendants of certain lands for use in extracting oil and other mineral substances therefrom, the express consideration therefor being a royalty of one-eighth of the mineral so extracted.

[1] The provision of the lease upon which the action is based is as follows:

> "It is further expressly agreed and understood that in the event that the second parties [defendants] shall fail to commence operations by the 4th day of July, 1911, under the terms of this lease, then and in that event the parties of the second part [defendants] will pay the party of the first part [plaintiff] one hundred ($100) dollars per month for each and every month in which they shall make such default in the commencement of operations hereunder."

The complaint alleged and the court found that defendants and each of them wholly failed and refused to commence operations on or before July 4, 1911, and from thence to March 4, 1913, continuously failed and refused so to commence operations in accordance with their covenant so to do, and likewise refused to pay the $100 per month or any part thereof during said period of default. No attack is made upon this finding; indeed, it is conceded that defendants never at any time complied or attempted to comply with their agreement in this respect. Their contention is that, notwithstanding their express covenant, the lease constitutes merely an option on their part, and that plaintiff's sole remedy for breach of the agreement was to enter upon the property and terminate the lease. It is quite true that by another provision of the lease it was provided that a failure on the part of the lessees to comply with the conditions thereof, or their failure to diligently prosecute the work of drilling and producing oil, would render the lease null and void and of no effect. This provision constitutes an option given to the lessor, which, in lieu of insisting upon the payment of the $100 per month as provided in that portion of the lease hereinbefore quoted, he might or might not exercise at his election. Defendants, having agreed to commence operations before July 4, 1911, could not insist that their failure to perform their covenants should be equivalent to performance. As said by the court in discussing a like contention in Woodland Oil Co. v. Crawford, 55 Ohio St. 161, 44 N. E. 1093, 34 L. R. A. 62, where a great number of cases in support of the proposition are cited:

> "A promise to drill a well cannot be satisfied by a failure to drill such well. The proper construction to be placed upon such an agreement is, that upon failure of the lessee to drill a well, or pay the rental, * * * the lessor may elect to put an end to the lease, * * * or he may elect to have the lease continue in force to the end of the term, and enforce * * * the payment of rentals, as provided in the lease."

So here, under the terms of defendants' express covenant to pay $100 per month for each and every month in which they shall make default in the commencement of operations, the lessor may, instead of exercising the right which he has to terminate the lease, insist upon the payment of the sum stipulated to be paid for failure to comply with the covenant to commence operations and drill one well each year during the term of the lease. In support of their contention appellants have cited a number of cases, chief among which are those of Risch v. Burch, 175 Ind. 621, 95 N. E. 123, and Glasgow v. Chartiers Oil Co., 152 Pa. 48, 25 Atl. 232, an examination of which shows there was a lack of any covenant on the part of the lessees in the leases considered to do the work specified or pay anything as rental or damage for failure to do it. They involve contracts containing provisions to the effect that in the event of failure on the part of the lessees to develop the land or pay rental, the lessor might terminate the lease. There being no covenant on the part of the lessee, this was the lessor's only remedy. In the instant case, however, the lease contains an express covenant on the part of the lessees to the effect that in case they fail to commence operations by July 4, 1911, they will pay the $100 per month for each month during which they shall make default therein.

[2] It is next insisted that the covenant to pay the $100 per month must be regarded as a penalty, and not as liquidated damages, and since there was no evidence introduced showing the amount of damages which plaintiff had sustained, no recovery can be had. This contention is fully answered by the opinion in the case of Escondido Oil & Development Co. v. Glaser, 144 Cal. 494, 77 Pac. 1040, where the court, in discussing a like claim made therein, said:

> "Fixing the amount for damages sustained in contracts for digging oil wells very similar to the one here involved was upheld in Gibson v. Oliver, 158 Pa. St. 277 [27 Atl. 961], and the cases there cited. And it would seem that damages for breaches of contracts touching future interests in oil wells of unknown value are of such remote and speculative character as to bring them peculiarly within the rule that the parties should have the right to fix them by mutual agreement."

From the nature of the case it would be impossible to calculate with any degree of certainty the amount of damage sustained by plaintiff by reason of the breach of the covenant made by defendants. In the case of McComber v. Kellerman, 162 Cal. 749, 124 Pac. 431, the court, considering a like contention, said:

> "It was clearly in the nature of rental for the premises or compensation for the right, and not an attempt to fix a penalty or liquidated damages. But if it were considered as liquidated damages, the complaint and proof are sufficient to support the judgment. The nature of the case and the extreme difficulty of fixing damages arising from the breach of such a contract are fully shown by the lease itself."

There is no merit in the contention that the evidence is insufficient to sustain the finding as to the assignment made by the original lessor in said lease to the plaintiff bringing this action.

The judgment and order are affirmed.

We concur: MELVIN, J.; WILBUR, J.

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178 Cal. 102

CLARKIN v. MORRIS. (L. A. 4126.)

(Supreme Court of California. April 11, 1918. On Hearing in Bank, May 10, 1918.)

1. JUDGMENT 🔑419—EQUITABLE RELIEF—AFFIDAVIT FOR SERVICE BY PUBLICATION—SUFFICIENCY.

An affidavit for publication under Code Civ. Proc. § 412, on the ground that defendant could not after due diligence be found within the state, *held* sufficient to sustain order for publication of summons when attacked by action to set aside judgment; it presenting facts tending to show the exercise of diligence and that defendant could not be found.

2. PROCESS 🔑96(4)—AFFIDAVIT FOR SERVICE BY PUBLICATION—SUFFICIENCY.

Such affidavit was sufficient, although it did not declare expressly that affiant did not himself know the whereabouts of defendant, where such fact is implied from the language of the affidavit and could reasonably be inferred from statement therein that affiant was ignorant of the whereabouts of defendant.

On Hearing in Bank.

3. TRIAL 🔑396(4) — EVIDENCE TO SUPPORT FINDINGS.

Although the court found the existence of a state of facts warranting setting aside judgment for fraud, where plaintiff failed to offer any evidence in support of certain material allegations for relief on ground of fraud, decree for plaintiff cannot be sustained.

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by Gladys M. Clarkin against J. E.

Morris. Judgment for plaintiff, and defendant appeals. Reversed.

Hancock & Lawrence and S. M. Johnstone, all of Los Angeles, for appellant. Waldo M. York, of Los Angeles, for respondent.

SHAW, J. In this action plaintiff sued to set aside a judgment against her in favor of J. E. Morris made on October 5, 1911. The grounds assigned in her complaint for setting aside said judgment were that the same was rendered upon service by publication only and that the order for the publication of summons was procured without filing any affidavit showing that the said Gladys M. Clarkin, defendant in said action, resided out of the state of California, or had departed from the state of California, or could not, after due diligence, be found within the state of California, or that she had concealed herself to avoid the service of summons, and that said Morris, plaintiff in said action, falsely represented to the court that such affidavit had been made and thereby obtained said judgment. The defendant alleged that he had obtained the order for publication by means of an affidavit presented to the court at the time the same was obtained, and that the publication was made in pursuance of the order made upon such affidavit, and he denied that he had fraudulently represented to the court at the time the judgment was given that the order for the publication of summons had been procured otherwise than upon said affidavit. The affidavit itself is referred to and made a part of the answer, and it was also introduced in evidence. The only question presented in the case is the sufficiency of the affidavit to sustain the order for the publication of summons.

[1] The affidavit purported to state a case for the publication of summons on the ground that defendant could not after due diligence be found within the state, as provided in section 412 of the Code of Civil Procedure. The facts relating to this subject as set forth in the affidavit are as follows: That defendant, Gladys M. Clarkin, is a necessary party and cannot be found within the state of California; that she had not filed or recorded any certificate of residence as provided in section 1163 of the Civil Code; that on October 22, 1889, she resided in the city of Los Angeles, state of California; that since the suit was filed, which was four days prior to the making of the affidavit, the affiant had made diligent search and inquiry for said defendant; that the summons had been given to the sheriff with instructions to serve the same on said defendant, and that his return thereon had stated that he could not find the said defendant in the county of Los Angeles; that on October 25, 1889, one Owen E. Clarkin was appointed guardian of said Gladys M. Clarkin, who was then a minor, by the superior court of Los Angeles county; that in that proceeding the guardian had filed a bond with H. H. Yonkin and E. L. McWilliams as sureties, and had caused J. C. Wilmon, William Mead, and A. T. Trimble to be appointed appraisers of said minor's property; that on December 4, 1889, said Wilmon and Trimble returned and filed an inventory and appraisement thereof and that W. A. Ryan was attorney for the said guardian; that affiant had made inquiries of Yonkin, Wilmon, Trimble, and Mead as to the whereabouts of said Gladys M. Clarkin; that W. A. Ryan, the attorney aforesaid, was then deceased, and E. L. McWilliams, the other surety upon the bond, could not be found within the city of Los Angeles; that said persons are persons who would be most likely to know the whereabouts of said Gladys M. Clarkin; that affiant had also made inquiries of many other persons from whom he could expect to obtain information as to the whereabouts of said defendant and had examined the city directories and that from said search and said inquiries and the exercise of said diligence he had been unable to find said defendant in the state of California; and therefore he declared that by the exercise of diligent search the defendant could not be found within the state of California. The court in its findings in the present case states that the affidavit does not disclose what answers were returned to his inquiries by the parties of whom the inquiries were made, nor that any inquiry had been made of Owen E. Clarkin, the former guardian of Gladys M. Clarkin. Its conclusion was that the affidavit did not show sufficient diligence, and thereupon judgment was given in favor of the defendant canceling the previous judgment.

The rule regarding the sufficiency of affidavits for publication when attacked collaterally is clearly set forth in the language of Mr. Justice Harrison in Rue v. Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732, as follows:

> "If the facts set forth in the affidavit have a legal tendency to show the exercise of diligence on behalf of the plaintiff in seeking to find the defendant within the state, and that after the exercise of such diligence he cannot be found, the decision of the judge that the affidavit shows the same to his satisfaction is to be regarded with the same effect as is his decision upon any other matter of fact submitted to his judicial determination."

We are of the opinion that the affidavit in the case of Morris v. Clarkin under consideration here presented facts which did have a legal tendency to show the exercise of diligence on behalf of the plaintiff in seeking to find the defendant, and also to show that the defendant could not be found after such diligence. In the case of Rue v. Quinn, aforesaid, the affidavit in controversy stated the return of the sheriff similar to that in the present case; that the affiant himself did not know the residence of the defendant; that after the summons was issued he ha made due and diligent search and inquiry for the defendant by inquiring of each of several prominent county officers named, and had also made inquiry of all other persons from whom he could expect to obtain information as to the whereabouts of said defendants. The affidavit in the present case certainly shows as much diligence and as strenuous an attempt to discover the whereabouts of defendant as did that involved in Rue v. Quinn.

[2] The only point stated in that case which is not stated in the present case is that the present affidavit does not declare expressly, as that one did, that the affiant himself did not know the residence of said defendant. This fact, however, is implied by the language of the affidavit in almost every sentence, and it would be a reasonable inference from the statements therein that the affiant himself was ignorant of the whereabouts of Gladys M. Clarkin. It is obvious that the persons of whom the defendant in the present case inquired would be those who would be considered most likely to know the facts sought to be discovered, much more so than those of whom inquiry was made in Rue v. Quinn. Unless we can say that an affidavit is insufficient in every case where it does not expressly state that the affiant himself does not know the whereabouts of defendant, we must consider the present affidavit sufficient. We are not willing to go to that extent in indulging collateral attacks upon judgments regularly rendered in pursuance of law. With respect to the guardian of whom inquiry was not made there is no claim that he was living or could have been found at the time. This being the only question presented, and the one which is decisive of the case, it follows that the court erred in rendering the judgment for the plaintiff.

The judgment is reversed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

On Hearing in Bank.

PER CURIAM. [3] The respondent urges, in her petition for a hearing in bank, that the department failed to pass upon her contention that the former judgment against her had been obtained by fraud. It is true that the complaint alleged, and the court found, the existence of a state of facts which, under the rule declared in Dunlap v. Steere, 92 Cal. 344, 28 Pac. 563, 16 L. R. A. 361, 27 Am. St. Rep. 143, and similar cases, would have warranted equitable relief against such judgment. But the appellant failed at the trial to offer any evidence in support of certain allegations material to her claim for relief on the ground of fraud. The bill of exceptions embodies proper specifications of the insufficiency of the evidence to sustain the findings in this regard, and the appellant made the point in his brief. The judgment in favor of the respondent could not, therefore, have been sustained on any ground.

The petition for hearing in bank is denied.

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178 Cal. 206

UNION HOLLYWOOD WATER CO. v. CITY OF LOS ANGELES et al. (L. A. 4061.)

(Supreme Court of California. April 29, 1918. Rehearing Denied May 27, 1918.)

1. WATERS AND WATER COURSES 🔑203(12)—WATER SUPPLY—RATES—VALUATION.

Where meters installed by water company in new houses and the like which were not revenue producing, and there was nothing to show that they would be in use within the year, they were properly not considered in arriving at valuation for purpose of rate making for the year.

2. WATERS AND WATER COURSES 🔑203(12)—WATER SUPPLY—RATES—VALUATION.

In an action involving reasonableness of water rates, where court gave a greater valuation to meters for which it gave a water company credit than the water company gave for all the meters in its verified statement, or in its evidence, it cannot complain that the court refused to consider some meters contained in such statement.

3. WATERS AND WATER COURSES 🔑203(12)—WATER RATES—VALUATION.

In action involving reasonableness of water rates, *held*, under the evidence, that there was no abuse of discretion in not considering an unused emergency plant such an essential part of the system as to justify an increased rate.

4. APPEAL AND ERROR 🔑1011(1)—FINDINGS OF FACT—CONFLICTING EVIDENCE.

In an action to restrain enforcement of a city ordinance regulating water rates, valuation of property of water company arrived at on conflicting evidence will not be disturbed on appeal.

5. WATERS AND WATER COURSES 🔑203(12)—WATER SUPPLY—RATES—VALUATION.

In ascertaining the value of property of a water company for the purpose of fixing rates, the court could fix the valuation of the water-bearing land from which percolating water was obtained without considering the value of the water separate from the land, by comparing it with similar water-bearing land in the same locality.

In Bank. Appeal from Superior Court, Los Angeles County; Robert M. Clark, Judge.

Action by the Union Hollywood Water Company to restrain the City of Los Angeles and others from enforcing an ordinance regulating water rates. Judgment for defendants. From an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Haas & Dunnigan and Sheldon Borden, all of Los Angeles, for appellant. Albert Lee Stephens, Charles S. Burnell, E. R. Young, and Wm. P. Mealey, all of Los Angeles, for respondents.

RICHARDS, Judge pro tem. This is an appeal from an order denying the plaintiff's motion for a new trial. The action was one brought to obtain an injunction to restrain the defendant city of Los Angeles from enforcing a certain ordinance regulating the water rates to be charged by persons, firms, or corporations supplying or distributing water in or to the city of Los Angeles or the inhabitants thereof or to or for the use of vessels in Los Angeles harbor for the year commencing July 1, 1910, and ending June 30, 1911. Plaintiff was one of the corporations coming within the terms and provisions of the ordinance in question. The issue presented before the trial court was whether the provisions of the ordinance, if enforced, would afford the plaintiff a reasonable return upon its investment in the various kinds of properties owned or used by it on July 1, 1910, and which were essential and necessary in its business of distributing water to the inhabitants of Los Angeles during the year in which said regulative ordinance was in force. It is conceded that upon the hearing of the cause the trial court conducted a minute and exhaustive investigation as to the value of the plaintiff's various properties and as to the extent of their necessary use as parts of its operating and distributing system, and that upon these matters in controversy the testimony was much at variance. The appellant insists, however, that as to certain specified matters the findings of the court have no support in the evidence, and that the ordinance generally is unreasonable and confiscatory, and hence void. The first finding which the appellant thus assails is the finding of the trial court to the effect that only 3,172 of the service connections and meters owned by the plaintiff were used or necessary to be used for the distribution and sale of plaintiff's water within the city of Los Angeles. The evidence in this respect showed that the plaintiff was engaged in the distribution of water not only within a certain area within the city of Los Angeles, but also in and to districts without the limits of said city, and that for the purpose of operating its entire system within and without said city it owned and had in use 4,039 service connections and meters, and that of this number there were actually in use within the city of Los Angeles 3,172 of such service connections and meters. The evidence also showed that in addition to this latter number in actual use within said city the plaintiff owned and held 589 meters which were not in actual use at the time the court's valuations were made. These were called dormant meters, and, according to the testimony of the secretary of the plaintiff, most of these dormant meters had been installed in new properties, such as houses which had been built, but not as yet rented or used. The value of these unused meters, according to the valuation placed by the trial court upon those in use, would have amounted at best to a very small proportion of the total valuation of the plaintiff's other properties, and, even if added to said valuation, could have effected at most a very small increase in plaintiff's water rates.

[1] It is clear, moreover, that the trial court was not wrong in the exclusion of these 589 meters from its calculation in respect to the value of the plaintiff's working properties. These meters and other connections were idle at the time the valuations were made. They had never as yet come into use as a revenue producing part of the plaintiff's water system within said city. They were installed in advance of the actual necessity for their use, and there was no sufficient showing that they would be used during the year for which the rates were fixed, and the other water users and rate payers of the city should not be charged an additional amount, however small, in the way of a water rate in order to yield a return to plaintiff upon a species of property which was not in actual use as a part of its system, and which was yielding no return to plaintiff prior to the passage or taking effect of said ordinance.

[2] In addition to this, our attention is called to the fact that the trial court, in its fixation of a value upon the 3,172 meters and service connections of the plaintiff in actual use at the time of such valuation, placed a value thereon which is much more than double the valuation which the plaintiff itself placed thereon in the verified statement of its properties attached to its complaint; and our attention has not been called to any evidence in the record increasing this latter valuation. If this be so, then it follows that the court has already allowed the plaintiff a valuation upon this item of its properties far greater than it was entitled to have placed upon it for the purpose of the fixation of a water rate, and it cannot therefore be said that the plaintiff was in any wise prejudiced by any error of the court in failing to include the 589 meters in question in arriving at such valuation.

For these reasons we are unable to say that the trial court abused its discretion in the omission of this item from its valuation of the plaintiff's essential properties for the purpose of determining their total value and of regulating its water rates.

[3] The appellant's next contention is that the court erred in its finding that a portion of the plaintiff's properties, known as the Jefferson street plant, including its lots, wells, and water rights in adjacent acres, were unnecessary and not essential to its distributing system within said city. Prior to the organization of the Union Hollywood Water Company, in the year 1906, the Jefferson street pumping plant had been owned and operated by a corporation known as West Los Angeles Water Company, and was being used to supply water to the western portion of that city lying in its vicinity. Upon the organization of the Union Hollywood Water Company, however, it took over the properties of the West Los Angeles Wa-

ter Company, a part of which was this particular plant, and also took over the properties of another corporation known as West Side Water Company, which was at the time engaged in serving water to another section of the western part of said city. After this consolidation of these two corporations had been effected in the name of and under the ownership of the plaintiff herein the latter developed an additional water supply from certain water-bearing lands at Sherman, which rendered unnecessary the further operation of the Jefferson street pumping plant, and in the beginning of the year 1908 the latter was shut down, and so continued to be up to and after the commencement of this action. It is conceded that this was the condition of things at the time of the trial, but the appellant insists that, notwithstanding this fact, its Jefferson street pumping plant was being maintained by it as an emergency plant to be put into use in the event of any interference with its water service from its other sources of supply. There was evidence, however, tending to show that this plant was not at the time connected with the rest of the plaintiff's water system, and that the installation of some two miles of pipe would be required to make such connection. Taking these facts into consideration, the trial court concluded, and we think properly, that the Jefferson street plant, in its state of nonuse and disconnectedness, was not such an essential part of the plaintiff's distributing system as to justify the imposition of an added water rate upon its customers. With the discretion of the trial court to make this finding from the state of the evidence before it, this court will not interfere upon appeal.

[4] The appellant's next contention, to which considerable space is devoted in its opening brief, is that the trial court did not place an adequate valuation upon certain easements and rights of way over private property which were a part of its system for supplying water to the inhabitants of Los Angeles, and that the court, in reaching a basis for the valuation of this class of property, included as unnecessary and nonessential a considerable part of the plaintiff's acquired easements and rights of way. As to this latter contention we do not think it is sustained by a fair construction of the finding of the trial court, but that, with certain designated exceptions, such as the so-called Soldiers' Home reservoir, the Jefferson street pumping plant and its adjacent water-bearing acres, the Day tract, etc., the trial court was undertaking to place a valuation upon all of the plaintiff's properties in the nature of easements and rights of way over the lands of private parties. Whether or not that valuation was sufficient depends upon the evidence upon that subject, which evidence was detailed, extensive, and conflicting, and, this being so, the finding of the court upon that subject will not be disturbed.

We might go on dealing in detail with the other alleged errors of the trial court in arriving at its conclusions as to the proper amount and value of the plaintiff's various properties for the purpose of arriving at a basis of total valuation upon which to predicate a reasonable water rate to be charged by the plaintiff and collected from its customers for the year covered by the terms of the ordinance in question, but the discussion would be unprofitable, since the conclusion in each of these matters must, in the state of the evidence, have rested in the sound discretion of the trial court.

[5] There is, however, one remaining question which deserves separate consideration. This is the contention of the appellant that the trial court adopted a wrong principle of valuation in its finding relative to the value to be placed upon the water-bearing lands of the appellant. The finding which the plaintiff thus assails reads as follows:

> "That plaintiff was also on said date the owner of water-bearing real estate constituting a part of said plant and system, but said water-bearing real estate was not of the value of $225,000, but was of the value of $92,500. And in making this finding the court does not consider the value of the water in said land separate and apart from said land, but fixed the value of said water-bearing land by comparing its value with similar water-bearing land in the same locality, capable of producing a like amount of water."

In respect to this finding the appellant contends that it was entitled, in excess of the valuation which the trial court placed upon its water-bearing lands as real estate, to have its rights in and to the water collected or contained therein admeasured and ascertained as separate from and in addition to the value of the land as land. The discussion of this phase of the appellant's case has reference particularly to the lands of the plaintiff at Sherman, the waters in which are percolating waters which are collected and extracted from the subsurface of said land by means of powerful pumps, and when so extracted are transferred to plaintiff's reservoirs and mains, and thence conveyed to its customers. There was evidence before the court that there were other lands in the vicinity of the so-called Sherman lands of plaintiff which also contained these or other percolating waters derived from the same higher sources as those supplying plaintiff's said lands. It was these facts in relation to the original state of these waters prior to the plaintiff's extraction of them which controlled the conclusion of the court that they were a part and parcel of the soil itself, having an appraisable valuation as a part of the land through which they percolated. It was these facts also which differentiated the cases cited by appellant from the case at bar; for in each of them the water rights which the courts recognized as having an appraisable value apart from the land were those appertaining to reservoirs or to surface lakes or streams. It is not necessary to consider the question as to whether, in the case at bar, the trial court might have adopted a method of valuation in which the percolating waters in the tract would be considered as appraisable apart from the value of the land as land, for the reason that both methods of valuation were open to its adoption under the authority of Marin Water, etc., Co. v. Railroad Commission, 171 Cal. 706, 715, 154 Pac. 864, Ann. Cas. 1917C, 114.

The trial court adopted and applied the rule approved in this case as the basis for its valuation of the plaintiff's water-bearing lands, and having a separate valuation to the pumping works, which in effect separated the percolating waters from these lands, and we are of the opinion that it was not in error in so doing; nor do we think that it abused its discretion in the value which it affixed upon this portion of the plaintiff's properties, in view of the evidence before it.

The contention of the appellant that the ordinance under review is unreasonable, confiscatory, and hence unconstitutional, depends for its force upon the appellant's foregoing contentions as to the undervaluations of its properties or portions thereof, and, since these have not been sustained, this final contention must of necessity also fall.

No other points appear in the record requiring separate consideration.

The order is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; WILBUR, J.; MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

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178 Cal. 213

Ex parte MANA. (Cr. 2145.)

(Supreme Court of California. May 1, 1918.)

1. Jury 🔑10—Right to Trial by Jury—Common Law.

Constitutional provisions guaranteeing the right to a trial by jury establish the right to a trial as known at common law.

2. Jury 🔑39—Qualifications of Jury—Legislative Power.

The qualifications of the jury is a matter subject to legislative control, and, even though prescribed qualifications may differ from those at common law, the legislation is valid.

3. Jury 🔑39—Right to Trial—Qualifications—Jury Consisting in Part of Women.

Const. U. S. Amend. 14, forbids any state to make or enforce any law abridging the privileges or immunities of citizens of the United States, and the subsequent California Constitution by article 1, § 7, provides that the right of trial by jury shall be secured to all and remain inviolate, and by article 20, § 18, provides that no person shall on account of sex be disqualified from entering upon or pursuing any lawful business or profession, and amendment of October 10, 1911, article 2, § 1, gave women the right to vote and hold office, and the Legislature provided that a woman might act as a juror. *Held*, that the legislation pointed merely to the matter of sex as a qualification, and that the Legislature was justified in dealing with the matter as such, so that it was no ground for a release from custody that one was convicted of felony by a jury consisting in part of women.

In Bank. Application for writ of habeas corpus by Eban Mana. Writ discharged, and petitioner remanded.

Feliz & White, of Salinas, for petitioner. U. S. Webb, of San Francisco, for respondent. Gail Laughlin, of San Francisco, for various organizations of women.

WILBUR, J. Petitioner, convicted of a felony by a jury consisting in part of women, seeks release from custody on the ground that the act of the Legislature authorizing women to sit as jurors is unconstitutional. The right to a trial by a jury is provided for in article 1, § 7, of the Constitution, adopted by the people of the state of California in May, 1879, as follows:

> "Section 7. The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three-fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases not amounting to felony, by the consent of both parties in open court, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions and cases of misdemeanor, the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in open court."

[1, 2] The petitioner claims that the word "men" should be inserted by proper construction in the Constitution, so that the Constitution would in effect read: "The right of trial by a jury of twelve men shall be secured to all," etc. This contention is based upon the proposition that when the Constitution provides for a trial by a jury it, by necessary inference, provides for the jury as known at the common law (People v. Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75), and that, as juries of men were provided for by the common law, the Constitution must be thus construed. Two questions seem to be thoroughly settled by the unbroken line of decisions in all the states: First, that constitutional provisions guaranteeing the right to a trial by jury established the right to a trial by a jury as known at common law; second, that the qualifications of the jury is a matter subject to legislative control, and that, even though such qualifications may differ from those at common law, such legislation is nevertheless a valid exercise of legislative power. 24 Cyc. 187; People v. Powell, supra; People v. Chin Mook, 51 Cal. 597.

[3] At the time of the adoption of our Constitution (1879) the Fourteenth Amendment of the Constitution of the United States provided that:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * *

> nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

By this amendment state laws and state Constitutions were modified or abridged so far as necessary to conform to the rights and privileges thus created. In interpreting the right to a trial by jury as guaranteed by our Constitution, we must therefore look, not alone to the common law, but also to this amendment so far as it affects the right to a trial by jury. The Supreme Court of the United States, in construing the effect of this constitutional amendment upon the right of a colored man to a trial by jury in West Virginia (100 U. S. 303, 308, 25 L. Ed. 664), said:

> "The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, *persons having the same legal status in society as that which he holds*." (Italics ours.)

It was therefore held that to try a negro before a jury from which his race was excluded by law was a denial of his right to a trial by jury as guaranteed by the Constitution of West Virginia, for the reason that it deprived him of a trial by a jury composed of his "neighbors, fellows, associates, persons having the same legal status in society as that which he holds." In deciding that question the court added:

> "We do not say that, within the limits within which it is not excluded by the amendment a state may not prescribe the *qualifications of its jurors* (italics ours) and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this."

It will be observed, then, that the Supreme Court of the United States, in determining the rights of citizens of the United States to a jury trial under the Fourteenth Amendment, bases its conclusion as to the right of a state to discriminate against female citizens of the United States upon the ground of the disqualification of females as jurors.

Our Constitution also expressly provides (article 20, § 18):

> "No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation or profession."

And while jury service is neither a "business, vocation or profession," the Constitution recognizes the capacity of women to enter upon any "lawful business, vocation or profession." By an amendment to our Constitution, October 10, 1911 (art. 2, § 1), women were given the right to vote and hold office. If the contention of the petitioner is well grounded, we would then have a situation where a woman on trial for a crime might be brought to trial before a woman judge, prosecuted by a woman district attorney, defended by a woman lawyer, brought in court by a woman bailiff, and yet forced to a trial before a jury of men, because men only were considered as eligible for jury duty at common law. It would seem that the inferences to be derived from so radical an amendment of the Constitution are quite as strong as those to be derived from the use of the term "trial by jury."

The Legislature of the state in providing that a woman might act as a juror evidently believed that there was no longer any necessity of discriminating against her as a citizen of the United States because she was disqualified. The Constitution having recognized her as in all respects the equal of man, the Legislature was justified in doing away with the discrimination which had theretofore existed against her in the matter of jury service. We do not hold that the Fourteenth Amendment to the federal Constitution, or the Woman Suffrage Amendment to the Constitution of this state, were of themselves sufficient to entitle women to act as jurors, although this question has been seriously raised and discussed, but not decided, by the Supreme Court of Wyoming in McKinney v. State, 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710. We do hold, however, that this amendment points so clearly to the matter of sex as a question of qualification that the Legislature was amply justified in dealing with the matter as such.

Writ discharged. Petitioner remanded.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

178 Cal. 153

KINSEY v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA. (L. A. 4155.)

(Supreme Court of California. April 15, 1918. Modification of Judgment May 7, 1918.)

1. INSURANCE 🔑466 — ACCIDENT INSURANCE.

If an accident was the proximate cause of drowning of insured, the nature of accident was immaterial on the question of liability on an accident policy.

2. INSURANCE 🔑645(3) — BREACH OF WARRANTIES—PLEADING.

Where insurer alleges a certain specific breach of warranty, in that insured in accident policy falsely stated he did not have heart trouble, it cannot introduce evidence of breach of warranty as to apoplexy or other warranties, which may have caused death.

3. EVIDENCE 🔑546—EXPERT TESTIMONY—COMPETENCY.

It was within the discretion of the trial court to refuse to allow life guards to give their opinion whether an insured found in the water died from drowning, where it did not appear that their knowledge made them competent as a matter of law, and where medical experts differed on the question.

4. INSURANCE 🔑665(5)—ACCIDENT INSURANCE—CAUSE OF DEATH—EVIDENCE.

Evidence *held* sufficient to sustain finding that insured in accident policy was drowned, and did not die from heart trouble.

5. NEW TRIAL 🔑103—NEWLY DISCOVERED EVIDENCE—MATERIALITY.

In action on accident policy for accidental drowning, where the only breach of warranty alleged in the answer was that deceased had heart trouble, an affidavit of a physician that in his opinion the physical condition of deceased prior to the time of securing the policy, as shown by the deposition of one named, indicated that he had suffered from an apoplectic stroke did not support a motion for new trial on ground of discovered evidence.

Department 2. Appeal from Superior Court, Los Angeles County; Louis W. Meyers, Judge.

Action by Esther A. Kinsey against the Pacific Mutual Life Insurance Company of California, a corporation. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Modified and affirmed.

Williams, Goudge & Chandler, of Los Angeles, for appellant. Edwin A. Meserve and

Shirley E. Meserve, both of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. On May 12, 1911, defendant issued to Edward W. Kinsey, who was the husband of plaintiff, a policy of insurance by which defendant agreed to and did insure said Kinsey against "bodily injury sustained during the term of the policy through accidental means (excluding suicide, sane or insane, or any attempt thereat, sane or insane) and resulting directly, independently, and exclusively of all other causes in * * * death." Plaintiff, as beneficiary named in said policy, alleging the insured, while bathing in the surf was accidentally drowned, on September 18, 1913, brought this action to recover the amount of the indemnity specified in the policy. A trial was had before a jury, which rendered a verdict in favor of plaintiff for the sum prayed for in the complaint. Judgment followed, from which, and an order denying defendant's motion for a new trial, it appeals.

In its answer defendant denied that the death of deceased was the result of accidental drowning, denied that any sum was due plaintiff under the terms of the policy, and affirmatively alleged that deceased in procuring the policy made certain warranties, among which was that he was in sound physical condition, whereas at the time of making such warranty he was afflicted with heart disease, which fact was at the time of the issuance of said policy unknown to defendant, who at all times believed and relied upon the representations so made by the insured, and that subsequent to the death of the insured, upon learning of the falsity thereof, tendered the plaintiff the premiums theretofore received by it from deceased, which, being refused, were deposited in court.

Upon the issues joined, the questions involved were: First, did the death of the insured result from accidental drowning? second, did deceased, as alleged, misrepresent his physical condition? and, third, assuming these facts to be determined in favor of plaintiff, what amount is she entitled to recover under the terms of the policy?

[1] In its brief appellant assigns as error the giving of certain instructions to the jury. Upon the hearing it was conceded by counsel for appellant that its contention as to instruction No. 12 was without merit; and an examination of other instructions complained of, when taken in connection with and as a part of the entire charge given to the jury, shows that they are likewise without merit. By instruction No. 23 the court told the jury that, if they found that Edward W. Kinsey was drowned as the resu't of an accident, it was immaterial for the purpose of the case how he came to drown, provided it found that such drowning was the proximate result of accident. The ultimate fact was that he was drowned as the result of accident. The nature of the accident which caused him to drown was immaterial, provided it constituted the proximate cause of the drowning.

[2] By instruction No. 22 the jury was instructed that defendant by its answer had limited its defense based upon alleged breach of plaintiff's warranty that he was in sound physical condition to the claim that he was afflicted with heart trouble, and told the jury that evidence of any breach other than that so alleged was not evidence for its consideration in determining the question as to breach of warranty made. The giving of this instruction finds full support in the case of Taylor v. Modern Woodmen of America, 42 Wash. 304, 84 Pac. 867, 7 Ann. Cas. 607, and a number of authorities there cited, and is likewise approved in Weber v. Ancient Order of Pyramids, 104 Mo. App. 729, 78 S. W. 650, in both of which it is, in effect, held that where a certain specific breach of warranty is alleged, the defendant should be restricted to the specific charge of fault or wrong contained in the pleading. Otherwise, as stated in Taylor v. Modern Woodmen of America, supra, "no matter how many conditions precedent the contract contained, the plaintiff would be obliged to go to the expense of preparing to prove performance or waiver of every one of them." The only breach of warranty alleged in the answer was that plaintiff at the time of procuring the policy was afflicted with heart trouble; and under the pleading the court correctly instructed the jury that, in considering the question as to whether or not there was a breach of warranty, they should consider only evidence touching the allegation that deceased was afflicted with heart disease.

[3] Defendant called as witnesses the life guards who assisted in rescuing the body of deceased from the surf, and who aided in efforts to resuscitate him. They were asked questions, the purpose of which was to elicit their opinion based upon their observation of deceased as to whether the death of deceased was due to drowning. Objection was sustained to these questions and the ruling is assigned as error. The contention of appellant is that these life guards were, by reason of their calling and experience which they were shown to possess in rescuing and treating persons apparently drowned, qualified like a physician or surgeon to express their opinion as to whether the appearance of deceased was indicative of death by drowning. As to whether or not they were thus qualified was a question for the determination of the trial judge, and in the absence of an abuse of discretion disclosed by the record, his ruling should not be disturbed. The evidence, while perhaps showing that these witnesses were skilled in the methods of rescuing drowning persons from the water, fails to show that they had any knowledge, gained by experi-

ence or otherwise, upon which, from their observation of the appearance of the body of deceased, they were as a matter of law entitled to testify to their opinions as to the cause of the death of deceased. Indeed, as shown by this record, the question was one upon which men of long professional standing and experience differed.

[4] It is next claimed that the evidence was insufficient to sustain the verdict. There is no merit whatsoever in this contention. While there was expert testimony to the effect that the appearance of the body of deceased was consistent with the fact that his death might have been due to other causes such as apoplexy or heart failure, it also clearly tended to establish facts which indicated that his death was due to drowning, and the jury, whose province it was to determine the question upon such conflict of evidence, so found.

[5] It is likewise claimed that a new trial should have been granted on the ground of newly discovered evidence. This is based upon an affidavit made by a physician to the effect that in his opinion the physical condition of deceased prior to the time of securing the policy, as shown by the deposition of Emma Belle Badger, indicated that he had suffered from an apoplectic stroke. A mere statement of the fact upon which the contention is based shows that there was no abuse of discretion on the part of the trial court in refusing a new trial upon such ground. Moreover, the only breach of warranty alleged in the answer was that deceased had heart trouble.

The policy of insurance provided that, if the premiums thereon were "payable quarter-annually or semiannually in advance, then each year's premium paid after payment of the first year's premium, will increase said benefits 5 per cent. until such increase is 50 per cent." It appears that the insured paid the second year's premium semiannually in advance, by reason of which fact the benefit was increased 5 per cent. during the second year. The amount specified in the policy was $5,000, which, increased by $250, made the sum which plaintiff was entitled to recover under the terms of the policy, $5,250. By reason of an erroneous instruction, however, the jury fixed the amount due upon the policy at $6,500. At the hearing of the case it was conceded by counsel for respondent that the judgment, based upon said verdict, was $1,250 in excess of the amount to which plaintiff was justly entitled.

It is therefore ordered that the judgment be and the same is modified, by deducting therefrom, as of the date rendered, the sum of $1,250, and, as thus modified, the judgment is affirmed.

We concur: MELVIN, J.; WILBUR, J.

Modification of Judgment.

VICTOR E. SHAW, Judge pro tem. The judgment heretofore given by this court is amended to read as follows, viz.:

"The judgment appealed from is modified by deducting therefrom $1.250 and interest thereof from November 1, 1913, to date of judgment, amounting to $63.75, making a total of $1,313.75, and, as thus modified, said judgment is affirmed. The order denying a new trial is affirmed. Appellant shall recover its cost on the appeal to the extent only of $50 for and on account of the printed transcript used in presenting the record, and $20 only for and on account of cost of printing briefs, making a total of $70, and $10 for filing transcript. Respondent shall recover as costs of printing briefs the sum of $50, and no other costs on these appeals."

We concur: WILBUR, J.; MELVIN, J.

178 Cal. 217

RAMISH v. MARSH. (L. A. 42[illegible]9.)

(Supreme Court of California. May 3, 1918.)

Arbitration and Award ⟹68—Irregularities—Waiver.

Where arbitration for adjustment of partnership accounts was for the benefit of both parties, their acceptance of the award and a part payment thereunder to one of them constituted waiver of any irregularities in the award.

Department 2. Appeal from Superior Court, Los Angeles County; G. W. Nicol, Judge.

Action by Adolph Ramish against Martin C. Marsh. Judgment for plaintiff, and defendant appeals. Affirmed.

Hannon & Rickard and J. Vincent Hannon, all of Los Angeles, for appellant. Olin Wellborn, Jr., and Alfred H. McAdoo, both of Los Angeles, for respondent.

WILBUR, J. Defendant appeals from a judgment in favor of plaintiff, based in part upon a common-law award of three arbitrators, selected to adjust the partnership accounts of plaintiff and defendant, in accordance with a written agreement of arbitration. Defendant resists said award on the ground of many alleged informalities in the proceedings of said arbitrators. The findings are in favor of said award. It is also found that after the award, the defendant "told plaintiff to draw money from the Metropolitan Contracting Company (a corporation owned by plaintiff and defendant) and to credit the amount so drawn as payments upon the sum due from defendant to plaintiff under and by virtue of the award of said arbitrators," and this was done, and as a conclusion of law holds that the defendant had waived any irregularities in the arbitration. As the arbitration was for the benefit of both parties, their acceptance of the award, and the payment thereunder by defendant to plaintiff would constitute a waiver of any irregularities in the award. See, on this point, Matter of Silliman, 159 Cal. 155, 113 Pac. 135; Dore v. So. Pac. Co., 163 Cal. 182, 124 Pac. 817; 5 Corpus Juris, 170, sec. 426.

Judgment affirmed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

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178 Cal. 222

EDMONDS v. WILCOX. (L. A. 4210.)

(Supreme Court of California. May 3, 1918.)

1. APPEAL AND ERROR 🔑928(3)—PRESUMPTIONS.

In the absence of record showing to the contrary, it is presumed that the court's statement in instruction that certain facts were conceded was true.

2. PLEADING 🔑8(15)—CONCLUSIONS—FRAUDULENT STATEMENTS.

In action on notes given in renewal of corporation stock subscription notes, allegation in the answer that at time of renewal of the notes the holders thereof "ratified and confirmed the statements and representations" made to induce the execution of the original notes, which were set out, was not the allegation of a conclusion, but an allegation that the holders repeated the false statements of the agent who sold the stock.

3. FRAUD 🔑11(2) — STATEMENT OF FACT — OPINION.

Where banks, holding stock subscription notes, to induce renewal thereof, confirmed statement of original seller thereof that "they wouldn't take $5 a share for their shares if they couldn't get more," and that the bank regarded the stock as ample security for a loan of its face value, this was not a mere expression of opinion, but a statement of value, which, considered with the fact the stock was actually worthless, and in connection with other assertions of the banks, justified a finding of fraud.

4. FRAUD 🔑58(1)—PROOF REQUIRED.

Notwithstanding judicial expressions concerning the necessity of clear and satisfactory proof of fraud, the rule of Code Civ. Proc. § 2061, subd. 5, that a preponderance of the evidence controls in a civil case applies in a civil case where fraud is claimed.

Department 2. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by B. J. Edmonds against H. W. Wilcox. From the judgment, plaintiff appeals. Affirmed.

Sam Ferry Smith and Ward, Ward & Ward, all of San Diego, for appellant. Shreve, Reed, Sample & Shreve and Theodore Stensland, all of San Diego, for respondent.

WILBUR, J. This is an action brought by the plaintiff to recover judgment upon two promissory notes assigned to him for collection. These notes were given in renewal of notes given in payment of a subscription for stock in the Western Underwriting & Mortgage Company, one to each of two banks. Subsequently, on April 4th, 1913, the defendant executed renewal notes. It is claimed by defendant that the original notes were procured by fraudulent representations. But the appellant claims that at the time of the giving of the renewal notes, April 4, 1913, plaintiff had become aware of the fraud, and that therefore he waived the fraud by giving the renewal notes.

[1] After the opening statement by defendant, which was construed by the plaintiff as an admission of knowledge and therefore a waiver by defendant of the original fraud at the time of the giving of the renewal notes, the court on motion of the plaintiff made on that ground excluded evidence of the original fraud, and by ruling on the evidence and by instruction to the jury confined the defendant to evidence of fraud at the time of said renewal. The court, in instructing the jury as to the measure of damages, stated that it was assumed by the parties on the trial that the stock was of the value of $2 per share, the amount paid therefor, if the original representations were true, and that for that reason no proof had been given as to the value thereof in that event, and that the jury should so assume. While this was no doubt an instruction on the facts, it is stated to be on conceded facts, and we cannot say from the record printed in the briefs and before us that this was not correct, as it is presumed to be.

[2, 3] The only fraud alleged in the answer to have occurred at the time of the renewal of the notes is that the agents of the banks holding the notes "then and there ratified and confirmed the statements and representations so made by said agents, A. O. Garrett, and L. U. McKee, and the said L. A. Blocman as aforesaid." It is claimed that this is but an allegation of a conclusion, but it is an allegation that the agent of the bank in effect repeated the previous false statements of the agents who sold the stock, which were set out in great detail in the answer, containing 42 pages. The jury found on the issue thus presented in favor of the defendant. One of these representations that was thus confirmed by the agent of the banks was that "they wouldn't take $5 a share for their shares if they couldn't get more," and that the bank regarded the stock as ample security for a loan of its face value. As the stock was actually worthless and so found to be by the jury, this could hardly be classed as a mere expression of opinion. It was a statement of value which, taken alone, might be so regarded, but reinforced by the assertion that the banks regarded the stock as ample security for a loan of the face value thereof, without regard to the financial standing of the purchaser; that the Western Underwriting & Mortgage Company was "one of the solid financial institutions of the coast"; that the dividends arising from the company were so large that they would pay off the notes; that the banks preferred that form of se-

curity (the stock) to any other, and would gladly renew the notes; coupled with the actual loan by the banks of the face value of the stock, and the immediate renewal thereof, amply justified the jury in its finding of fraud. See Barron Est. Co. v. Woodruff Co., 163 Cal. 561, 126 Pac. 351, 42 L. R. A. (N. S.) 125.

[4] The court instructed the jury that the case must be decided according to the preponderance of the evidence. This is correct. De Kahn v. Chase, 170 Pac. 608. This is the statutory rule in civil cases, and all judicial expressions concerning the necessity of clear and satisfactory proof of fraud must be construed in the light of the fundamental rule that a preponderance of the evidence controls in a civil case. Section 2061, subd. 5, Code Civ. Proc.

Judgment affirmed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

178 Cal. 218

FRENCH v. FARMER et al. (L. A. 4224.)

(Supreme Court of California. May 3, 1918.)

1. PRINCIPAL AND SURETY 🔑66(1)—LIABILITY TO THIRD PERSONS—BONDS—CONSTRUCTION.

Surety bond of contractor, conditioned that he should "pay all laborers, mechanics and materialmen and persons who shall supply him with provisions or goods, all just debts due to such person or to any others to whom any part of the work is given incurred in carrying on such work," did not entitle one who leased mules to the contractor to recover on the bond.

2. PRINCIPAL AND SURETY 🔑66(1)—LIABILITY TO THIRD PERSONS—BONDS—CONSTRUCTION.

Such bond did not warrant recovery by the lessor of the mules for services and expenses of a corral man, whom he furnished, and who was to be paid by the contractor, the right of action, if any, being in favor of the employé and not the lessor.

3. PRINCIPAL AND SURETY 🔑136—LIABILITY TO THIRD PERSONS—BONDS—CONSTRUCTION.

Recovery for provisions furnished railroad contractor could be had on the contractor's bond to the railroad, conditioned to pay for provisions used, by a third person furnishing the provisions, in whose favor the bond did not nominally run, on the theory that the bond was one made for his benefit.

Department 2. Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by M. H. French against O. O. Farmer and the National Surety Company. Judgment for plaintiff, and defendant Surety Company appeals. Affirmed.

Carroll Allen, Bertin A. Weyl, and Allen & Weyl, all of Los Angeles, for appellant. Robt. T. Linney, Gordon L. Finley, and Ralph W. Schoonover, all of Los Angeles, for respondent.

WILBUR, J. The defendant National Surety Company appeals from a judgment in favor of plaintiff upon a common-law bond executed by the defendant to the Grand Canyon Railway Company, conditioned upon the faithful performance of "all the stipulations and agreements contained in" a contract entered into between defendant Farmer and said railway company, on the part of said Farmer to be performed and observed, and further conditioned that said Farmer "shall well and faithfully pay all laborers, mechanics and materialmen, and persons who shall supply such contractor with provisions or goods of any kind, all just debts due to such persons, or to any others to whom any part of such work is given, incurred in carrying on such work." The contract between Farmer and the railway company was for the construction of a wagon road in the Grand Canyon, Ariz., upon the property of the United States government. This contract provided, among other things, that:

> "The contractor shall promptly pay all subcontractors, materialmen, laborers and other employés as often as payments are made to him by the company, and shall deliver said work free from any claim or lien on account of such labor and materials and subcontractors. * * *"

The form of the bond was identical with that set out in the opinion in the case of the National Bank of Cleburne v. Railway Co. et al., 95 Tex. 176, 66 S. W. 203.

[1] The plaintiff, French, by contract in writing, leased to the defendant Farmer the contractor, to be used in the performance of the latter's contract with the railway company, 32 head of mules, 1 saddle horse and 16 sets of harness. He also agreed to furnish a "corral boss," to be paid by Farmer. Farmer having failed to pay therefor, this action was brought by French against Farmer and the surety company to recover $4,200 rental for the use of the teams and saddle horse, $10 for services of corral man, and $5 for expenses of corral man, and $75 for hay and barley sold. Judgment was rendered against defendant Farmer and the defendant surety company. The appeal is by the surety company only. It is claimed that there is not sufficient privity between the defendant surety company, as obligee of the bond, and the plaintiff to authorize suit by him upon the bond. That point, however, has been determined adversely to appellant's contention by this court in Union Sheet Metal Works v. Dodge, 129 Cal. 390, 62 Pac. 41, and later by the court in bank in People's Lumber Co. v. Gillard, 136 Cal. 55, 68 Pac. 576. The question then is, Does the contract or bond, or both, contain a sufficient promise to pay the obligation of the plaintiff to authorize him to sue to enforce this as a promise made for his benefit? With reference to the item of rental for the mules, a similar question was involved in Wood, Curtis & Co. v. El Dorado, etc., Co., 153 Cal. 231, 94 Pac. 877, 16 L. R. A. (N. S.) 585, 126 Am. St. Rep. 80, 15 Ann. Cas. 382, wherein the

following question was answered in the negative by this court:

> "Did plaintiff by this letting of his horses at a stipulated price per month 'bestow labor' upon the work so as to entitle it to a lien under section 1183 of the Code of Civil Procedure?"

Upon the same reasoning, which need not be here repeated, it must be held that plaintiff was not a person "to whom any part of such work is given," and that therefore the contract and bond make no express provision for the payment to the plaintiff of that indebtedness here sued upon. This view is strengthened by the fact that both the contract and bond make it the duty of the contractor to furnish teams, without fixing any obligation to pay therefor.

[2] As to the items of $10, services of corral man, and $5, traveling expenses of corral man, under the contract between French and Farmer the corral man was to have been paid by Farmer. Even if we assume that the corral man was a laborer upon the work within the meaning ot the contract and bond, it does not follow that the plaintiff, upon paying such laborer, was entitled to sue therefor upon the bond. The right of action, if any, was in the corral man and not in his employer, who was not a subcontractor.

[3] As to the judgment for $75 for hay and barley sold, there was no express agreement contained in the contract for the payment for either "provisions or goods," although the bond is expressly conditioned upon the payment of all just debts incurred therefor in carrying on such work. The question is, then, squarely presented whether or not there can be a recovery upon the bond based upon the condition thereof by a third person not a party thereto, where the bond does not by its terms expressly inure to the benefit of such third person and the right to sue thereon is based entirely upon the theory that the third person is entitled to sue upon a promise made for his benefit. The Supreme Court of Texas, upon a bond identical in form, held that the surety could not be sued thereon by a third party. National Bank, etc., v. Railway Co., supra. This was upon the theory that the bond was one of indemnity to the railway company, containing no express agreement to pay such third person, and therefore he could not sue thereon. If we adopt this view we violate the fundamental principle that every part of a contract should be given some effect, for the railway company could not, in any event, be liable for "goods" and "provisions" furnished the contractor in carrying out its contract, nor in this case could there be any lien therefor, as the property upon which the work was done was government property. If, under the circumstances, any effect whatever is to be given to this clause in the condition of the bond, it must be held that it was the intention of the parties to benefit such third persons rather than the railway company, to whom the bond ran. The case of Parker v. Jeffery, 26 Or. 186, 37 Pac. 712, is in harmony with the Supreme Court of Texas. The courts of Nebraska, Missouri, Iowa, Indiana, and Michigan, however, seem to hold to the view that if it can be fairly said from either the contract or the bond, which are to be construed together, that the parties intended to and did agree to pay such third person, a suit could be brought on such bond by such third person to recover upon the promise so made for his benefit. Lyman v. City of Lincoln, 38 Neb. 794, 57 N. W. 531; Kaufmann v. Cooper, 46 Neb. 644, 65 N. W. 796; School District v. Livers, 147 Mo. 580, 49 S. W. 507; Jordan v. Kavanaugh, 63 Iowa, 152, 18 N. W. 851; National Surety Co. v. Foster Lumber Co., 42 Ind. App. 671, 85 N. E. 489. While the question has not been directly decided by this court, the cases of Union Sheet Metal Works v. Dodge, supra, and People's Lumber Co. v. Gillard, supra, were based in part upon the authority of the Indiana, Iowa, Michigan, and Nebraska cases, as was also the case of W. P. Fuller & Co. v. Alturas School District, 28 Cal. App. 609, 153 Pac. 743. We therefore hold that the plaintiff was entitled to recover the item for goods and provisions.

The lower court is directed to modify the judgment by striking out all items therefrom save and except the item of $75 for goods and provisions, and, as so modified, the judgment is affirmed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

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178 Cal. 261

CHUNG SING v. SOUTHERN PAC. CO. et al.

(L. A. 5293.)

(Supreme Court of California. May 9, 1918.)

1. Appeal and Error ⚷422—Notice of Appeal—Misnomer of Parties.

That a notice of appeal by three defendants misnamed one of them does not necessitate the dismissal of the appeal as to the others.

2. Appeal and Error ⚷422—Notice of Appeal—Misnomer of Parties.

Where notice of appeal by three defendants misnamed one of them by substituting a name of a person not a party to the record, such notice was nevertheless sufficient as to the defendant omitted, where it was obvious from the remainder of the record that the omission was a clerical mistake.

3. Appeal and Error ⚷373(1)—Undertaking—Necessity.

Where an appeal is taken under Code Civ. Proc. §§ 941a to 941c, no undertaking is essential, and the amendments of the Codes in 1915 made no change in the law in that respect.

In Bank. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Chung Sing against the Southern Pacific Company and others. Judgment for plaintiff, and defendants appeal. On motion to dismiss appeal. Denied.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellants. Waldo M. York and Harry M. Irwin, both of Los Angeles, and William D. O'Hara, for respondent.

ANGELLOTTI, C. J. This is a motion to dismiss an appeal from a judgment entered February 16, 1917, as well as from certain orders. The principal grounds of the motion to dismiss the appeal are, first, that no notice of appeal was filed on behalf of defendant Blackburn within the time allowed by law, and, second, that the notice of appeal filed is insufficient as to any of the defendants, in that it does not sufficiently identify the judgment appealed from. Both of these alleged grounds are based on the fact that in the notice of appeal signed by the attorneys of all the defendants and filed within due time, April 10, 1917, it is stated that "the defendants Southern Pacific Company, a corporation, C. A. Burton, and H. W. Crumrine, hereby appeal" from "* * * that certain judgment, in favor of the plaintiff and against said defendants and each of them, entered on or about the 16th day of February, A. D. 1917, in book 407, page 4, of Judgments," etc., and from an order entered March 30, 1917, reducing said judgment to $13,000. The name of the defendant Geo. W. Blackburn did not appear therein; the name "C. A. Burton" appearing in lieu thereof owing to mistake and inadvertence. The superior court, after the time for appeal elapsed, made an order allowing the notice to be amended in this respect, upon a showing to its satisfaction of the mistake. It is claimed that the superior court had no power to allow such an amendment after the time for appeal had expired.

[1] In so far as defendants Southern Pacific Company and H. W. Crumrine, who were originally and specifically named in the notice of appeal, are concerned, there is no force in the claim that the appeal must be dismissed. It is perfectly plain in view of the record, despite the misnomer of the other appellant, that the judgment referred to in the notice is the judgment in favor of Chung Sing and against said defendants and George W. Blackburn for $18,000 and costs, entered February 16, 1917, in Book 407 of Judgments, at page 4, and reduced by $5,000 by order entered March 30, 1917. In other words, the judgment attempted to be appealed from by these defendants was sufficiently identified by the notice.

[2] As to defendant Blackburn a different question is presented, owing to the fact that in attempting to specifically name the defendants in the notice of appeal another name was substituted for his, with the result that his name did not appear at all. Was there any notice of appeal filed on his behalf within the time allowed by law? We are of the opinion that this question should be answered in the affirmative. The verdict and judgment in the cause were against the Southern Pacific Company, Geo. W. Blackburn, and H. W. Crumrine only, all of whom were represented in the action by the same attorneys. There was no verdict or judgment against any one named Burton. The notice of appeal also refers to an order of the superior court made and entered September 12, 1916, granting in part and denying in part "said defendants' motion for new trial." The record shows that said motion was made by the Southern Pacific Company, H. W. Crumrine, and Geo. W. Blackburn only, and that no one named Burton was involved therein. It also refers to the order of March 30, 1917, reducing the judgment from $18,000 to $13,000, which the record shows was an order making such reduction in favor of the company, Blackburn, and Crumrine only, and declaring that the judgment should be for $13,000 and costs as against each of them. No one named Burton was involved therein. An undertaking on appeal filed on the day the notice of appeal was served states that the appeal is by defendants Southern Pacific Company, Geo. W. Blackburn, and H. W. Crumrine. It seems perfectly apparent from the notice, when read in connection with the record, that such notice was filed on behalf of the three defendants against whom the judgment runs, and that the use of the name "C. A. Burton" instead of "George W. Blackburn" to designate one of the appellants was solely due to inadvertence—a mere clerical misprision. One of the three defendants against whom the judgment runs and on whose behalf it was desired to appeal was designated as "C. A. Burton" instead of "George W. Blackburn." The record demonstrates this, and the adverse party could not have been misled thereby. Under these circumstances we are satisfied it should not be held that no notice of appeal was filed by Blackburn. We say this entirely regardless of the order of the superior court allowing the notice of appeal to be amended in this regard.

[3] It is urged that the undertaking on appeal is fatally defective. We are not, on this motion, concerned with any question as to the validity of this bond as a stay bond. It is therefore unnecessary to determine whether the objection to the bond is well based. The appeal may be regarded as taken under sections 941a, 941b, and 941c, of the Code of Civil Procedure, and, this being so, any defect in the undertaking must be disregarded for the reason that under those sections no undertaking is essential to the taking or maintenance of the appeal. Theisen v. Matthai, 165 Cal. 252, 131 Pac. 747. See, also, Estate of Stough, 173 Cal. 640, 161 Pac. 1. The amendments to our Codes in

1915 made no change in our law in this respect.

The motion is denied.

We concur: SLOSS, J.; WILBUR, J.; MELVIN, J.; RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

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178 Cal. 225

NEALE v. ATCHISON, T. & S. F. RY. CO. et al. (L. A. 4203.)

(Supreme Court of California. May 3, 1918. Rehearing Denied May 31, 1918.)

1. Appeal and Error 🔑907(1)—Presumptions—Evidence.

Testimony that at one place in a track locomotives wobbled about, the witness indicating the motion, cannot be disregarded, but the court on appeal must assume that it indicates undue movement resulting from a bad condition of the track, because all reasonable deductions from the evidence must be indulged in favor of the judgment.

2. Master and Servant 🔑278(7)—Injuries to Servant—Defective Railroad Track—Evidence.

In action for death of engineer, evidence *held* to support judgment for plaintiff on theory that the track was defective and caused the derailment.

3. Master and Servant 🔑286(24) — Railroad Tracks—Inspection—Questions for Jury.

In action for death of engineer when locomotive derailed, though witness testified that shortly before the accident the track had been inspected, question whether the inspection was proper was for the jury.

4. Evidence 🔑116 — Explanatory Matters—Custom.

In action for death of engineer when locomotive was derailed, the roadmaster should have been allowed to say whether it was the usual custom to burn ties when unfit for service, after he had testified that the ties at the point where the locomotive was derailed were burned.

5. Appeal and Error 🔑1058(2)—Harmless Error.

Error in excluding testimony is not prejudicial, where the witness afterwards gives the excluded testimony in substance.

6. Master and Servant 🔑265(6)—Injuries to Servant—Derailment of Locomotive—Res Ipsa Loquitur Doctrine.

While the mere happening of derailment of engine is not proof of negligence of the railroad, it is competent to be considered thereon.

7. Master and Servant 🔑101, 102(9)—Injury to Servant—Care Required.

It is the duty of a railroad company to exercise reasonable care to keep its tracks and locomotives in a reasonably safe condition for its employés.

8. Trial 🔑296(3)—Instructions—Cure of Error.

Error in instructing that a master must furnish track and locomotives in reasonably safe condition was not harmful, where further instructions properly held the master to exercise ordinary care to furnish reasonably safe track and locomotives.

Department 2. Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Jessie H. Neale, as administratrix of the estate of James B. Neale, deceased, against the Atchison, Topeka & Santa Fé Railway Company and another. From the judgment and order denying new trial, defendants appeal. Affirmed.

E. W. Camp, U. T. Clotfelter, and M. W. Reed, all of Los Angeles, for appellants. E. B. Drake, of Los Angeles, for respondent.

MELVIN, J. Defendants appeal from the judgment and from an order denying the motion for a new trial. The action was one to recover damages for the death of James B. Neale, respondent's intestate, an engineer in the service of the defendant corporation. The accident which caused the death of Mr. Neale was the derailment of an engine of which he had charge. Mr. Bean and Mr. Purdy, respectively mechanical superintendent and roadmaster of the railroad company, were joined as defendants, and a verdict was rendered against them as well as the corporation. On motion for a new trial the verdict against Bean was set aside. The other two defendants are appealing.

The theory of plaintiff, as set forth in her pleading, was that the railroad company and defendant Bean negligently furnished James B. Neale a defective engine, and that the corporation and defendant Purdy negligently permitted the track, at the place where the accident occurred, to become unsound and defective. The latter ground seems to be the one on which respondent relies for affirmance of the judgment. Several attacks are made by appellants on the findings which, it is contended, are not, in many of their parts, supported by the evidence. The testimony tends to show that the train was moving at the rate of 20 to 25 miles an hour. The engine left the rails near the point of a switch. Appellants insist that the record furnishes no evidence that the track was unsound, or that they were charged with notice of its condition, if it was defective.

[1] Upon the subject of the defective condition of the track one witness, Corwin, testified that he had noticed engines as they approached the place where the derailment afterwards occurred. He said: "I have noticed them in passing, the engine would be wobbling like this" (indicating). It is argued that such testimony is of no value because any engine going at the rate of 20 or 25 miles an hour will show some movement from side to side, such as the witness characterized as "wobbling." Of course, we cannot have reproduced for us the pantomime accompanying the testimony. Therefore we must assume that it indicated an undue movement evidencing a bad condition of the track, because all reasonable deductions from the evidence must be indulged in favor of the judgment.

[2] Another witness, Smith, stated that

where engine and track are in good condition, the engine will not be derailed from a speed of from 20 to 25 miles an hour. Other witnesses testified that some of the ties over which the wheels of the engine passed after leaving the rails were badly splintered and some were "broken in two." Counsel for appellants insist that this evidence is of no value to plaintiff's case, and lends no support to the theory that the track was in bad condition, because a heavy engine running over redwood ties would naturally splinter them. "In fact," they say, "it is only sound wood that splinters; rotten wood crumbles." But the testimony tends to show that, while some of the ties were splintered and some broken completely, many were merely marked by the wheels. The evidence also showed that some of the ties, on removal, proved to be partly rotten, and that they were so soft that the rails and tie plates cut down from half to three-fourths of an inch into the wood. We think that this and other evidence produced at the trial sufficiently supports the judgment. The testimony tends to show, for example, that of 52 ties examined in detail by the witnesses, 6 or 8 were broken through, others torn all to pieces and splintered, while many were only marked by the wheels, and that the engine ran for 250 feet along a switch over ties smaller than those over which it had passed on the main track and only marked the smaller timbers.

[3] Defendants introduced the testimony of two of the employés of the railroad to the effect that the track at the place where the accident occurred had been duly and properly inspected shortly before the accident. This testimony did tend to show that a general inspection of the track had been made, and that the switch point near the place of subsequent derailment of the engine had been very carefully examined, but it was for the jury to determine from all of the facts and circumstances, including the interests of the witnesses themselves as employés of the railroad company, whether their inspections had been properly made.

[4, 5] Mr. Purdy, one of the witnesses for the defendants, testified that certain ties broken in two by the derailment were taken away from the track and burned "because they were unfit for further service." He was asked if that was "the usual custom with ties rendered useless in that way." Objection to the question was sustained and the ruling is specified as error. The question should have been permitted, but appellants were not injured because later the witness said, speaking of the section foreman who had burned the ties:

> "I have no authority to tell him to burn up ties inspected by other people. But that is the general custom. I suppose in this case he took it upon himself to burn them; he knowing that that has been the custom and practice."

[6] The court instructed the jury that the mere happening of the derailment or the death of James B. Neale raised no presumption of negligence of the defendants; that the burden was upon plaintiff to show by a preponderance of evidence that the accident was proximately caused by some one or more of the specific acts of negligence charged in the complaint; and that "the mere facts that the engine was derailed and said Neale was killed, taken alone, are not to be considered by you as proof of any negligence on the part of either or any of the defendants." Appellants complain of the use of the word "proof" instead of "evidence" in the latter part of the instruction. As originally proposed the latter word was used. There is no force in this contention. It is true, as appellants indicate, that this court in Brymer v. Southern Pacific Co., 90 Cal. 496, 27 Pac. 371, has said that the mere fact of the occurrence of an accident does not fix the liability, or even raise a presumption that the employer was at fault. But the evidence regarding such an accident is clearly admissible, so that the fact of the happening thereof, if established, may be considered in connection with other facts which might tend to make up a complete showing of negligence. This court has never said that evidence of the failure of machinery to do its allotted work may not be introduced, but the rule is that proof of the occurrence of the accident by reason of such failure, standing alone, is not proof of negligence.

[7] The jury was instructed that it was the railroad company's duty to furnish its engineer a reasonably sound and safe engine upon which to perform his duties and a reasonably safe track, failing in which judgment should go for plaintiff. The counsel for appellants say that the obligation of the corporation was not to furnish a reasonably safe track, but to exercise reasonable care to furnish a reasonably safe track. In this behalf the case of Duffy v. Hobbs, Wall & Co., 166 Cal. 210, 135 Pac. 1093, L. R. A. 1916F, 806, is cited. The opinion in that case declares that under a well-settled rule an employer is bound to use ordinary care to see that his employés have a safe place in which to labor, and that the tools and appliances with which they are to work are in good condition and reasonably safe for the purposes intended. It is there declared that:

> "This rule, however, does not apply between the master and the servant who is employed to perform for the master this duty to the other servants, where the injury happens because of the failure of such servant to do that part of his duty."

It will be seen at once that the qualification of the general rule does not apply to this case. In Thompson v. California Cons. Co., 148 Cal. 35, 82 Pac. 367, also cited by appellants, the court was considering a situation in which a workman was employed in a quarry in which blasting was done and the conditions were constantly changing. It was held that where the servant is under the same obligation as the master to look for dangers in the place of employment, and has equal facilities for ascertaining them, and under such conditions continues to work, the master is not liable for any injuries caused by the dangers then existing unless, after knowing or being presumed to know the dangers himself, the master urges or coerces the servant to continue the work. In Eastern Transportation Co. v. Johnson, 117 Va. 306, 84 S. E. 649, and Southern Ry. v. Childrey, 113 Va. 376, 74 S. E. 221, the court said in effect that it is the duty of the master to exercise ordinary care to provide, not safe and suitable appliances and instrumentalities, but reasonably safe and suitable appliances and instrumentalities for the use of his servant. But a railroad track is not a tool given to a servant and one which he is required to observe and to know when it becomes unsuitable and unsafe. The dangers arising from the rotting of ties are not obvious to the engineer who passes over the road at a high speed. Such dangers may only be learned by inspection, and it is the duty of the railroad company to inspect its tracks and to exercise reasonable care to keep them in a reasonably safe condition for the purposes for which they are used. The true rule has been stated many times. It will suffice to quote the language of Mr. Justice Kerrigan in Matchette v. California Fruit Canners' Association, 33 Cal. App. 156–159, 164 Pac. 423, 424:

> "The duty of an employer to furnish an employé with a reasonably safe place to work is fulfilled when he exercises ordinary care for that purpose. * * * It was the defendant's duty to use reasonable care in providing a reasonably safe place for decedent to work."

[8] While the instruction criticised, if taken alone, might possibly cause jurors to place a heavier burden upon the employer than the law permits, we are of the opinion that, when taken in connection with the rest of the charge (as the jury were instructed that it must be), this instruction could not have been misleading. The court carefully defined ordinary care and negligence, and the jury was told that plaintiff was bound to prove negligence in order to recover; that it was the duty of the corporation and defendant Purdy "to have used ordinary care in furnishing a safe track, trackage, and ties over which the engine" was being operated; and that a failure so to do would be negligence, "and if such negligence, if any, contributed to the happening of the accident as a proximate cause thereof, you will find against both of said defendants, or either of them, if shown by the evidence to have been negligent in that behalf." Taken together the instructions properly declared the law.

Nor do we think the jury could have been misled by the instructions, taken as a whole into a belief that the railroad company owed to its engineer the same duty that the law imposed upon it with reference to a passenger. The jurors were carefully instructed upon the rule respecting the burden of proof, and that "the mere facts that the engine was derailed and said Neale was killed" were not, when taken alone, to be considered as proof of any negligence on the part of defendants or any one of them.

The judgment and order are affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

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178 Cal. 257

In re JEPSON'S ESTATE. (L. A. 5574.)

(Supreme Court of California. May 8, 1918.)

1. Wills 🔑302(2)—Proof of Signature.
Evidence *held* sufficient to sustain finding of the court that an alleged will was in the handwriting of and signed by the deceased.

2. Appeal and Error 🔑995, 1011(1) — Questions of Fact—Weight of Evidence.
Where the evidence is conflicting, the findings of fact of a trial court or jury is conclusive on appeal, the weight of the evidence being for the jury or court, unless obviously false or inherently improbable.

3. Appeal and Error 🔑1010(1)—Review —Findings of Fact.
An appellate court will not assume the rôle of a handwriting expert, for the purpose of setting aside a finding of fact by the trial court, based not only on its own inspection of a writing, but also upon the opinions of witnesses peculiarly qualified.

4. Wills 🔑303(4)—Olographic Wills—Proof.
Code Civ. Proc. § 1315, does not require that both witnesses to an olographic will be produced.

5. New Trial 🔑102(1)—Newly Discovered Evidence—Diligence.
To be entitled to a new trial on the ground of newly discovered evidence, it must be shown that the evidence could not, with reasonable diligence, have been produced at the trial.

6. New Trial 🔑104(1)—Newly Discovered Cumulative Evidence.
New trial will not be granted for newly discovered evidence which is merely cumulative.

In Bank. Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

In the matter of the estate of Frederick Emil Jepson, also known as Fred Jepson, deceased. From an order admitting will to probate, and appointing Elise Jepson executrix, and an order denying their motion for a new trial, contestants of the admission of the will to probate appeal. Affirmed.

Fred N. Arnoldy, of Los Angeles, for appellants. Frank Stewart, J. W. Howell, and Stewart & Stewart, all of Los Angeles, for respondent.

SLOSS, J. Frederick Emil Jepson died in Los Angeles county on November 5, 1915, survived by his wife, Elise Jepson, and several nephews and nieces, the children of a deceased brother and sister of Jepson. No will appearing, the widow applied for letters of administration, which were granted to her. Upon her petition for the setting apart of a homestead, the nephews and nieces appeared in opposition. The superior court ruled that they were not entitled to oppose the widow's petition, for the reason, as she claimed, that the entire estate passed to her under the law of succession. The nephews and nieces appealed, and this court, on a motion to dismiss, and later, in passing on the merits of the appeals, decided that the appellants were entitled to share in the estate of the supposed intestate. Estate of Jepson, 174 Cal. 684, 164 Pac. 1; Estate of Jepson, 170 Pac. 1182. About a year and a half after Jepson's death, and shortly after our decision on the motion to dismiss, the widow filed a paper as the last will of the decedent, together with a petition for its admission to probate. The nephews and nieces filed a contest, putting in issue the genuineness of the alleged will. Upon the trial the court found that the paper was duly executed by the testator in the presence of two subscribing witnesses. It further found that the will was written "entirely in the handwriting of said testator, by his own hand, and was dated and subscribed by him." Orders were made admitting the will to probate, and appointing the widow, Elise Jepson, executrix. The contestants appeal from these orders. By their appeal they seek to review, also, an order denying their motion for a new trial.

The controversy turns, principally, on the sufficiency of the evidence to support the findings just mentioned. Frederick Jepson was a native of Germany. For some years prior to 1903 he lived in Yonkers, in the state of New York. In that year he moved to California, and continued to reside in this state until his death. He was married to the respondent in 1882. The disputed paper, which was in the German language, purported to have been executed at Yonkers on the 27th day of February, 1903, a date shortly before the departure of Jepson for California. According to the testimony introduced by the respondent, it was entirely written, dated, and signed by Jepson, but it bore, after the signature of the alleged testator, an attestation clause to which the names of John Behrens and Rudolph Hettler were affixed as attesting witnesses. Hettler appeared at the trial, and testified directly and specifically to Jepson's compliance with all of the formalities required for the execution of an attested will. He also testified that the entire document, with the exception of the signatures of himself and Behrens, was in the handwriting of the decedent. His wife, who is a sister of the respondent, gave corroborating testimony concerning the execution of the paper, and also declared her opinion that the handwriting was that of the decedent. Additional opinion evidence that the paper was in the handwriting of Jepson was given by the respondent, by another witness familiar with the decedent's handwriting, and by an expert on handwriting. On the other hand, the appellants testified that, in their opinion the signature was not genuine, and their testimony was supported by that of two other witnesses, one an expert.

[1-3] This mere statement should suffice to show that the case presents a question, simply, of a conflict of evidence, upon which the trial court's determination of the issue of fact must be deemed conclusive here. The appellants argue with great earnestness and apparent conviction that the evidence offered by the respondent is unworthy of belief, and should have been rejected. No rule of appellate practice is more firmly settled than that the weight of evidence is for the jury or the court passing on the facts. It is true, of course, that testimony may be so obviously false or so inherently improbable as to require its rejection. But no such situation is presented here. Viewing, for the moment, the opinion evidence alone, we could not say that the court below should have rejected the testimony of the witnesses who declared that, in their view, the signature was that of the decedent. Photographic copies of the will and of exemplars of Jepson's admitted handwriting are contained in the transcript, and differences between the subscription of the alleged will and signatures appearing on other writings of Jepson are pointed out. But these differences do not appear to us to be any greater or more significant than the variations between different handwritings of conceded authenticity. Even if they were more marked than they are, we should still be in no position to pass upon the genuineness of the handwriting with that degree of certainty which would be required to overthrow a finding of the trial court. A court of appellate jurisdiction cannot be expected to assume the rôle of a handwriting expert, for the purpose of setting aside a finding made by the trial court, and based, not only upon its own inspection and comparison of the original writings, but upon the opinions of witnesses peculiarly qualified, either by special study of the subject or by familiarity with the handwriting of the decedent. But beyond all this, we have the direct testimony of Hettler, which, as above stated, is corroborated in some degree, that he saw Jepson sign the paper. There was nothing on the face of the evidence for respondent to compel its rejection by the trial court. The appellants make much of the fact that the will was not produced until long after the decedent's death, and then only when this court had held against the widow's claim that she was entitled to take the entire estate in the absence of a testamentary disposition. But this, like other matters to which appellants point, is merely a circumstance, to which the trial judge was to give, as he doubtless did, such weight as he thought it deserved. There is no occasion to

recite the several particulars brought forward by the appellants to justify their belief that the signature to the disputed paper was a forgery. These may, singly or collectively, have justified a suspicion that the alleged will was not genuine, but no greater force can be attributed to them on this appeal. On the other hand, we might, if it were necessary, call attention to various presumptions and inferences which may fairly be regarded as fortifying the conclusion reached on the trial. A careful reading of the whole record satisfied us that the attack upon the court's finding is entirely without merit.

[4] The appellants make the further point that under the provisions of section 1315 of the Code of Civil Procedure the will should not have been admitted to probate without the production of Behrens, one of the subscribing witnesses. Regardless of any other consideration, the finding that the paper was duly executed as an olographic will furnishes a sufficient answer to this point.

[5, 6] The motion for new trial was based, in part, upon the ground of newly discovered evidence. Affidavits of witnesses resident in Yonkers to the effect that the disputed signature was spurious were offered. The court was warranted in disregarding these affidavits upon the grounds: First, that there was no sufficient showing that the evidence could not, with reasonable diligence, have been produced at the trial; and, second, that it was merely cumulative.

No other points are made.

The orders appealed from are affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; MELVIN, J.; RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

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178 Cal. 234

BENOIST v. BENOIST. (L. A. 4247.)

(Supreme Court of California. May 8, 1918.)

1. LIMITATION OF ACTIONS 🔑103(2)—ACTION AGAINST TRUSTEE—REPUDIATION.

The rule that the statute does not run in favor of a trustee against his beneficiary till the trust is repudiated, and adverse claim of trustee is clearly and unequivocally made known, applies to express trusts only, and not to an involuntary trust raised by operation of law.

2. LIMITATION OF ACTIONS 🔑102(6)—RECOVERY OF CHATTELS—ACCRUAL OF CAUSE OF ACTION.

Where pictures were given to defendant's father, under agreement that on his death they should go to his son, if he left any, otherwise to plaintiff, and they were then given to defendant by her father, and she took possession of them, plaintiff's cause of action accrued, and Code Civ. Proc. § 338, subd. 3, giving three years for action for chattels detained, began to run at least on the death of the father leaving no son.

3. NEW TRIAL 🔑79—SUFFICIENCY OF EVIDENCE—IMMATERIAL FINDINGS.

New trial will not be granted for want of evidence to sustain immaterial findings.

Department 1. Appeal from Superior Court, Los Angeles County; George H. Cabaniss, Judge.

Action by Conde L. Benoist against Eugenie Benoist. From an order denying new trial, plaintiff appeals. Affirmed.

Fairbanks & MacFarland, of Los Angeles, for appellant. Chas. L. Benoist, of Los Angels, for respondent.

SLOSS, J. In this action, which was brought to recover the possession of seven family portraits, judgment went in favor of the defendant. The plaintiff appeals from an order denying his motion for a new trial.

The trial court made findings as follows: Mrs. Eliza B. Pallen was a sister of the plaintiff, Conde L. Benoist, and of S. H. Benoist, the father of the defendant. In 1877, Mrs. Pallen, who was then the owner of the portraits in question, made a written agreement with her said brothers, which provided, in effect, that she gave the portraits to S. H. Benoist, with the understanding that they should, at his death, "go to his oldest son, if he should have any," but, in the event of his dying without male issue, the portraits should go to Conde L. Benoist, or his oldest son. In the year 1899, S. H. Benoist made a gift of the portraits to his daughter, the defendant, who took them "with knowledge of the agreement, and denying its validity, and claimed to be the owner of the portraits." The plaintiff knew of defendant's possession and claim of ownership. The defendant has had possession of the portraits since the year 1899, and has had them in her possession in the county of Los Angeles for eleven years or more, which fact was known to the plaintiff. S. H. Benoist died without male issue on November 10, 1910.

As conclusions of law the court found that the agreement between Mrs. Pallen and her brothers was valid and binding; that S. H. Benoist violated this agreement when he made a gift of the portraits to the defendant; that a trust devolved upon the defendant when she came into possession; that the statute of limitations then began to run; that the action is governed by section 338, subdivision 3, of the Code of Civil Procedure, and that it is barred by the statute of limitations.

The motion for new trial was based upon the grounds of newly discovered evidence, and insufficiency of the evidence to justify the decision. The showing made did not require the granting of the motion on the first ground, and the appellant makes no complaint on this score. On the other ground, the attack is directed against the findings that the plaintiff knew of defendant's possession and claim of ownership. The record is, in truth, devoid of any evidence tending to show that the plaintiff had such knowledge, and if these findings were necessary to the support of the judgment, the order appealed from could not be upheld. But, in view of the other facts found, it becomes entirely immaterial whether the plaintiff did or did not have knowledge of defendant's possession and claim, and the findings questioned have no real bearing on the ultimate issue raised by the plea of the statute of limitations.

[1] The appellant takes his stand upon the rule that the statute of limitations does not begin to run in favor of a trustee as against his beneficiary until there has been a repudiation of the trust, and the adverse claim of the trustee has been "clearly and unequivocally made known to the cestui que trust." Luco v. De Toro, 91 Cal. 405, 416, 27 Pac. 1085. This rule applies, however, to express trusts only. Where an involuntary trust is raised by operation of law, no repudiation of the trust is required to set the statute in operation. The period of limitation begins with the commission of the wrongful act. Hecht v. Slaney, 72 Cal. 363, 366, 14 Pac. 88; Broder v. Conklin, 121 Cal. 282, 288, 53 Pac. 699; Barker v. Hurley, 132 Cal. 21, 26, 63 Pac. 1071, 64 Pac. 480; Earhart v. Churchill Co., 169 Cal. 728, 731, 147 Pac. 942.

[2] Here, as appears from findings which are not assailed, the defendant was not a party to the agreement upon which the plaintiff bases his claim, and she took the portraits as her own in antagonism to that claim, and denying its validity. It is not necessary to consider whether the court was correct in its conclusion of law that the statute began to run in 1899, when the defendant came into possession of the portraits. In any event, the plaintiff's right of action accrued when S. H. Benoist died without male issue, whereupon, under the agreement, the portraits were to go to the plaintiff. This event took place in November, 1910, which was more than three years before the commencement of the action. In any aspect, therefore, the action was barred by the provisions of the Code section to which the court refers in its findings.

[3] A new trial will not be granted for want of evidence to sustain immaterial findings. Haese v. Heitzeg, 159 Cal. 569, 573, 114 Pac. 816.

The order is affirmed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

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178 Cal. 58

ROCKRIDGE PLACE CO. v. CITY COUNCIL OF CITY OF OAKLAND et al. (S. F. 8301.)

(Supreme Court of California. April 1, 1918. On Petition for Rehearing, May 1, 1918.)

1. COURTS 🔑485—TRANSFER OF CAUSES—ASSESSMENTS FOR STREET IMPROVEMENTS.

The Supreme Court may transfer to itself and exercise jurisdiction to vacate the decision of the District Court of Appeal annulling, on certiorari, resolution for a reassessment of lands for street improvements.

2. COURTS 🔑487(2)—TRANSFER OF CAUSES—ASSESSMENTS FOR STREET IMPROVEMENTS.

The Supreme Court may exercise jurisdiction to vacate a decision of the District Court of Appeal as to assessment for public improvements, and transfer such cause to itself on the petition of one not a party to the proceeding, or upon its own motion.

3. COURTS 🔑488(1)—TRANSFER OF CAUSES—EFFECT.

An order by the Supreme Court granting a hearing, in such court, of certiorari proceeding pending in the District Court of Appeal as to an assessment of lands for public improvements, vacates the decision of the District Court and transfers the case to the Supreme Court as though originally instituted therein.

4. COURTS 🔑486 — TRANSFER OF CAUSES — GROUNDS.

The action of the District Court of Appeal in regard to an assessment of land for street improvements may be vacated, and cause transferred to the Supreme Court, notwithstanding no error appears on the face of the opinion when considered without regard to the record, since such action is an original proceeding.

5. MUNICIPAL CORPORATIONS 🔑514(11) — PUBLIC IMPROVEMENTS—MODE OF REASSESSMENTS.

Reassessment of a city council for a street improvement will not be set aside as not being proportionate to benefits for the mere reason that deductions and additions were made to the original assessment at a certain sum per front foot.

6. MUNICIPAL CORPORATIONS 🔑407(1) — PUBLIC IMPROVEMENTS—ASSESSMENT—CONSTITUTIONALITY OF STATUTE.

Improvement Act (St. 1911, p. 730), providing in section 4 that the city council may make the expense of a public improvement chargeable upon a district to be benefited, and by section 20 that it shall assess the cost of the work upon the several lots in the assessment district benefited thereby upon each respectively, in proportion "to the estimated benefits to be received by each of said several lots," is not unconstitutional as failing to provide for an assessment in accordance with the benefits to be actually received.

In Bank. Certiorari by the Rockridge Place Company to review a reassessment of lands for street improvement by the City Council of the City of Oakland and others. Proceeding dismissed.

C. Irving Wright and F. E. Boland, both of San Francisco, for plaintiff. Wm. H. O'Brien, of Oakland, for defendants. Johnson & Shaw, of Oakland (R. M. F. Soto, of San Francisco, of counsel), for petitioner Marsh Bros. & Gardenier, Inc.

ANGELLOTTI, C. J. This is a proceeding in certiorari to review a resolution of the city council of the city of Oakland, adopted December 28, 1915, directing a reassessment of the lands liable for a certain street improvement, and prescribing the amount of assessment as to each parcel of land within the assessment district. The proceeding was instituted November 10, 1916, in the District Court of Appeal of the First Appellate District. Judgment was given by that court annulling the resolution. Within 60 days thereafter this court vacated said decision and judgment and granted a hearing herein. The only petition filed herein asking for such action was one filed by Marsh Bros. & Gardenier, Inc., a corporation, which was not technically a party to the certiorari proceeding, but which was a party in interest, being the street contractor in whose favor the assessment was made.

[1-4] The claim that this court was without power to vacate the decision of the District Court of Appeal in this matter, and to transfer the same to this court for determination, is sufficiently answered by what is said in the Matter of Wells, 174 Cal. 467, 163 Pac. 657. As to proceedings in mandamus, prohibition, and certiorari originally instituted in a District Court of Appeal, this court has many times made such orders, and the uniform practice in that regard is fully sustained by the opinion in the case cited. It is immaterial that the only petition for such action by this court was by one not made a party to the proceeding. This court has the power to make such an order on its own motion. When such an order is made within the time prescribed in the Constitution, the decision of the District Court of Appeal is vacated and the matter is transferred to this court for a determination of all the material questions involved therein, to the same extent as if originally instituted in this court. It is also immaterial that the opinion of the District Court of Appeal may not show any error upon its face, when considered without regard to the record. The practice established by our decisions (People v. Davis, 147 Cal. 346, 81 Pac. 718; Burke v. Maze, 10 Cal. App. 206, 215, 101 Pac. 438, 440; Rauers, etc., v. Berthiaume, 21 Cal. App. 675, 132 Pac. 596, 833), to the effect that in considering petitions for a hearing, in this court, of appeals required by our Constitution to be taken to a District Court of Appeal, we will consider only the opinion of that court and will not look into the record, is confined to appeals, and has never been extended to original proceedings instituted in such courts. There are material differences between the two classes of matters, which, to our minds, preclude any such extension of the practice, or at least, render it inadvisable to declare any such rule as to original proceedings instituted in a District Court of Appeal. There is no question of power involved in this regard. The power exists as to all matters, and has been exercised in this particular matter, with the result that the proceeding is now here for determination on its merits.

We will concede, for the purposes of the decision, that this proceeding should not be dismissed for laches, or because of the claim that petitioner, before instituting the same, in common with others, resorted to an action in equity to enjoin proceedings under the assessment and prosecuted the same to judgment, with the result that judgment was given against it and its coplaintiffs on the merits. We will concede, purely for the purposes of the decision, that certiorari will lie to review an assessment levied on property for street improvements, and come at once to a discussion of the claim of petitioner that the assessment ordered herein is on its face in excess of the jurisdiction of the city council and void.

[5] The street improvement work here involved was work on portions of two intersecting streets, and was done under the provisions of the so-called Street Improvement Act of 1911 (Stats. 1911, p. 730). The work and improvement being in the opinion of the council of more than local or ordinary public benefit, the district benefited was described, and it was ordered that the cost and expense be chargeable against and assessed upon said district. Under the law it was required that the assessment on the several pieces and parcels of land within the district be in proportion to the estimated benefits to each lot. The work was done by the contractor and accepted by the superintendent of streets, who made his assessment for the cost of the work with incidental expenses, $27,978.68, upon the various lots of land in the district, 447 in number. An appeal was made by certain property owners to the council to review the assessment. The appeal was heard and the council gave its decision by the resolution here assailed, wherein the amount to be assessed against each lot in the district was specified. The sole point made against the resolution and the assessment thereby ordered is that the council did not take into consideration the proportion of benefits to be derived by each of the several lots and make the assessment accordingly, but, by said resolution, arbitrarily apportioned a portion of the cost without regard to benefits. The particular charge in this behalf is that council deducted from the assessment theretofore made by the superintendent of streets on the several lots fronting on Chabot road the sum of 50 cents per running foot, amounting (according to petitioner's brief) to $4,462.03, and added this to the assessment against all of the lots in the district in proportion to the area of each of said lots; the charge by reason thereof being (according to petitioner's brief) $0.0006 per square foot, and increasing petitioner's assessment from $652.50 to $663.27.

It may be admitted that an analysis of the assessment made by the street superintendent and that ordered by the council on appeal shows that the effect of the action of the council was that as to each lot fronting on Chabot road the street superintendent's assessment was reduced by an amount equal to fifty cents per running foot, less approximately $0.0006 per square foot of area, and that the assessment on each of the other lots in the district was increased approximately $0.0006 per square foot of area. Also that the deduction of 50 cents per running foot on Chabot road aggregates $4,462.03, and that $0.0006 per square foot aggregates in the whole district approximately the same amount. But it does not follow that alleged "mathematical demonstration," as it is called by learned counsel, of the method adopted by the council in apportioning the assessment, that the assessment was not made by the council solely with reference to the benefit to each lot, and does not represent the best judgment of that body as to the amount that should be charged against each lot under that method of apportionment. Certainly there is in this proceeding no showing to the contrary, and the situation portrayed by the record is not such that we can say that there was even any error of judgment in the apportionment. The return to the writ shows that the council gave much time to the hearing of the appeal, the same being considered at several sessions, at which the parties interested were given the opportunity to be heard and were in fact heard. The minutes disclose that the sworn testimony of witnesses was received, and the resolution here assailed so states in terms. The nature of this testimony does not appear, as no record was kept thereof; the law not requiring any such record. Certainly it will not be presumed that this testimony was not sufficient to support the conclusion of the council. The resolution in terms requires the superintendent of streets to assess the sum of $27,978.68 upon the several lots, "upon each respectively in proportion to the estimated benefits to be received by each of said several lots," and states that "this council hereby finds and decides and determines that said several lots * * * are benefited by said work and improvement in the proportions and in the amounts set forth in the table of assessments hereinafter set forth." In the face of this finding, unassailed as it is by anything in the record, it cannot be said here that the assessment was not made in accord with the rule of apportionment prescribed by the statute. The "mathematical demonstration" of learned counsel is simply a demonstration of the facts we have already admitted. Those facts are entirely consistent with a conclusion that it was correctly decided by the council that, in order to make the assessment one according to the benefit to the several lots, it was necessary to charge against each lot the exact amount specified in the resolution. That the amounts so charged are, in so far as the $4,462.03 is concerned, the same as would have been obtained by the method which counsel contends was in fact adopted, but as to the adoption of which there is no showing in the record other than that they are the same, is entirely beside the question. It certainly cannot be held upon the record before us that under no conceivable conditions could the several lots be benefited in the proportion stated by the assessment, or that the assessment is void on its face.

[6] A question is raised as to the constitutionality of the Improvement Act of 1911, the claim being that it does not provide for an assessment of the lands in the district in accordance with the benefits to be actually received by such lands from the work, but only provides for an assessment in proportion to the estimated benefits. The act provides (section 4) that the city council may make the expense of the work chargeable upon a district, which, in its resolution of intention, it shall declare "to be the district benefited by said work and improvement," etc., and (section 20) that it shall assess the cost of the work upon the several lots in the assessment district benefited thereby, "upon each respectively, in proportion to the estimated benefits to be received by each of said several lots," etc. Full opportunity is required to be given to the property owners to be heard with respect to the proposed work and the extent of the district, prior to any order for the doing of the work, and after the assessment is made they have the opportunity to be heard as to the amounts charged against their respective lots. It is apparent, of course, that if the district created by the city council comprises all the land to be actually benefited by the proposed work, which is the manifest design of the act, and if this "benefit" to the land embraced in the district exceeds the cost of the work, an assessment of the cost upon the several lots in the district "upon each respectively in proportion to the estimated benefits," etc., is an assessment upon each lot in accordance with the benefits received by it from the work. The point appears to be that the cost of the work which is to be assessed against the lands of the district may exceed the benefit, with the result that the assessment on those lands while in proportion to the benefits may not be in accord with the benefits accruing to each lot from the work. We do not think the act, fairly read, so contemplates or provides. When it provides for the establishment of "the district benefited by said work," it contemplates a district that will in fact be benefited by the completion of the proposed improvement under the terms of the act, including the imposition of the cost thereof upon the lands of the district. If this be the proper construction of the act in this regard, as we think it is, the objection made is without force. That the exact cost of the proposed work is not known until after the establishment of the district, is unimportant. It can be approximately determined with sufficient certainty to avoid the possible condition suggested by counsel. There is no suggestion that any such condition exists in the case at bar.

The proceeding is dismissed.

We concur: SLOSS, J.; WILBUR, J.; MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

On Petition for Rehearing.

PER CURIAM. The petition for a rehearing is denied. In denying a rehearing we deem it proper to say that we do not consider the points made by the petitioner relative to the alleged damage to its property resulting from the grading to the official grade available in this proceeding. See Duncan v. Ramish, 142 Cal. 693, 694, 76 Pac. 661; Hornung v. McCarthy, 126 Cal. 17, 58 Pac. 303; Engebretson v. Gay, 158 Cal. 27, 109 Pac. 879.

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36 Cal. App. 585

UNION MACH. CO. v. CHICAGO BONDING & SURETY CO. (Civ. 2222.)

(District Court of Appeal, First District, California. March 26, 1918.)

1. Bailment 🔑18(3)—Lien for Repairs—Possession—Statutes.

Under Civ. Code, §§ 3049, 3051, providing for liens on personal property, where machine company repairs a dredger, and constructs new parts therefor, its lien for repair charges and price of new parts is dependent upon company retaining possession of the dredger.

2. Guaranty 🔑16(1)—Consideration—Relinquishment of Lien.

Where a machine company does repair work on, and furnishes new parts for, a dredger, and without receiving payment therefor gives up possession of dredger upon guaranty of payment by a bonding company, the relinquishment of the lien is sufficient consideration for the guaranty.

3. Guaranty 🔑16(4)—Consideration—Extension of Time for Payment.

Extension of time of payment was a sufficient consideration for the guaranty.

4. Costs 🔑260(1)—Damages for Frivolous Appeal.

Where an appeal is taken obviously for purpose of delay, the court may assess damages for the prosecution of a frivolous appeal.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by the Union Machine Company, a corporation, against the Chicago Bonding & Surety Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Watt, Miller, Thornton & Watt, of San Francisco, for appellant. Cushing & Cushing and Wm. S. McKnight, all of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of the plaintiff upon a guaranty executed by the defendant.

The appeal is without merit. The facts are briefly these: Plaintiff entered into a contract with the Western Reclamation Company to make certain repairs to and to construct new parts for a dredger. Part of the work under the contract had been performed, and plaintiff was entitled to the contract price therefor. When the balance of the work was ready for delivery the plaintiff refused to install the same until it should be paid in full for all the work. The Western Reclamation Company was unable to make payment at the time, and prevailed upon the plaintiff to perform the balance of the work upon the execution by the defendant of a written instrument by the terms of which the latter guaranteed the payment of all bills against the Western Reclamation Company for the work done on the dredger under the contract, the same to be paid at stated periods.

[1-3] We do not doubt that the plaintiff had a perfect right to retain possession of the undelivered part of the work until the purchase price of all the work was paid. Civ. Code, §§ 3049, 3051. It follows that by the delivery of the articles in question without receiving payment, in reliance upon the security of the guaranty, plaintiff suffered a detriment which was a good consideration for the guaranty. Moreover, at the time and as a part of the transaction just noted plaintiff agreed to extend the time of payment for the articles mentioned in the contract, which we think furnished an additional and distinct consideration for the guaranty sufficient of itself to support the same.

[4] We cannot escape the conviction that the present appeal was not taken in good faith, but for the purposes of delay, and that the court should exercise its power of imposing a penalty upon the appellant for what it deems an abuse of the right of appeal. The judgment is affirmed, and it is ordered that the appellant pay to the respondent the sum of $50 as damages for the taking and prosecuting of a frivolous appeal.

We concur: ZOOK, Judge pro tem.; BEASLY, Judge pro tem.

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36 Cal. App. 601

BORBA et al. v. DE MELLO. (Civ. 2341.)

(District Court of Appeal, Second District, California. March 26, 1918.)

Appeal and Error 🔑760(1)—Briefs—Sufficiency.

One presenting his appeal by the alternative method must print in his brief such portion of the record as he desires reviewed, as required by Code Civ. Proc. § 953c, and references to the transcript are insufficient.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Constantino V. Borba and others against Jose De Mello. Judgment for plaintiffs, and defendant appeals. Affirmed.

Bradley & Bradley, of Visalia, for appellant. G. W. Zartman, of Tulare, for respondents.

PER CURIAM. Defendant in this case appeals from an adverse judgment, and presents his appeal by the alternative method. In the briefs filed by counsel no attempt is made to comply with the provisions of section 953c, Code of Civil Procedure, which require that the parties in presenting an appeal by the method mentioned shall print in their brief such portions of the record as they desire to call to the court's attention. Numerous references are made to the pages of the transcript filed, but it has been repeatedly held that the appellate courts will not examine the transcript documents in order to determine whether there is merit in the contentions made by the appellant. Many opinions of this court and the Supreme Court reiterate the rule. A collection of the cases so holding will be found grouped in the case of Barker Bros. v. Joos et al., 171 Pac. 1085. Not having properly before us sufficient of the record to illustrate the various contentions made on behalf of the appellant, we are compelled to hold that no error is shown as against the judgment.

The judgment appealed from is affirmed.

36 Cal. App. 582

MOORE & SCOTT IRON WORKS et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 2467.)

(District Court of Appeal, First District, California. March 25, 1918. Rehearing Denied by Supreme Court, May 25, 1918.)

Master and Servant 🔑375(2) — "Arising in Course of Employment."

Where one employed as a bolter-up within the hull of a ship in course of construction left his employment to go to lunch, but instead of going the usual safe way chose another dangerous way, whereby he was killed, he was not in the course of his employment within the Workmen's Compensation Act.

Proceedings by Minerva Higgins against the Moore & Scott Iron Works and others for compensation for the death of Michael Higgins, deceased. There was an award by the Industrial Accident Commission, and defendants petition for a writ of review. Award annulled.

Rehearing denied by Supreme Court; Angellotti, C. J., and Lorigan, J., dissenting.

Redman & Alexander, of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

PER CURIAM. The award of the Industrial Accident Commission in this case must be annulled upon the following considerations: Michael Higgins, employed as a bolter-up within the hull of a ship in the course of construction at the Moore & Scott Iron Works, left his employment for the purpose of going to his lunch; he went by an unusual route, and undertook to go down a scaffolding and ladder on the outside of the ship—a means not intended for his use in leaving the ship at any time—another and perfectly safe method of exit having been provided by his employers. In doing so he lost his hold and fell, and was killed. Upon these facts it must be held that the death of Higgins did not take place in the course of his employment; nor was he at the time of the accident performing any service growing out of or incidental to his employment, nor acting within the course thereof. Fitzgerald v. Clarke & Son, 1 B. W. C. C. (Eng.) 197.

The findings of the commission to the effect that he might have been leaving his work for the purpose of getting more bolts for use therein, or for the purpose of getting fresh air, seem to us to rest upon nothing but conjecture. There is no evidence in the record to sustain them. The fresh air, if he needed it, could have been obtained in a perfectly safe place upon the deck of the vessel, and nearer to the point of his immediate employment than the scaffolding from which he fell, and there seem to have been no bolts or other material necessary to his work to be obtained at the place toward which he was going. It is certain from this record, it seems to us, that he was, as has been said, simply abandoning his work before the hour when he was permitted to leave it.

The award is annulled.

36 Cal. App. 574

PEOPLE v. HILL. (Cr. 707.)

(District Court of Appeal, First District, California. March 23, 1918.)

1. Perjury 🔑25(6)— Sufficiency of Indictment.

Allegations that at a certain time in the superior court of the county of F. there was on trial a certain action in which the people were plaintiff and B. was defendant, and that it was then material to know where B. was on a certain date, and whether he was with the defendant at a certain place, was a sufficient presentation of the matter in which it was charged defendant committed perjury.

2. Perjury 🔑33(1)—Sufficiency of Evidence.

Evidence *held* sufficient to support a conviction of perjury.

3. Criminal Law 🔑553 — Findings of Fact.

The jury in a criminal case has the right to entirely discredit the testimony of defendant and another, and to base its verdict on other evidence which it considers more trustworthy.

4. Criminal Law 🔑730(1)—Misconduct of Counsel—Admonishing the Jury.

Where, in perjury case, prosecuting attorney improperly referred in argument to matters in the case where the offense was alleged to have been committed, on defendant's motion to admonish the jury, a statement of the court, "I think I will take the view of the defendant, and instruct the jury to disregard that part of it," was a sufficient admonition, especially where the matter referred to was known to the jury.

5. Criminal Law 🔑1207 — Indeterminate Sentences.

Where an offense was committed before the indeterminate sentence law took effect, an indeterminate sentence cannot be given.

6. CRIMINAL LAW ⚷1188 — HARMLESS ERROR—SENTENCE.

A conviction will not be reversed for error in giving an indeterminate sentence for an offense committed before the indeterminate sentence law went into effect, but the case will be remanded, with instructions to give a proper sentence.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

A. J. Hill was convicted of perjury, and he appeals. Remanded, with directions to give proper sentence.

Burns & Watkins and E. A. Williams, all of Fresno, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted in the superior court of Fresno county of perjury, and an indeterminate sentence of imprisonment in a state penitentiary was imposed upon him. He appeals from the judgment and from an order denying him a new trial.

The points insisted upon for a reversal of the judgment and order are that the court erred in overruling the demurrer to the information; insufficiency of the evidence to sustain the verdict; misconduct of the district attorney by which the defendant was prevented from having a fair and impartial trial; and that the court erred in not determining the period of the defendant's confinement.

[1] Considering the first point raised, it appears that the information sets forth, among other things, that at a certain time in the superior court of the county of Fresno there was on trial a certain action in which the people of the state of California were plaintiff and Clarence C. Boling was defendant, and that it was then and there material to know in said action where the defendant Boling was on the night of December 6, 1915, and whether or not said Boling at said time time stayed all night with Hill, the defendant in this case, at a place known as Hub. It is claimed that this is not a sufficient setting forth of the controversy or matter in respect to which the offense was committed to comply with the provisions of section 966 of the Penal Code.

We think this statement of the indictment was a sufficient presentation of the matter in which it is charged that Hill committed the perjury complained of. The purpose of the requirement of setting forth the substance of the controversy or matter in which the perjury is alleged to have taken place is to inform the defendant of the offense with which he is charged, and this is as effectually done by the statement above given as if the whole proceedings of the trial had been incorporated in the information. The demurrer to the information on this ground was properly overruled.

[2, 3] The next, and main point urged by appellant for a reversal is the insufficiency of the evidence to sustain the verdict. The verdict of the jury is that Hill, in testifying in the case of People v. Boling that Boling stayed with him in his camp at Hub on the night of December 6, 1915, testified falsely. In reaching this conclusion the jury had before them evidence of the following facts among others: One Boling was informed against and tried in the superior court of Fresno county for the larceny of certain mules. Upon that trial, in attempting to establish an alibi, he produced Hill, the present defendant, as a witness in his behalf, who testified that Boling passed the night of December 6, 1915, with him in his tent at a little station called Hub, where he testified he was camping at the time. It appears that Hub is a very small community containing but a few inhabitants. At the trial of the present case the prosecution called as witnesses a number of the residents of Hub, who testified to Hill's presence there at the end of December and the beginning of January, and that they had not seen him there prior to that time. The owner of the pasture in which Hill camped during his stay at Hub testified that the only time he saw Hill there was after December 27th. To the same effect is the testimony of Joe Fernandez, near whose house the defendant was camped, and who witnessed the arrival of Hill at Hub. Another witness testified to a horse trade with Hill at Hub on January 8th, and that Hill stayed at Hub but a few days, and in any event not more than ten days. This testimony is sufficient to warrant the jury in finding that Hill himself was not at Hub on December 6th, and that consequently Boling did not camp there with him on that night, even though there was contradictory evidence given by Boling and the defendant. The fact that the claim of defendant and Boling that the latter was at Hub on the night of December 6th was made at Boling's trial in an endeavor to relieve him of the charge of grand larceny was before the jury. It was also before them that Boling gave testimony contradictory of his claim that he visited Hub in December, and that he also stated a few days after December 6, 1915, that he passed that night in a barn. The jury had the right—which it evidently exercised—to entirely discredit the testimony of Boling and the defendant, and to base its verdict on other evidence which it considered more trustworthy.

[4] The next contention of the appellant is that the district attorney was guilty of misconduct during the trial by which the defendant was prevented from being fairly and impartially tried. Regarding this matter the record shows that the prosecuting officer, during his argument to the jury, referred to some evidence contained in a tran-

script of the trial of People v. Boling concerning the finding of certain stolen mules in Boling's pasture. This transcript had been offered in evidence in the present case for the purpose of showing the materiality of Hill's testimony given in that trial, and had been so offered in the absence of the jury. It is the appellant's contention that this evidence was addressed solely to the judge of the trial court, and that the district attorney should not have referred to it in his argument to the jury. Appellant's counsel objected to the prosecuting officer's reference to this testimony, and requested that the jury be instructed to disregard it. It is apparent from the colloquy between the court and counsel at the time that the court was rather inclined to the view that the reference was proper, but the court closed the incident by saying, "I think I will take the view of the defendant, and instruct the jury to disregard that part of it." The district attorney acquiesced in this by saying, "Very well, I don't oppose the order of the court." It is urged that this was not an instruction or admonition to the jury. There can be no doubt that it was intended to be such, and the district attorney at least so understood it, as is clear from his remark; and while it might with advantage have been given much more emphatically, we cannot hold in the present case that the defendant was prejudiced by this manner of closing the incident, especially in view of the fact that it was well known to the jury that Boling was charged with the theft of the mules. Indeed, this point seems to be somewhat inconsistent with the point urged in support of the demurrer, that the indictment or information did not sufficiently set forth the substance of the controversy—a point based upon the omission to state in that pleading that Boling was charged with having stolen the very mules referred to in the district attorney's argument.

[5, 6] Finally it is claimed by the appellant that the court erred in pronouncing upon him an indeterminate sentence. The offense was committed before the indeterminate sentence law at present in force took effect, and this case stands upon the same footing in that respect as Ex parte Lee, a case recently decided by the Supreme Court on habeas corpus, and reported in 171 Pac. 958, in which it is held that the indeterminate sentence law is ex post facto as to crimes committed before it took effect. The case at bar comes within the authority of that case, and is one wherein the court should have pronounced judgment in conformity to the state of the law as it existed at the time of the commission of the offense. The indeterminate sentence is the only error we find in the record. We will not reverse the case therefor, but will remand it to the superior court, with instructions that such steps be taken as may be necessary to bring the defendant before it, and in accordance with the procedure adopted in Ex parte Lee, supra, pronounce judgment upon the defendant under the law as it stood at the time his crime was committed.

It is so ordered.

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36 Cal. App. 589

PEOPLE v. WILSON. (Cr. 560.)

(District Court of Appeal. Second District, California. March 26, 1918. Rehearing Denied April 25, 1918.)

1. Homicide 🔑105 — Justification — Arrest.

An officer is not justified in shooting a man in order to compel submission to arrest for a misdemeanor.

2. Homicide 🔑111 — Self-Defense — Arrest.

An officer, properly engaged in attempting to make an arrest on a misdemeanor charge, has the right to resist attack made upon him, and, being rightfully there and not legally considered the aggressor, may in his own defense take life.

3. Homicide 🔑276 — Justification — Evidence.

In a prosecution for manslaughter against deputy constable who shot deceased while attempting to arrest him for disturbing the peace, evidence *held* not as a matter of law to make the act justifiable.

4. Homicide 🔑332(3) — Review — Questions of Fact.

In a prosecution for manslaughter by a deputy constable in an attempt to make an arrest for disturbing the peace, the question on conflicting evidence as to whether the shooting was a crime for which conviction should be had is for the jury, and its finding is conclusive.

5. Criminal Law 🔑1174(2)—Conduct of Juror—Evidence—Misconduct.

In a prosecution for manslaughter, evidence of improper conduct of a juror in giving a witness a ride in his automobile and discussing a map of the scene of the crime, in violation of the instructions, *held* not to require reversal.

6. Criminal Law 🔑823(5)—Instructions —Intent.

In a prosecution against a deputy constable for killing a man he was attempting to arrest on a misdemeanor charge, an instruction that a person must be presumed to intend that which he attempts to or which he voluntarily does in fact do, and must also be presumed to intend all the natural, probable, and usual consequences of his own voluntary act, and the willful use of a deadly weapon without excuse or provocation generally indicates a felonious intent, correctly stated the law, when taken in connection with other parts of the charge, advising the jury that it must find beyond a reasonable doubt that defendant committed the acts charged.

7. Criminal Law 🔑761(11) — Instructions—Assumption of Facts.

In a prosecution against a deputy constable for killing a person he was attempting to arrest on a misdemeanor charge, an instruction, advising that when a homicide is proved the burden of proving circumstances of mitigation or justification devolves upon defendant, unless the proof on the part of the prosecution tends to show that the crime amounts only to manslaughter, or that defendant is justifiable or excusable, was not erroneous, as assuming that the commission of the homicide by defendant had been proved.

8. CRIMINAL LAW ⚷1137(3)—REVIEW—INSTRUCTIONS.

An instruction in a criminal case, given at defendant's request, cannot be questioned by defendant on appeal.

9. HOMICIDE ⚷325 — REVIEW — RESERVATION OF OBJECTIONS.

In a prosecution against a deputy constable for killing a person he was attempting to arrest on a misdemeanor charge, admission of evidence as to malice would not be considered, in the absence of an objection at the time offered.

10. CRIMINAL LAW ⚷419, 420(11) — EVIDENCE—HEARSAY.

In a prosecution against a deputy constable for killing a person whom he was attempting to arrest on a misdemeanor charge, a statement by a witness of the answer to a question that he had asked a third person as to whether he knew who owned the gun that had been found at the scene of the crime was inadmissible as hearsay.

11. HOMICIDE ⚷268 — MANSLAUGHTER — QUESTIONS OF FACT.

In a prosecution against a deputy constable for killing a person whom he was attempting to arrest on a misdemeanor charge, evidence as to whether the bullet that killed deceased came from defendant's gun or from that of another *held* to make a question for the jury.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

G. A. Wilson was convicted of manslaughter, and from the judgment and a denial of new trial he appeals. Affirmed.

W. T. Helms, of Los Angeles, and J. F. Frick, of Lompoc, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was charged, by an information of the district attorney of the county of Santa Barbara, with having on the 29th day of April, 1917, murdered Pedro Lopez. The jury by its verdict found him guilty of the crime of manslaughter, and the trial judge sentenced him to serve a term of ten years in the penitentiary. Motion for a new trial was made and denied, and an appeal was then taken both from the judgment and from the order denying that motion.

The killing occurred while appellant, who was at the time a deputy constable, was assisting one Knight, the constable under whom appellant was deputized, in an attempt to arrest Lopez and a man named Flores. On the day in question Lopez, in company with Flores, one Pena, and one Cordero, was in a building which was located on the main street of the little town of Santa Ynez in the county of Santa Barbara. Lopez at least had been drinking, and by all of the testimony was shown to have been considerably intoxicated. The men emerged from the building onto a vacant lot adjoining thereto. They were quarreling and fighting among themselves, one knocking the other down repeatedly. A fifth man named Espinosa made another of the party who participated in the fight on the lot. As to how the encounter started and as to who the chief aggressor was, is, to our minds, immaterial to a consideration of the case. While the men were engaged in the mêlée, Wilson, who conducted a garage in the neighborhood, was notified of the disturbance by an employé of his, this employé being related to one of the participants in the disturbance. The announcement of this employé to Wilson at the time was for Wilson to "come; they are killing my cousin." Wilson had just previous to that time suffered an injury to one of his legs below the knee, and the injured part was incased in a cast, making it necessary for him to use crutches or a crutch. Responding to the call made, Wilson got into an automobile and rode to the scene of the disturbance. There were a number of bystanders there at the time engaged in watching the fight, and, as we may remark, seeming to enjoy the performance, as none of them offered to interfere to quell the disturbance. Wilson, upon his arrival at the scene, left his machine, called upon two bystanders to assist him, and attempted to arrest the men who were fighting. There was testimony of the prosecution introduced showing that he called upon the disturbers to cease their fighting, and notified them that they were under arrest. That these men knew Wilson well, and knew him to be an officer authorized to make arrests, the evidence admits of no doubt at all. Instead of submitting to arrest, the men turned upon Wilson; some one of them knocked his crutch or crutches away and knocked his gun from his hand. The testimony was undisputed as showing that Wilson made no attempt to use his revolver in any way other than in the attempt to intimidate the men and compel them to submit to arrest. The disturbers, however, appeared not to fear the gun, and continued their aggressive acts against Wilson, who, recovering his gun from the ground, made his way back to the automobile and went after Knight, the constable. It is worth while here to note that had Wilson the inclination or the desire to have shot any of the men during this first encounter, he had ample opportunity to do so, for he was armed with a large caliber revolver which was fully loaded. As soon as Wilson left the scene to get the assistance of Knight, two of the participants in the row made their escape or went away, and there remained Lopez, Flores, and Espinosa. It is not clear that Espinosa participated actively in interfering with Wilson's first attempt to arrest the disturbers of the peace. Flores and Lopez, as the evidence indicates, appreciated the fact that when Wilson obtained assistance their arrest might be effected. As Wilson returned with Knight, the three men last mentioned had started across the field. Knight called upon them to stop. The testimony of Flores and Espinosa was generally to the effect that they obeyed the command, while Knight and Wilson agree that the men did not. Whether they came to a stop or not upon the call by Knight, it is clear beyond doubt from the whole record that Flores and Lopez declined to submit themselves to arrest. Knight stated that he fired several shots into the ground in order to intimidate the men, and there is no dispute about the fact that he did fire into the ground. The testimony shows that Knight used his gun only in the attempt to intimidate the men and compel them to submit to arrest and as a club to beat off their attack upon him. It was shown clearly that both Flores and Lopez declined to acknowledge the right of Knight to arrest them, and that they proceeded with physical force to drive Knight away, as they had previously done to Wilson. Knight grappled with the men, and the two appear to have gotten the better of him. Meanwhile Wilson stood by, several feet away, taking no active part in the tussle.

Up to this point we have recited the facts which appear to be without material dispute as the record shows them. From this point the testimony in its narrative of the occurrence which culminated in the shooting of Lopez is divergent. The testimony of several witnesses introduced on behalf of the prosecution, some of which is that given by bystanders, some by Flores and Espinosa, was to the effect that in the midst of the struggle between Knight and Flores and Lopez, Wilson approached Lopez, and, standing a distance of from six to eight feet away from him, deliberately discharged his revolver in Lopez's direction, whereupon Lopez sank to the ground, shot through the head. Lopez was in fact shot through the head, and died almost immediately. On the other hand, the testimony first of Knight was that when the two men whom he was attempting to arrest began to get the better of him, he called out that, unless some one came to his assistance, he would have to shoot one of the men; that Wilson immediately came to his assistance, a shot was fired, and Lopez sank to the ground, and that he (Knight) was then able to place handcuffs upon Flores. At about the same time, Knight testified, he (Knight) fired another shot from his revolver, aiming the shot downward between the legs of one of the men with whom he was struggling. Wilson testified that he did not intentionally fire any shot; that when he saw the men getting the better of Knight and Knight called for help, he approached and struck Flores, who appeared to be the more obstreperous of the two, over the head with his revolver, and that his revolver was discharged accidentally. As to where the shot went he testified that he did not know.

We have here given a brief synopsis of the testimony covering the case as it was presented to the jury. There was some testimony in the record offered for the purpose of showing malice on the part of Wilson. This testimony consisted of statements of some of the witnesses that they had heard that Wilson had said at a prior time that there were some men whom he intended to "get," mentioning the name of Lopez as being one of them. There was testimony by another witness that after the shooting of Lopez, Wilson had stated that he had shot Lopez and made some further remark that he did not think any more of doing that than of hunting "rabbits." This testimony we must conclude was given no weight by the jury, for the verdict of manslaughter eliminated any finding of malice. No doubt that the jury considered, when it was made clear to them that Wilson upon the first encounter had every opportunity under provoking circumstances to use his weapon against Lopez, that there was small showing of any particular malice held in the mind of Wilson against any of the men concerned. From the undisputed evidence it appears very clear that Wilson as an officer was fully authorized to arrest Lopez and Flores and the other men engaged in the fight, when he first appeared upon the scene where the disturbance was in progress. These men were then engaged in a public disturbance of the peace. They added to their offense that of resisting an officer in the discharge of a public duty. Not only was Wilson authorized to arrest them, but if he had declined to interfere he would have left himself open to a charge of dereliction. The right to arrest the men did not cease when Wilson went away to get the assistance of Knight, any more than had the men fled, remained out of sight for a time, and then been overtaken by Wilson and whomsoever he might have secured to assist him in making the arrest. Knight's act in attempting to make the arrest was accompanied by all of the right which Wilson himself had.

[1-4] By reason of the particular verdict returned, we then view the case as being one which submitted to the jury the questions: (1) Whether under the circumstances of the case, the arrest being for a misdemeanor, there was no such exercise of force on behalf of the persons whose arrest was being attempted as to authorize the use of a deadly weapon to the extent of killing; (2) whether, conceding no intent to discharge the weapon and no necessity to so discharge it, the officer made use of it in such a careless and negligent manner as to make him responsible where a death resulted from his act. The first proposition, of course, involves the matter of self-defense. The law is well understood to be that an officer is not justified in shooting a man in order to compel submission to an arrest on a misdemeanor charge. While this is so, an officer properly engaged in attempting to make an arrest in such a case has the right to resist attack made upon him, and, being rightfully

there and not legally considered the aggressor, may in his own defense take life. Under the testimony heard by the jury in the case, it does not appear as a matter of law that the act was justifiable. The facts under the conflicting testimony were for the jury to resolve. It was for the jury to say, judging from all the circumstances, as to whether the shooting of Lopez amounted to a crime for which a conviction of Wilson should be had. Upon those questions of fact, and where the verdict is against the defendant, an appellate tribunal has no right to say that the determination of the jury should have been otherwise. Our examination can only extend to a consideration of the alleged errors which it is claimed were committed in the course of the trial by which defendant was prevented from having a full and fair hearing as guaranteed by the law.

[5] Appellant contends, first, that he is entitled to a new trial because the jury received evidence out of court and the members thereof were guilty of prejudicial misconduct. In support of this ground made on his motion for a new trial defendant made affidavits, and by consent of the prosecution testimony was introduced orally on both sides. One Brant, at the trial, gave important evidence for the people. One of the jurors, Gordon, was the employer of the son-in-law of Brant at Santa Barbara. On several occasions during the trial Gordon was seen in company with Brant, riding in Gordon's automobile to the courthouse. Another juror, Gates, accompanied them on at least one occasion. On another occasion Gott and Fitzgerald, witnesses for the state, were were with them. Appellant did not show that the persons mentioned had discussed at any of these times the case or any of the evidence. The attorney who represented the appellant at the trial testified that, when a map or plat used to illustrate the scene of the shooting, and which had been introduced in evidence, was handed to the jury, the jury were instructed by the court not to discuss the map, and that, notwithstanding this injunction, Jurors Gordon and Gates did point out the various places delineated on the drawing and discuss the same. It appears by the record that the jury, after having retired to the jury room to deliberate upon a verdict, and before agreeing thereto, was returned into court, where the request was made that the jury be allowed to take certain exhibits, including this map. By consent of people and defendant, the exhibits were given to the jury, which again retired to the jury room. It was while the jury was in the courtroom in the presence of the judge that it is claimed Gates and Gordon discussed the map. Gordon testified there was no such discussion had in the courtroom, and that while he had invited the three witnesses mentioned to ride with him to the courthouse, he had had no conversation with them about the case or the evidence; that he had merely picked them up on the street while all were on their way to attend the trial. Not only did appellant fail to furnish the trial judge with any proof that any improper communications had passed between the jury and witnesses, but positive testimony was furnished that no such communications passed. Conceding that it is always better that jurors should so conduct themselves as to avoid even the suspicion that they may have had discussion with witnesses about the case in which they are sitting, a suspicion alone may not be taken as sufficient to establish the fact claimed. Had the showing made by the defendant, involving the association of Gordon with the witnesses Brant, Fitzgerald, and Gates, stood alone and uncontradicted, the trial judge would not have been authorized to conclude that there had been no interchange of improper communication. Referring to the question as to whether Jurors Gates and Gordon, disregarding the injunction of the court, passed remarks between themselves upon the map exhibit while in the courtroom, it will be seen that the same condition of conflicting evidence was again presented to the trial judge. But we cannot perceive how, conceding that the jurors did do what is charged against them, prejudicial error would be created. The jury came into the courtroom and asked for the exhibits, including the map. Defendant consented that they have the map, and it was taken to the jury room for examination. The map had been regularly introduced in evidence, and its contents were presumably well known to the jury.

Another ground of the motion for a new trial was that the court had misdirected the jury in matters of law, and erred in its decision in the course of the trial. The discussion of the alleged errors in the giving of instructions should be prefaced by a summary of the charge as given by the court. The trial judge in this case gave very full instructions touching the right of peace officers to use deadly weapons in making arrests. He defined what constituted a disturbance of the peace and what constituted resisting an officer. While, as counsel for appellant suggest, the trial judge evidently thought that Knight and Wilson had not the right to attempt the arrest of Flores and Lopez at the time they did, this view of his was given expression only at the time of the sentencing of this appellant. The instructions did not so declare, either directly or by reasonable inference. And we deem it proper to say, at the end of an exhaustive perusal of the record, that we find nothing to indicate on the part of the trial judge the hostile prejudiced attitude ascribed to him in the briefs of counsel. We find but one instruction offered by defendant and marked in the record as "refused." That instruction defined the crime of manslaughter and its substance was contained in the charge read by the court to the jury.

[6] Instruction No. 4 is attacked on the ground that the assumption was presented to the jury that there was an absence of evidence showing that appellant did not intend the death of Lopez. This instruction was in the following words:

> "A person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable, and usual consequences of his own voluntary acts. Therefore, when one person assaults another violently with a dangerous weapon, likely to kill, and which does in fact destroy the life of the party assailed, the natural presumption is that such assailant intended death, or other great bodily harm; and, in the absence of evidence to the contrary, this presumption must prevail. The willful use of a deadly weapon without excuse or provocation generally indicates a felonious intent."

The instruction correctly stated the law, and is one so frequently given as to have become almost axiomatic. It must not be read alone, but must be read in connection with the entire charge, and particularly that portion of it which advised the jury that it must find beyond a reasonable doubt that defendant committed the acts charged. It was qualified, too, by instructions defining the right of peace officers to resort to the use of deadly weapons in making arrests or in defending themselves against attack while so engaged.

[7] Instruction No. 29, it is contended, was inappropriate and erroneous under the defense made to the charge. By this instruction the jury was advised that when a homicide is proved, the burden of proving circumstances of mitigation or that would justify or excuse it, devolves upon a defendant, unless the proof on the part of the prosecution tends to show that the crime amounts only to manslaughter, or that the defendant is justifiable or excusable. Of this instruction counsel say:

> (1) "It is a practical assumption by the court that the commission of the homicide by the defendant has been proved"; (2) "otherwise the instruction could have no application to the case, and, by the words of the instruction itself, it should not have been given, since the very last clause of the instruction itself provides that it is not to be applied when the proof on the part of the prosecution tends to show that the defendant was justifiable or excusable."

Read in connection with other instructions given, there was no assumption of guilt reasonably to be deduced from this instruction. In making the second point against it, counsel has tried the case for the jury and rendered his verdict. The charge made in the information was murder, and the jury had the right to determine under the evidence whether defendant was guilty at all, or, if guilty, whether his guilt was of the first or second degree, or was manslaughter.

[8] Instruction No. 31, which is criticized by appellant, appears to have been given at the request of the defendant, and therefore appellant cannot be here heard to question its soundness.

[9] It is argued that the testimony of two witnesses to the effect that about a month before the shooting of Lopez they had heard Wilson say that he was going to "get" Lopez, Flores, and another man named, and that he had a big gun that would stop them, referred to statements and incidents too remote to be competent. This testimony was not remote in point of time, and was introduced in support of the attempt on the part of the prosecution to show malice of Wilson. As has already been noted, the jury evidently did not pay great heed to this testimony for the offense of which they convicted the appellant involved no particular malicious intent. But there is another and complete answer to any objection that might have been here made to this evidence, and that is that it appears that no objection at all was urged at the trial against its introduction. The same condition of the record is shown and the same answers may be made to the contention for error in admitting the testimony of Ed Hames. Hames testified regarding some "trouble" that appellant had had a year before with Lopez over cattle, and to having heard appellant at that time say that he would kill Lopez. It would serve only to extend this opinion to an unwarrantable length to take up with more detail the objections urged against the admissibility of other testimony, or to alleged misconduct of the prosecuting officers. The testimony of which complaint is pointedly made was received without a word of objection from the defendant at the trial. Statements of the prosecuting attorneys, which it is claimed were calculated and intended to improperly influence the jury, were not objected to at the time, and no request was made to have the court instruct the jury to disregard them. The prosecuting officers were indeed zealous in their endeavors to convict the defendant. The introduction of an American flag found about the neck of Lopez, and the narrative of how it had been the subject of a quarrel on the day of the shooting when Lopez was said to have declared his willingness to fight for the flag, were no doubt "make-weights," for we can see no reason why the flag or the incident referred to tended to establish that Wilson shot Lopez either lawfully or unlawfully. Evidently the prosecutors, from the manner of their examination of witnesses, took the view, which they sought to impress upon the jury, that Wilson and Knight had not the right to attempt the arrest of Lopez and Flores. We must assume that the instructions of the court were heeded by the jury, and, as before noted, these instructions were comprehensive in defining the rights of officers as our law declares them to be.

[10] It is claimed that the court erred in sustaining objection to a question asked of

the witness Bailey, who was called for the defense. Flores, a fellow participant with Lopez in the disturbance occurring on the day Lopez met his death, while testifying for the people, was asked on cross-examination whether Lopez had a gun at the time he was shot. Flores replied in the negative, and was next asked whether he had not, after the shooting, told Bailey that there was a gun found at the scene of the affray, and that it was Lopez's. He replied that he had not so stated. Bailey was interrogated as to the alleged statements of Flores. The record shows the examination of Bailey on this subject to have been as follows:

> "Q. Did you in the presence of Frank Flores and his mother on the Indian Reservation, near Santa Ynez, on the night of the 30th of April, 1917, have any conversation with Frank Flores about a gun? A. I asked Mr. Flores if the gun that Robles picked up over there near where the fight occurred was his gun. He stated that it was not. I said, 'Do you know whose gun it is?'
>
> "Mr. Ford (the assistant prosecutor): Just a moment. We object to that as hearsay.
>
> "The Court: That objection is sustained."

The objection, we think, was properly sustained on the ground stated by the prosecuting officer.

[11] It is claimed that the evidence showed without conflict that it was a bullet from Knight's gun, and not from Wilson's gun, that killed Lopez. Knight was using a .32 caliber gun, while Wilson's gun was a heavy .45 caliber weapon. The testimony of the physician who examined the wound in Lopez's head was that the aperture at the place of exit was much larger than the aperture at the point of entrance. There was testimony that the bullets used in Knight's gun were soft, and that the bullets used in Wilson's gun were hard, "steel-jacketed." The defense produced a witness who qualified as an expert and who had had experience in army hospitals, and had also made certain tests before the trial with guns and bullets of the kinds used by Wilson and Knight. The testimony of this witness was to the effect that a .45 caliber bullet such as was used in Wilson's gun would produce approximately the same size of hole at the point of exit as at the point of entrance, and that the kind of bullet used in Knight's gun would produce a smaller hole at the point of entrance than at the point of exit, owing to the fact that the bullet was softer and would spread out as it encountered the bone on the opposite side of a head. This evidence was not conclusive of the fact that a bullet from Knight's gun, and not from Wilson's, had passed through the head of Lopex, and it was still left for the jury to determine under all of the facts laid before them as to whether the deadly wound had been inflicted by appellant.

The law as stated by appellant's counsel touching the right of peace officers to use deadly weapons in effecting arrests is no doubt correctly set forth in the briefs. In the opening paragraph of this opinion we have expressed a view which accords with that which is given exposition in the authorities cited by appellant. The difficulty with appellant's position is that he leaves out of account the consideration that there was some substantial evidence given which showed that Wilson acted deliberately and without such provocation as the law deems sufficient to justify an officer in killing a person whose arrest on a charge of misdemeanor he is attempting to accomplish. It may be that that testimony was untrue; it may be that the shooting was an accident which occurred while Wilson in good faith was using only such force as the circumstances reasonably justified in assisting his fellow officer in the lawful undertaking of arresting a disturber of the peace. But we are not permitted to substitute our judgment for that of the jury, or to say on the facts that the verdict should have been otherwise. It may be well said that any error of a fairly substantial nature might be sufficient to justify a reversal of the case. This because of the fact that a verdict in favor of the defendant could not have been assailed on the ground that it was not fully supported by competent evidence. In other words, any substantial error would make it appear more readily that there had been a miscarriage of justice. However, we have searched with great diligence through the record, and have examined with much care all of the assignments of error made by counsel in their brief. We find nothing which would justify the conclusion that defendant was not given a fair trial, or that he was denied any right which the law guarantees to a person accused of crime.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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36 Cal. App. 587

Ex parte DOWELL. (Cr. 601.)

(District Court of Appeal, Second District, California. March 26, 1918.)

1. Criminal Law ⟹241—Jurisdiction of Justice of the Peace—Commitment.

A justice of the peace of a township has no authority to commit an offender to the custody of the chief of the police of Los Angeles city, commitment by justice of the peace of townships running to the sheriff of the county and not to local police officers.

2. Criminal Law ⟹90(6)—Jurisdiction of Justice of the Peace—Police Courts.

Where a misdemeanor is admittedly committed within the city of Los Angeles, the police courts of that city have exclusive jurisdiction under St. 1913, p. 469, giving exclusive jurisdiction to police courts of the cities of the first and one-half class of all misdemeanors occurring within the city, so that a commitment issued by the justice of the peace of a township on an offense committed within the city of Los Angeles is void.

Application by Lorton L. Dowell for a writ of habeas corpus. Petitioner discharged.

C. B. Ladd, of Los Angeles, for petitioner. Erwin W. Widney, City Pros., and W. K. Crawford, Deputy City Pros., both of Los Angeles, for respondent.

JAMES, J. It appears by the return made to the writ that petitioner is held in custody by the chief of police of the city of Los Angeles under a writ of commitment issued by the justice of the peace of Malibu township. This commitment shows that the petitioner was convicted of the crime of battery and sentenced to serve a term of 90 days in the city prison. Petitioner bases his demand to be released from custody on two contentions, namely: (1) The justice of the peace of Malibu township has no authority to commit a person to the custody of the chief of police of Los Angeles city; (2) that the justices' court of Malibu township has no jurisdiction of a misdemeanor committed within the limits of the city of Los Angeles because exclusive jurisdiction to try all such offenses is conferred by legislative enactment upon the police courts of such city.

[1, 2] We are not pointed to the authority of any provision of statute or charter showing any right in a justice of the peace of a township to commit an offender to the custody of the chief of police of Los Angeles city. Commitments issued by justices of the peace of townships run to the sheriff of the county and not to local police officers. While we think that the petitioner is improperly held by respondent because of the lack of authority in the justice to commit to that particular officer's custody, it might be questionable whether the order to be made herein, granting the first contention of petitioner to be well founded, should be that he should be discharged absolutely from custody or remanded to the court having jurisdiction of the cause for further proceedings. However, involved in the second contention is the question as to whether the justice's court of Malibu township had any jurisdiction of the charge upon which petitioner was convicted. By general statute of the Legislature (Stats. 1913, p. 469), exclusive jurisdiction is given to police courts in cities of the first and one-half class (Los Angeles) of all misdemeanors occurring within the city. That the Legislature has the right to vest exclusive jurisdiction in police courts of misdemeanors arising within the limits of the cities is held in Union Ice Co. v. Rose, 11 Cal. App. 357, 104 Pac. 1006, and cases therein cited. Ex parte Dolan, 128 Cal. 460, 60 Pac. 1094, cited by respondent, does not deny to the Legislature the right we have ascribed to it, but holds only that the city charter may not do the same thing. As the misdemeanor with which petitioner was charged was admittedly committed within the present limits of the city of Los Angeles, we think that the police courts of that city only had jurisdiction of the offense. It follows, therefore, that the commitment issued by the justice of the peace of Malibu township is without force and is void.

It is ordered that petitioner be, and he hereby is, discharged from the custody of the chief of police of Los Angeles city.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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36 Cal. App. 584

NEW ENGLAND EQUITABLE INS. CO. v. CHICAGO BONDING & SURETY CO. et al. (Civ. 2175.)

(District Court of Appeal, First District, California. March 26, 1918.)

1. CONTRACTS 🔑306(4) — BUILDING CONTRACTS—ABANDONMENT BY SUBCONTRACTOR—NOTICE.

Where contract between principal contractor and subcontractor provided that if subcontractor should delay work, the contractor might proceed therewith if after three days' notice to prosecute the work subcontractor does not do so, no notice was required to authorize contractor to complete work, where subcontractor entirely abandoned contract.

2. PRINCIPAL AND SURETY 🔑82(2)—BUILDING CONTRACTS—NONPERFORMANCE—DAMAGES.

Where subcontractor abandons work and owner completing the job deducted the cost thereof from amount payable principal contractor under his contract, the principal contractor was damaged to the extent of such deduction, and can recover such damages from subcontractor's bondsmen.

3. COSTS 🔑260(1)—DAMAGES FOR FRIVOLOUS APPEAL.

Where an appeal is obviously for purpose of delay, the court may impose additional damages for taking a frivolous appeal.

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by the New England Equitable Insurance Company, a corporation, against the Chicago Bonding & Surety Company and another. Judgment for plaintiff, and defendant named appeals. Affirmed.

Watt, Miller, Thornton & Watt, of San Francisco, for appellant. Samuel Knight and F. Eldred Boland, both of San Francisco, for respondent.

ZOOK, Judge pro tem. Plaintiff's assignor, one Carr, entered into a contract with the regents of the University of California to build a classroom at Davis, and sublet the portion of his contract to defendant Macdonald, taking a bond from defendant surety company for Macdonald's faithful performance of his contract. Macdonald abandoned the work, whereupon Carr proceeded to do it himself, but later, becoming financially embarrassed, was unable to finish the work, and the regents took it over, completed the job, and deducted the cost thereof, amounting to $1,409, from the money payable to Carr under his contract. On this state of facts plaintiff had judgment against defendant surety company for $750, the full amount of its bond.

[1] But two points are presented on this appeal. The contract provided that in the event that Macdonald should delay the work Carr might prosecute it "if same is not done after three days' notice." It is claimed that Carr did not give this notice before proceeding with the work after Macdonald's abandonment, and that the surety was thereby relieved from liability. As was expressly held by this court in Bacigalupi v. Phœnix Bldg., etc., Co., 14 Cal. App. 632, 639, 112 Pac. 892, notice is unnecessary where the contractor entirely abandons the contract, which the trial court expressly found to be the fact in the case at bar.

[2] Appellant's only other contention is that because Carr did not himself complete the work, he was not injured by Macdonald's failure to do the work. The owner did complete the work, at an actual and reasonable cost of $925.50, and as this amount was deducted from the amount to be paid to Carr on his contract, it is obvious that he was damaged to the extent of this deduction.

[3] The appeal in this case, as in another case appealed by the same defendant at this term of court, is obviously without merit, and we are satisfied that the same was taken for the purpose of delay. We are of the opinion that the judgment should be affirmed, and that the plaintiff should recover from the defendant surety company the sum of $50 as damages for a frivolous appeal. It is therefore so ordered.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

36 Cal. App. 641

LOBBETT & DEAN v. OAKLAND, A. & E. RY. (Civ. 2293.)

(District Court of Appeal, First District, California. March 29, 1918.)

1. STREET RAILROADS ⟹103(3)—LAST CLEAR CHANCE RULE—KNOWLEDGE OF DANGER.

Where motorman slowed down, thinking plaintiff's truck was going to cross the tracks, but speeded up when he saw the truck slow down, assuming that it would stop before it reached the track, the last clear chance doctrine did not apply; actual knowledge of plaintiff's danger being necessary.

2. APPEAL AND ERROR ⟹1071(5)—HARMLESS ERROR—IMMATERIAL FINDINGS.

An erroneous finding that plaintiff could have avoided collision with a street car by turning his truck to the right or left was immaterial, where plaintiff was negligent in not having control of the truck when approaching the crossing.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Lobbett & Dean, a corporation, against the Oakland, Antioch & Eastern Railway, a corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

B. D. Marx Greene, of Berkeley, Greene & Sinclair and Barry J. Colding, of San Francisco, for appellant. Snook & Church, of Oakland, for respondent.

ZOOK, Judge pro tem. This is an action for damages arising out of a collision between plaintiff's motor truck and an interurban train of the defendant, as a result of which plaintiff's truck was badly damaged. The scene of the accident was at the crossing of Shafter avenue, over which defendant has a right of way, and Cavour street, in the city of Oakland. The crossing is at grade, and both streets are practically level at that point. There was practically no conflict of evidence upon the trial, and the facts, briefly stated, are as follows: Plaintiff's driver, who admitted that he was perfectly familiar with the crossing in question and had frequently seen trains of the defendant pass by at that point, was driving a five-ton truck, loaded with rock, westerly along Cavour street, at the rate of about eight miles per hour, about the maximum speed of the machine when loaded. When about 33 feet from the crossing, he threw out his clutch, and after he had gone about 8 feet further, he saw defendant's train approaching. He immediately put on both brakes in an endeavor to stop, but was carried by the momentum of the heavy load to a point 2 feet from the nearest rail of defendant, and within the interference line of the train. He made no endeavor to turn to the right or left along Shafter avenue, although the court expressly found that by so doing he could easily have avoided the collision. Defendant's motorman testified that he first saw the truck when about 300 feet from the crossing; he immediately put on the air brake in order to stop and let the truck cross ahead of him, and could have brought the train to a standstill before it reached the crossing; but, seeing the truck slowing down, he speeded up the train upon the assumption that the truck would stop in time. When he finally saw that the truck was in danger, he was unable to stop the train in time to avoid a collision. Upon this state of facts, the court found that both plaintiff's driver and defendant's motorman were negligent, and gave judgment in favor of defendant upon the ground of plaintiff's contributory negligence.

[1] Appellant's main contention is that, conceding its own negligence, the case is one for the application of the last clear chance rule, but we are of the opinion that this claim is not well founded. The motorman's negligence, if any, lay in his speeding up the train after having slowed down, and the

reason given by him for doing so was his erroneous assumption that the truck would stop before it reached the crossing. He having shown a reasonable degree of care in slowing down but a moment before, when he thought the truck was going to cross, it is only reasonable to accept his statement that he thought any danger was passed when he speeded up again. Under these circumstances, there being no other evidence as to the state of the motorman's mind, the plaintiff has wholly failed to establish one of the principal conditions precedent to the application of the rule in question, namely, actual knowledge on the part of defendant's servant of the perilous position of the truck. Appellant's claim that the last clear chance rule applies where the defendant is in possession of facts from which a reasonable man would infer that plaintiff was in peril, although he may not have actual knowledge of such peril, is based upon a single sentence contained in the opinion of the Supreme Court in Arnold v. San Francisco-Oakland Terminal Ry., 164 Pac. 798. That the language relied on was inadvertently used in that case is apparent from the recent case of Collins v. Marsh, 169 Pac. 389, where it is said that:

> "It is well settled in this state that the 'last clear chance' rule does not apply where the defendant was not, but should have been, aware of the plaintiff's danger."

[2, 3] Appellant's only other contention is that the finding of the court that plaintiff's driver could have turned to either side and avoided the collision is not supported by the evidence. Inasmuch as plaintiff's driver was clearly negligent in not having his truck under control when approaching the crossing, this finding is immaterial and not necessary to support the judgment.

The judgment is affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

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36 Cal. App. 646

MACHADO v. MACHADO. (Civ. 2375.)

(District Court of Appeal, First District, California. March 30, 1918.)

1. Homestead 🔑57(1) — Establishment — Burden of Proof.

Wife in divorce suit claiming homestead has burden of showing declaration and recording of her homestead, and that she then resided on the property.

2. Evidence 🔑589—Weight—Conflicting Testimony.

Where party's testimony was conflicting and uncertain, the court was justified in resolving it against her.

3. Divorce 🔑287—Apportioning Property —Scope of Inquiry.

Where court apportioned property in divorce suit, and plaintiff on retrial awarded by Appellate Court introduced testimony as to value and character of properties of the parties, the court could, without going beyond the issues, make a new apportionment, and set aside previous orders.

4. New Trial 🔑½, New, vol. 9 Key-No. Series—Proceedings—Effect on Judgment.

Proceedings on motion for new trial are independent of the judgment.

5. Divorce 🔑284 — Appeal — New Trial —Effect on Judgment.

In divorce suit, plaintiff's appeal from a judgment apportioning the property did not deprive the court of jurisdiction to modify the judgment on motion for new trial, which was an independent proceeding.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Suit for divorce by Maria Machado against Frank R. Machado. From the judgment rendered, and order denying new trial on condition, plaintiff appeals. Affirmed.

See, also, 26 Cal. App. 16, 145 Pac. 738; 31 Cal. App. 378, 160 Pac. 684.

Beggs & McComish, of San Jose, and Joseph Rafael, of San Francisco, for appellant. C. L. Witten, of San Jose, R. V. Burns, of Mountain View, and F. H. Bloomingdale, of San Jose, for respondent.

BEASLY, Judge pro tem. This action was begun in 1913. Plaintiff had judgment for divorce on the ground of cruelty, and included in the judgment also was a settlement of property rights, to which she objected, and she appealed from the latter part of the judgment and was granted a new trial of the issues regarding property. The superior court retried those issues, and again adjusted the property rights of the parties. In this latter judgment it determined that what is known as the Guth ranch was separate property of the defendant, and what is known as the Alviso ranch was partly separate and partly community property, and awarded to the defendant as his separate property 40/63 of the Alviso ranch, and, determining that 23/63 thereof was community property, gave the defendant an even half of that. The court also added a provision to the judgment that the defendant should pay $50 a month to the plaintiff for the period of six months, and set aside all previous orders regarding alimony and support for plaintiff. It also decreed to be void a homestead which the plaintiff claimed on the Alviso ranch. The plaintiff appealed from this judgment on the 15th day of November, 1915. Thereafter, upon the hearing of a motion for a new trial, and on the 10th day of December, 1915, the court made an order modifying this judgment so as to award to the plaintiff 149/338 of the Alviso ranch instead of the 23/126 thereof, that is to say, one-half of 24/63 thereof, awarded her in the judgment. The condition of the refusal to grant a new trial to the plaintiff on the property issues was that the defendant should accept this latter division of the Alviso ranch, which he did. The plaintiff again appealed from this latter judgment as to property rights, and from this order.

[1, 2] Her first contention is that the order holding her homestead void and refusing to set it apart is unsupported by the evidence. The burden of showing not only the declaration of the homestead and the recording of the declaration, but also of showing that she was a resident upon the property at the time the declaration was made and recorded, rested upon the plaintiff. Apprate v. Faure, 121 Cal. 466, 53 Pac. 917. Her testimony is the only evidence upon this point, and it is conflicting and very uncertain, indeed difficult to understand; and therefore the trial court was justified in finding that that portion of her testimony which showed that she was not residing upon the property at the time of the declaration, but had abandoned it, was true. This being so, that finding is supported by the evidence.

[3] The plaintiff's next contention is that that part of the judgment at the second trial, providing that all orders theretofore made for the payment of alimony and for the support of the plaintiff should be vacated, was outside the issues of the case, in that, as it is claimed, no issue had been raised on this matter and no evidence introduced by either party relevant thereto. But evidence was introduced on the question of the value and character of the property of the parties, the very purpose of this evidence being to secure a just apportionment thereof between the parties. This justified the court in setting aside its former orders and in making a new judgment upon this subject. Indeed it is impossible for us to see what other purpose the appeal of the plaintiff upon the subject of property rights subserved except this.

[4, 5] The appellant's third contention is that her appeal from the judgment of November 9, 1915, deprived the trial court of jurisdiction to modify that judgment on motion for a new trial. But it has been the consistent practice of the courts of this state to insist upon the acceptance of modifications in judgments as a condition of refusing a new trial. The proceedings upon motion for a new trial are independent of the judgment. Hayne on New Trial and Appeal, § 2. None of the cases cited by the appellants seems to be a case where the court made it a condition of refusing a new trial that a modification of the judgment be assented to. Pashgian v. Stephenson, 10 Cal. App. 36, 100 Pac. 1075, was a case where a judgment was modified without a motion for a new trial, or at least no proceedings for a new trial appear in the record. In Shay v. Chicago Clock Co., 111 Cal. 549, 44 Pac. 237, a diminution of the record was suggested at the hearing of the appeal to bring up a document purporting to be a judgment nunc pro tunc. This nunc pro tunc judgment does not appear to have been made upon motion for a new trial. The same state of the record is found in Reynolds v. Reynolds, 67 Cal. 176, 7 Pac. 480. The plaintiff's motion for a new trial was pending. It was an independent proceeding of which the trial court had jurisdiction. Hayne on New Trial and Appeal, § 2. The appeal did not deprive the trial court of its authority. The court made an order on the hearing of this motion for a new trial that if the defendant should consent to a modification of the judgment the motion would be denied; otherwise it would be granted. The consent was given and the motion denied. The fact that this order was made after an appeal had been taken did not deprive the court of authority to make it, as it was a proper order in the proceeding for a new trial. Besides, it does not seem proper to permit the plaintiff to complain of this modification because it was altogether in her favor.

The fourth contention of the appellant is that the court erred in finding that all the personal property and the Guth ranch were the separate property of the defendant, and that the defendant had a $4,000 separate estate in the Alviso ranch.

It would serve no useful purpose to review the figures by which the court undertook to follow the issues and profits of the large business which the defendant owned as his separate property at the time of his marriage to the plaintiff, and of the changes in personal property and the investment and reinvestment of money which took place between his marriage and the beginning of this action for divorce. It is sufficient to say that the evidence supports the court's finding upon these points.

The fifth contention of the plaintiff is that she should have been given more than one-half of the community property. Leaving out of account the $50 a month allowed the plaintiff for six months it may be said that the trial court was exercising its discretion as to the division of this community property, and we cannot say that it abused its discretion in making the division as it did. The circumstances of the case presented many difficulties in the division and apportionment of the property of the parties; and the case itself is an illustration of the rule that the trial court must be given some latitude to use its own judgment in such matters.

The judgment is affirmed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

36 Cal. App. 579

PEOPLE v. FRAYSIER. (Cr. 675.)

(District Court of Appeal, First District, California. March 25, 1918.)

1. WITNESSES 🔑370(1)—IMPEACHMENT.
Conceding arresting officer was hostile to accused, such matters went to his credibility, but did not conclusively show that his testimony or that of witnesses secured by him was false.

2. RAPE 🔑51(5)—EVIDENCE—WEIGHT.
Where prosecutrix testified that she told arresting officer of the rape in order to avoid being punished, but did not say that her story was false, such matter went to her credibility, but if believed by the jury her testimony was sufficient upon which to rest conviction.

3. INDICTMENT AND INFORMATION 🔑176—ISSUES AND PROOF—TIME OF OFFENSE.
Failure to prove the exact day and hour of the crime is not fatal, where accused is not prejudiced thereby.

4. RAPE 🔑59(12)—INSTRUCTIONS—FAILURE TO MAKE COMPLAINT.
It is not error to refuse instructions that if prosecutrix made no complaint of the alleged crime the jury should view her failure to do so as a suspicious circumstance indicating that her story was false.

5. CRIMINAL LAW 🔑785(3)—INSTRUCTIONS—CAUTION.
The jury in prosecution for rape was sufficiently cautioned by instruction that a charge of rape is easy to make and difficult to disprove; that testimony of a child of tender years such as prosecutrix ought to be viewed with care and caution; and that evidence in such case must be weighed with utmost care and without bias or prejudice.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Louis Fraysier was convicted of statutory rape, and he appeals from the judgment and order denying motion for new trial. Affirmed.

A. C. Keane, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

KERRIGAN, J. The defendant was convicted of the crime of statutory rape. This appeal is from that judgment and from an order denying his motion for a new trial.

The defendant was a gardener making his living by growing and selling vegetables in San Francisco. His garden lay in the center of a city block shut in by fences and dwellings. Into that somewhat secluded place customers often sent their children to buy vegetables. Without elaborating the revolting details it will suffice to say that according to the testimony of the prosecutrix, a girl 12 years of age, she went to the defendant's garden one day in September, 1916, and was there ravished by the defendant. As is unfortunately often the case in prosecutions of this character, the testimony relied upon by the state is not as satisfactory as might be desired. This, perhaps, is inevitable. The prosecution was unable to fix the time of the day, whether in the forenoon or afternoon, nor the day of the week nor the date on which the assault occurred nearer than that it was some time three or four weeks before Labor Day. The prosecutrix testified that immediately after the assault she went home, but said nothing to her mother about the unusual occurrence, and straightway went out to play with some chums and forgot the matter; indeed she thought no more about it until the arresting officer called on her one day at school, when, to avoid being "put away" until she was 21 years of age, during which time she would not see her father and mother, she told the officer the story subsequently related by her in court.

With respect to the arresting officer it appears that on the day before, or not more than three days before, the arrest of the defendant, he had visited the defendant's garden, and finding there a little girl, the defendant, and a woman, drove the defendant and the woman from the premises, took the girl into a shack near by, and questioned her concerning her relations with the defendant. Failing to find them incriminating he took her to her home and told her to stay away from the defendant. The same night the defendant, the woman above mentioned, and the father of the little girl called at police headquarters and complained of the treatment to which the girl had been subjected. Not more than three days thereafter the same officer questioned the prosecutrix and caused the present charge to be brought against the defendant.

[1, 2] Conceding that the officer may have been hostile to the defendant, it of course does not follow that his testimony was false, or that he attempted to induce the prosecutrix to testify falsely. As to her testimony, while she stated that she told the officer the story about the assault in order to avoid being punished, still she did not testify that she had related a false story against the defendant, nor can we conclude that she did so. The criticism of these witnesses is as to a matter going to the weight and credibility to be given their testimony, which are considerations for the jury. We cannot say from a review of the entire record that the evidence of the prosecution was inherently improbable. The most that can be said is that its truth was open to suspicion. If believed by the jury it was sufficient to support their verdict and the judgment.

[3] Passing to the next point, there are, no doubt, cases where a defendant in making his defense would be seriously embarrassed by the failure of the prosecution to definitely fix the date of the alleged crime; but it does not appear that this defendant was prejudiced by such failure in this case. The prosecutrix gave the date of the assault as nearly as she could; and the case falls

within the general rule that the proof need not show that the offense was committed on the day named in the charging paper. People v. Squires, 99 Cal. 327, 33 Pac. 1092; People v. Allen, 144 Cal. 298, 77 Pac. 948.

[4] The court committed no error in refusing to give an instruction to the effect that, if the jury found from the evidence that the prosecutrix made no complaint of the alleged act of the defendant, they should view such failure as a suspicious circumstance indicating that her story was a fabrication. People v. Jacobs, 16 Cal. App. 478, 117 Pac. 615.

[5] We think, too, that the jury were sufficiently cautioned by the court in the instruction advising them in effect that a charge of rape is one easy to make and difficult to disprove; that the testimony of a child of tender years "such as the prosecuting witness here" ought to be viewed with great care and caution; and that the evidence in a case of this kind was to be weighed with the utmost care, without bias or prejudice. People v. Currie, 16 Cal. App. 731, 117 Pac. 941; People v. Liggett, 18 Cal. App. 367, 123 Pac. 225. The jury were fully and fairly instructed in every phase of the law applicable to the facts of the case.

Respecting a remark made by the trial judge of which complaint is made by the appellant, it was directed to counsel during a discussion as to the admission of certain evidence. It was quite harmless. It did not amount to misconduct. Counsel must have taken this view of it at the time it was made, for he did not assign it as misconduct or request the appropriate admonition.

The judgment and order are affirmed.

We concur: BEASLY, Judge pro tem.; ZOOK, Judge pro tem.

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36 Cal. App. 573

VERDIER v. STOLL. (Civ. 2496.)

(District Court of Appeal, Second District, California. March 23, 1918.)

APPEAL AND ERROR 🔑766 — BRIEFS—STATEMENT OF CASE—SUFFICIENCY.

Though in default of compliance with Code Civ. Proc. § 953c, requiring printing of parts of the record for appeal, judgment appealed from must be affirmed. The mere fact that appellant's brief on appeal insufficiently printed such portions of the record as he desired to call to the attention of the court, so as not fully to comply with the statute did not require dismissal.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by Marie Verdier against V. J. Stoll. Judgment for plaintiff, defendant appeals, and plaintiff moves to dismiss the appeal. Motion denied.

R. J. Hudson, of Bakersfield, for appellant. Alfred Siemon, of Bakersfield, for respondent.

WORKS, Judge pro tem. The respondent moves to dismiss the appeal on the ground that the appellant has not complied with that portion of section 953c of the Code of Civil Procedure to the effect that, in filing briefs on an appeal, the parties must "print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court."

The reproductions of parts of the record, made in appellant's brief, are very meager; perhaps we might even assert, from the inspection we have made of the brief for the purposes of the present motion, that they are insufficient to present the merits of the case for our consideration, when we come to dispose of the appeal. That, however, is far from saying that the appeal should be dismissed. The printing of parts of the record in the briefs, under section 953c, involves a considerable expense, and it may be that, in individual cases, counsel have entered and will enter into understandings designed to obviate the necessity of printing. This might be done, for instance, through a statement of a case in one brief, with an express assent to its correctness in the opposing brief. For us to dismiss appeals for an apparent insufficiency of an appellant's brief in the particular now insisted upon, in any case, would lay down a rule depriving litigants of the right to fully and satisfactorily state an agreed case in their briefs without the printing required by the section now under consideration. We must take this occasion, however, to reiterate the established rule, so many times stated by the Supreme Court and by this court, that, in default of a compliance with the terms of section 953c by appellants, the judgments from which they appeal must be affirmed, unless, indeed, a compliance with the section is obviated by such a condition of the briefs as is above mentioned. The dangers of a departure from the requirements of section 953c are illustrated by a quotation from our opinion in Sou. Cal. Iron & Steel Co. v. Maier, 172 Pac. 615, No. 2115, decided March 15, 1918:

> "There is only a typewritten transcript of the record. The quotations from pleadings and from evidence, as printed in the briefs, are less complete than they should have been. But by piecing together a scrap found in one brief with other scraps found here and there in other briefs, together with positive admissions of fact by counsel, we find enough, although barely enough, material for a decision on the merits. It is a dangerous practice for attorneys, in preparing their briefs, to neglect the provisions of section 953c, Code of Civil Procedure."

The motion is denied.

We concur: CONREY, P. J.; JAMES, J.

36 Cal. App. 547

BAY SHORE LAUNDRY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 1822.)

(District Court of Appeal, Third District, California. March 20, 1918.)

1. MASTER AND SERVANT 🔑380—WORKMEN'S COMPENSATION ACT — "WILLFUL MISCONDUCT."

An experienced laundryman, who while operating a wringing machine removed, for a definite purpose and contrary to Workmen's Compensation, Insurance, and Safety Act (St. 1913, p. 279) §§ 55, 62, 67, a guard which he knew was provided for his safety, was chargeable with "willful misconduct" within section 12, subd. 3, and could not recover for resulting injuries; the removal of the guard being intentional, deliberate, and willful, because done for a definite purpose, and also a misdemeanor under sections 55 and 67.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful Misconduct.]

2. MASTER AND SERVANT 🔑348—WORKMEN'S COMPENSATION ACT—PRESUMPTION—"WILLFUL."

It must be presumed that in Workmen's Compensation, Insurance, and Safety Act, § 12, subd. 3, as to willful misconduct barring recovery, the Legislature had in view the definition of "willful" as found in Pen. Code, § 7, being a purpose to do an act, without necessarily intending to violate a law or injure another.

Proceedings under Workmen's Compensation Act by Paul Verdier against the Bay Shore Laundry Company. From an award of the Industrial Accident Commission for applicant, the company makes application for writ of review. Order awarding compensation annulled.

C. F. Laumeister, of San Francisco, for petitioner. Chris. M. Bradley, of San Francisco, for respondents.

BURNETT, J. The commission awarded one Paul Verdier compensation in the sum of $675 for injuries received while in the employment of petitioner, and the question involved herein is whether said commission exceeded its jurisdiction in making said award. In fact, the only question in dispute before us is whether the applicant is chargeable with "willful misconduct" within the contemplation of the Workmen's Compensation, Insurance, and Safety Act (Stat. 1913, p. 279).

[1] Subdivision 3 of section 12 of said act excludes from its beneficial provisions every case where the injury is proximately caused "by willful misconduct of the injured employé." As to this, the law was changed in 1917, but the amendment did not take effect until January 1, 1918, and it is not disputed that the said statute of 1913 is applicable to the case at bar.

There is herein no controversy as to the facts, but the whole argument revolves around the conclusion of the commission that the applicant was not guilty of willful misconduct. The view of the case taken by the commission may be had from the following findings:

"That said injury arose out of and in the course of said employment, was proximately caused thereby, and occurred while the employé was performing service growing out of and incidental to the same as follows: His minor hand and arm were accidentally caught in a wringing machine which the employé was operating while it was in motion and while the safety guard thereto attached was not in a position to prevent such an accident. * * * That the operation of said wringing machine in said manner was not in deliberate violation of an enforced rule of instruction made by the employer for the protection of the employé, and, although careless and negligent, it was not intrinsically reckless or foolhardy. That the said injury was not proximately caused by willful misconduct."

It is to be observed that the commission does not find what caused the safety guard to be displaced. The evidence herein shows that the applicant himself displaced it while the machine was in motion. There is no dispute, also, that he did this intentionally. It was not the result of thoughtlessness, inadvertence, accident, forgetfulness, or stress of emergency. Nothing of that kind is claimed. Indeed, the only attempted excuse is that he thought he might gain some time and that he had seen other employés do likewise. To remove the covering it was necessary to manipulate a lever, and this was done by Verdier thoughtfully and, we may say, deliberately. Neither is there any finding that the removal of the guard contributed to the accident and was therefore a proximate cause of the injury. But as to the evidence of that there can be no possible dispute. If the guard had been in place, the applicant would not have been hurt. There were, indeed, two conditions or circumstances inseparably connected with the injury. One was that Verdier's foot slipped from the brake, thereby causing him to lose his balance and fall toward the revolving machine, and the other was the fact that said machine was exposed to contact with his hand in consequence of the removal of said guard. If either of these conditions had not been present and co-operating, the injury to the hand and arm would have been avoided. It is plain, therefore, that the removal of the covering had a proximate causal connection with the injury and, indeed, this is not disputed.

It was found that the act of the applicant was not "in deliberate violation of an enforced rule or instruction made by the employer for the protection of the employé." As a fact this is partly true, but it carries an erroneous implication. The act of removing the guard was "deliberate," but there was no "enforced rule or instruction of the employer." However, it is plain that no such rule or instruction was required. This safety device was furnished by the employer for the protection of the employé. The very object was to prevent such accidents, and its purpose was well known to the applicant, who was an experienced workman, having been engaged in that line for 20 years, and being entirely familiar with the use of such device. There is no contention that he did not fully comprehend the significance of its use and the danger attending its operation without the covering. The applicant could not have been better informed if specific instruction had been given. He must have known that this protection was furnished for his safety, and how important it was that he should not remove it while the machine was in operation. The commission does, indeed, find that he was "careless and negligent," but not guilty of willful misconduct. In this connection, it is admitted by respondents that he is properly chargeable with misconduct, but it is claimed that it lacks the element of willfulness contemplated by the statute. The contention is that there must be a "mens rea," a condition of mind bordering upon criminality, to justify the commission or the court in repudiating his claims for compensation. In support of the position this quotation is made from In re Burns, 218 Mass. 8, 105 N. E. 601:

> "Willful misconduct is much more than mere negligence or even gross culpable negligence, * * * conduct of a quasi criminal nature."

Attention is called, also, to what was said in Diestelhorst v. Industrial Accident Commission, 32 Cal. App. 771, 164 Pac. 44, as follows:

> "May not a person, although guilty of an infraction of an order given for his protection, show that at the time he was unmindful of the order and that his act was the result of inattention and thoughtlessness and without any real purpose to be contumacious."

The doctrine of the foregoing decisions may be fully indorsed and accepted, but it is difficult to see what comfort is thereby afforded to the applicant herein. The Compensation Act of 1913, § 55, provides:

> "No employé shall remove, displace, * * * destroy or carry off any safety device or safeguard furnished and provided for use in any employment or place of employment, or interfere in any way with the use thereof by any other person, or interfere with the use of any method or process adopted for the protection of any employé in such employment, or place of employment, or fail or neglect to do every other thing reasonably necessary to protect the life and safety of such employés."

Section 67 of said act provides:

> "Every employer, employé or other person who, either individually or acting as an officer, agent or employé of a corporation or other person, violates any safety provision contained in sections fifty-two, fifty-three, fifty-four or fifty-five of this act, or any part of any such provision, or who shall fail or refuse to comply with any such provision, or any part thereof, or who, directly or indirectly, knowingly induces another so to do is guilty of a misdemeanor."

It is to be observed, furthermore, that respondents, said commissioners, by virtue of the authority conferred upon the commission by said compensation act, made and issued certain laundry safety orders, effective August 1, 1916, in which the following is provided:

> "(a) All extractors must be equipped with metal guards which must entirely cover the openings to the outer shell. The guard must always be kept in position when the extractor is in motion."

Section 62 of said act provides that every employé shall obey and comply with the requirements of the safety orders of the commission. Hence it cannot be disputed that Verdier was guilty of a crime when he removed the guard, and that he knew that his act was likely to result in injury to himself. The Massachusetts case, therefore, does not save him. We have already seen that there is no room for the application of the Diestelhorst decision.

[2] Moreover, there can be no doubt that the misconduct of Verdier was willful within the meaning of the statute. The definition of the term is found in the Code, and it must be presumed that in said Compensation Act the Legislature had in view that definition. Section 7 of the Penal Code provides:

> "The word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage."

That Verdier had a willingness and purpose to commit the act of removing the guard is beyond question. From the act itself such presumption would follow, but he makes it certain by his testimony as to why he performed the act. It is not required to show that the injured person committed the wrongful act maliciously to prevent his recovery. If the Legislature had so intended it would, of course, have so provided. It was deemed proper to exclude one who was guilty of intentional or willful wrongdoing, and if we are to regard the facts in this case and the plain ordinary significance of the terms employed by the Legislature, it must be held that the applicant herein is in the excluded class.

In brief, the situation is this: Verdier's act constituted a misdemeanor and was therefore of a criminal nature. According to his testimony he performed said act for a definite purpose. It was therefore intentional, deliberate, and willful. Furthermore, he was an experienced laundryman, and understood the construction and operation of the mechanism. He realized that it was a high-speed machine and dangerous; he knew that the guard was provided for his protection and to prevent accidents, and that if he removed it the danger of accident was greatly increased. There was no good reason for his act. In fact, the only excuse offered by him was that he thought he might save time and he had seen other employés do the same thing. No such explanation could be accepted as satisfactory by any court. If he is to be exonerated for a reason like that, the provision of the statute becomes a meaningless and empty phrase. Besides, we may add, that it is quite apparent that he would not have saved any appreciable time by removing the guard while the machine was in motion, as the performance of that act required only a fraction of a second.

Indeed, the case is covered and controlled by the decision of the Supreme Court in Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35, and Fidelity & Deposit Co. v. Industrial Accident Com., 171 Cal. 728, 154 Pac. 834, L. R. A. 1916D, 903. In the former it is held that:

> "A workman who violates a reasonable rule made for his own protection from serious bodily injury and death is guilty of misconduct and that where the workman deliberately violated the rule with knowledge of its violation he is guilty of willful misconduct."

Therein the willful misconduct consisted in handling "hot" electrical wires without the use of rubber gloves, contrary to an express rule of the employer. In the other case the Supreme Court held that the employé was guilty of willful misconduct where he met his death, while engaged in his employer's business, from the overturning of an automobile driven by him in violation of the state motor vehicle act fixing a speed limit of 30 miles per hour.

As suggested by petitioner, these two cases represent two different classes of offenders; the first, where the provision breached by the employé is contained in a private rule or regulation of the employer. In this class the employé must have actual knowledge of the existence of the rule, and must be bound to obey it to make his willful breach thereof willful misconduct. The second class represented by the Fidelity Case, supra, is where the provision breached is embodied in a public statute. In this class the employé is charged with knowledge of the provision, and the breach thereof is willful misconduct as a matter of law. The case herein manifestly belongs to this latter class. It may be added that there was not even an attempt made to dispute the presumption that the applicant had knowledge of the existence of the statute and regulations in reference to safety devices.

We do not feel called upon to consider specifically all the cases cited. The essential principles herein involved are well settled, and we feel constrained to hold that the order awarding compensation was beyond the jurisdiction of the commission, and it is therefore annulled.

We concur: CHIPMAN, P. J.; HART, J.

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36 Cal. App. 567

BRANDES v. SUPERIOR COURT IN AND FOR SANTA BARBARA COUNTY.

(Civ. 2513.)

(District Court of Appeal, Second District, California. March 22, 1918.)

CONTEMPT 🔑23—SERVICE OF ORDER.

Before a party can be brought into contempt for not complying with an order of court, such order must be served upon him.

Original application by Sarah A. Brandes for a writ of review to review an order of the Superior Court of the State of California in and for the County of Santa Barbara, adjudging her guilty of contempt. Order annulled.

B. F. Thomas, of Santa Barbara, for petitioner. Thompson & Robertson, of Santa Barbara, and Robert M. Clarke, of Los Angeles, for respondent.

WORKS, Judge pro tem. The petitioner was granted a divorce from her husband, H. L. Brandes. The interlocutory decree was, in part, to the effect that Brandes should make certain conveyances of real and personal property to petitioner, and that "at the time of the execution and delivery" of such conveyances the petitioner should deliver to a certain bank a certain sheriff's certificate of sale held by her. Upon the allegation that he had himself complied with the decree, Brandes initiated a proceeding for contempt of court against petitioner on the ground that she had not delivered up the certificate of sale. In the affidavit which instituted the proceeding, Brandes averred that a copy of the decree had been served on petitioner, and that demand had been made upon her to comply with its terms. In an answering affidavit, petitioner alleged that the decree was never served upon her, and that no demand had ever been made that she deliver up the certificate of sale. Upon the issues thus framed the trial court found with the petitioner, but, nevertheless, it made its order adjudging her guilty of contempt. It is this order which is sought to be annulled in the present proceeding.

The action of the trial court was erroneous. "Before a party can be brought into contempt for not complying with an order of court, such order must be served upon him." Hennessy v. Nicol, 105 Cal. 138, 142, 38 Pac. 649, 650.

The order is annulled.

We concur: CONREY, P. J.; JAMES, J.

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36 Cal. App. 650

In re BIAGGI. (Civ. 2333.)

(District Court of Appeal, First District, California. April 1, 1918. Rehearing Denied by Supreme Court May 31, 1918.)

1. ATTORNEY AND CLIENT 🔑54, 57 — DISBARMENT—FINDINGS.

Findings are not required in proceedings for disbarment of an attorney at law; but they are not prohibited, and, when present, are properly a part of the record which the appellate court may review.

2. ATTORNEY AND CLIENT 🔑56—ORDER OF SUSPENSION—PREJUDGMENT.

Part of order suspending attorney from practice, requiring disbarment at the end of two years at another hearing, probably before another judge, and on other evidence of additional conduct involving moral turpitude, was improper, as an attempt to prejudge and predetermine matters not before the court when the order was made.

3. ATTORNEY AND CLIENT 🔑56 — ORDER OF SUSPENSION—INVALID PART—DISREGARD AS SURPLUSAGE.

Where the latter part of the trial court's order suspending an attorney at law from practice for five years, with the privilege to apply for reinstatement at the end of two years, which was invalid as an attempt to prejudge him on evidence of additional conduct involving moral turpitude, could be separated from the first part of the order, which was certain, and met all the requirements of a final judgment, it might be disregarded as surplusage.

4. ATTORNEY AND CLIENT 🔑39 — ADVERTISING TO PROCURE DIVORCE—STATUTE.

The conduct of an attorney at law in publishing in newspapers of general circulation an advertisement reading, with his name: "Attorneys. * * * Divorce, Probate, and Criminal Law My Specialties. Notary Public. Consultation Free"—was contrary to and in violation of Pen. Code, § 159a, making a misdemeanor advertising to procure divorce, or to act as attorney in any suit for alimony or divorce, etc.

Appeal from Superior Court, Santa Clara County; Curtis D. Wilbur, Judge.

In the matter of the proceedings for the disbarment of William R. Biaggi. From an order of suspension from practice, respondent appeals. Judgment modified, and, as modified, affirmed.

J. P. Fitzgerald, of San Jose, for appellant. C. L. Witten and Clarence C. Coolidge, both of San Jose, and L. D. Bohnett, of Campbell, for respondent.

PER CURIAM. This is an appeal from an order made by the trial court, after a trial and hearing, whereby it was adjudged and decreed:

> "That William R. Biaggi, the respondent, be suspended from the practice of law for the period of five years. That at the end of two years respondent may apply to be reinstated, and that, if it be proved to the satisfaction of the court at that time that the respondent has fully and fairly complied with the order of suspension, and has not, directly or indirectly, or by any subterfuge whatsoever, practiced or attempted to practice law, either by securing assignments of causes of action to himself, or in any other manner, then, in that event, that the respondent be restored to the roll of attorneys. On the other hand, at the end of two years, if it shall appear to the court that he has directly violated the order of court, or been guilty of any additional conduct involving moral turpitude, that, at that time, an order of permanent disbarment be entered by the court. In the event that the court is not satisfied by the showing made by the respondent at the end of two years, and does not permanently disbar the respondent, in accordance herewith, then, in that event, the order of suspension shall continue in force for the entire period of five years."

[1] It is contended that, in proceedings for suspension or disbarment, the judgment or order should specify the particular charge or accusation upon which the attorney was disbarred or suspended. The rule contended for is applied chiefly to contempt proceedings, where summary action has been taken without the formalities of accusation, answer, etc., and where the record consists of the order of suspension alone. In re Shortridge, 5 Cal. App. 379, 90 Pac. 478; Ex parte Henshaw, 73 Cal. 497, 15 Pac. 10; State v. Watkins, 3 Mo. 480; Crites v. State, 74 Neb. 687, 105 N. W. 469. It has been held that, where the accusation in a disbarment proceeding charges certain facts, which show conspiracy, and prays that accused be found guilty and be disbarred, the final order of the court that the application of plaintiff shall be granted is a sufficient finding of the guilt of the accused; the court saying that:

> "There being but one charge, it is clear from the record that defendant was found guilty of that charge." State v. Howard, 112 Iowa, 256, 83 N. W. 975.

The record before this court includes the accusation, answer, findings, and judgment. The findings state specifically the particular charges upon which the judgment in question is predicated, and, while findings are not required in proceedings for disbarment (Matter of Danford, 157 Cal. 425, 108 Pac. 322), they are not prohibited, and, when present, are properly a part of the record which this court may review (In re Wharton, 114 Cal. 367, 46 Pac. 172, 55 Am. St. Rep. 72).

[2, 3] It is urged that the judgment is conditional, and therefore void. The Code defines a judgment to be:

> "The final determination of the rights of the parties in an action or proceeding." Code Civ. Proc. § 577.
>
> "If a judgment though upon the merits or determining some substantial rights, leaves necessary further judicial action before the rights of the parties are settled it is not final." Freeman on Judgments (4th Ed.) vol. 1, § 16.

That part of the court's order which requires the respondent's disbarment at the end of two years, at another hearing, before another judge, most probably, and upon other evidence of additional conduct involving moral turpitude, must be held to be an attempt to prejudge and predetermine matters not before the court at the time the present order was made. Consolidated Mining Co. v. Huff, 62 Kan. 405, 63 Pac. 442. There is no difficulty, however, in separating the latter part of the court's order from the first part, which decrees that William Biaggi be suspended from the practice of law for the period of five years, with the privilege of applying for reinstatement at the end of two years. That decree is certain, and meets all the requirements of a final judgment, and hence the latter part of the order, which is invalid, may be disregarded as surplusage. Philbrook v. Newman (C. C.) 85 Fed. 139.

[4] The trial court found on ample evidence that Biaggi appeared before the superior court of Santa Clara county as attorney in the matter of certain adoption proceedings, and falsely stated to that court that the father of the minor child in question had never taken any interest whatever in said child, and that Biaggi did, at that time, "intention-

ally, willfully, knowingly, and fraudulently conceal" from the court the fact that the father was then endeavoring, in an action before another department of the same court, to obtain the custody of the child; and, further, that from the month of October, 1911, up to February 22, 1916, Biaggi caused to be published in certain newspapers of general circulation an advertisement reading:

> "ATTORNEYS
>
> "Wm. R. Biaggi. Divorce, Probate and Criminal Law My Specialties. Notary Public. Consultation Free. 426–27 Bank of San Jose Bldg. Phone San Jose 1638."

The court properly held that appellant's conduct in thus advertising was contrary to and in violation of the provisions of section 159a of the Penal Code. This disposes of all of the points worthy of discussion.

The judgment hereinbefore set forth shall be modified, to read that William R. Biaggi, the respondent, be suspended from the practice of law for the period of five years; that at the end of two years respondent may apply to be reinstated. As so modified, the judgment stands affirmed.

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36 Cal. App. 630

LONG v. JOHN BREUNER CO. (Civ. 1783.)

(District Court of Appeals, Third District, California. March 29, 1918. Rehearing Denied by Supreme Court May 27, 1918.)

1. NEGLIGENCE 🔑136(22) — SLOPING ENTRANCES TO BUILDINGS — QUESTION FOR JURY.
Whether a storekeeper was negligent in maintaining a 35 to 50 per cent. incline at the entrance to the store *held*, under the evidence, for the jury.

2. NEGLIGENCE 🔑44—ENTRANCES TO STORES—DUTY TO KEEP SAFE.
It is the duty of a merchandise storekeeper to keep the entrances to the store in a safe condition, and to use ordinary care to avoid accidents to those entering.

3. NEGLIGENCE 🔑136(26) — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.
Whether plaintiff who walked rapidly, in an occupied state of mind, out of a store entrance inclined at 35 to 50 per cent., was guilty of contributory negligence, *held*, under the evidence, for the jury.

4. NEGLIGENCE 🔑68—CONTRIBUTORY NEGLIGENCE—DUTY OF INJURED PERSONS.
It was the duty of a patron of a store to exercise ordinary care in passing out of a defective entrance.

5. TRIAL 🔑139(1)—PROVINCE OF JURY—EVIDENCE.
Motion for nonsuit will not be granted when there is any substantial evidence which, with the aid of all legitimate inferences favorable to plaintiff, would support a verdict or finding that the material allegations of the complaint are true.

6. NEGLIGENCE 🔑136(9) — QUESTION FOR JURY.
Negligence is a question of fact for the jury, even where there is no conflict of the evidence, if different conclusions upon the subject can be drawn from the evidence by reasonable and impartial men.

7. EVIDENCE 🔑513(2)—EXPERT TESTIMONY.
Where negligence alleged was maintenance of 35 to 50 per cent. incline at the entrance of a store, it was proper to allow architects to testify that the usual grade was 3 per cent., and that 10 per cent. was the greatest approved grade.

8. EVIDENCE 🔑505 — EXPERT TESTIMONY—OPINION OR FACT.
Testimony of an architect as to the usual grade for entrances to buildings and as to the highest approved grade are expressions of fact, and not opinions.

9. NEGLIGENCE 🔑125 — SIMILAR FACTS—EVIDENCE.
In action for injuries by slipping on inclined entrance to store, it was competent to show that other persons had previously slipped and fallen on such incline, as such evidence tended to show the dangerous character of the incline, the cause of plaintiff's fall, and to bring home to the defendant knowledge of the dangerous condition.

10. NEGLIGENCE 🔑125 — SIMILAR FACTS—EVIDENCE.
In action for injuries by falling on steep incline at entrance of store, previous accidents on such incline may be shown, if they are similar in their general character, and circumstances need not be shown to be precisely similar.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Margaret Long against the John Breuner Company, a corporation. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

Myrick & Deering and J. Walter Scott, all of San Francisco, for appellant. Irving D. Gibson, of Sacramento, and E. L. Stockwell, of San Francisco, for respondent.

HART, J. A jury returned a verdict in favor of plaintiff in the sum of $4,500 as damages sustained by her on account of injuries caused by her slipping and falling upon an incline in front of the main entrance to the store of the defendant in Sacramento. Judgment was entered for that amount, from which, and from the order denying its motion for a new trial, defendant appeals.

The defendant conducts a furniture store on the south side of K street between Sixth and Seventh streets in said city of Sacramento. At the time of the accident to plaintiff there was a concrete incline or apron leading from the entrance to the store to the sidewalk. The grade of this incline was from nothing, where it joined the sidewalk, to 35 per cent., as testified by one witness, or 50 per cent, according to another, at the point where plaintiff was injured. On each side the concrete of the apron was rounded off to meet the grade of the sidewalk. This rounded off portion was about a foot in width and gradually diminished as it approached the edge of the curbing, and it had been chipped with a chisel to roughen the surface. There is a column at each side of the entrance; the distance between them being about 12 feet. On the easterly column two steel rods supporting an awning were affixed to it, the lower end of the rod being 3½ feet above the sidewalk. These rods prevented one from walking within about 8½inches of the post. On October 24, 1914, the plaintiff, who was then 60 years of age and engaged as a teacher in the public schools of Sacramento, did some shopping in defendant's store. Upon leaving the store she went obliquely out of the door, turned to the east, and slipped on the rounding part of the incline, very close to the column at the east side of the entrance. There had been no rain that day and the incline was dry. The seriousness of the injuries suffered by plaintiff is not questioned by defendant.

It is first contended by appellant that its motion for a nonsuit should have been granted; the grounds of the motion being that defendant was not negligent in maintaining the inclined passageway, and that plaintiff was guilty of contributory negligence in failing to look and pay attention to the passageway as she went out.

The plaintiff, testifying on direct examination, said that there was "no foreign substance" on the floor near the approach, and that she did not stumble; that she merely slipped and fell. "I could not say," she proceeded, "whether I was standing on my toes or flat on my foot. I was just walking, that is all. I slipped on the right foot, my foot nearest to the building. I had not observed the nature of the incline or approach before I slipped." She further testified that on the occasion of the accident she wore a pair of Oxford ties or low shoes, with low heels, which "were broader and flatter than these." referring to the shoes she was wearing when testifying. On cross-examination she stated: That she had frequently gone into the store in question through the front entrance and the entrance at which she sustained her injuries; that she could not say whether she had ever particularly noticed the slope or the nature thereof before the accident, although, she said, at the time of the mishap she had "no present knowledge" of the slope or the approach or its character—that is to say, she was then "conscious of knowing" nothing of the slope. She said that her son had just returned to her home in ill health and that, while that fact "probably would have caused me some disturbance of my mind that day," she "was not at all out of my mind in any way. I knew what I was doing all the time. * * * I myself had been perfectly well prior to this time. I was probably walking rather rapidly at the time this happened, for I always do, or always did. I could not give any idea about how rapidly I proceeded as I left the store. I know probably I walked as I generally do, in rather a rapid manner. The skirt I wore that day was neither broad nor narrow. It was a medium width skirt—it was not wide. It was what you call a sensible skirt." She was asked whether she walked directly into the iron rod or column standing near the entrance, and whether, as she was in the act of falling, she attempted to grab the rod. She replied that she did not think so; that she was looking straight ahead. "I know," she added, "my mind is generally occupied."

It is not deemed necessary to reproduce herein in detail the testimony of the expert witnesses as to the grade or slope of the incline and as to the usual grade or slope of entrances to public buildings. It is enough to say that from the testimony of those witnesses the jury were, so far as it may be determined from the bare record before us, justified in finding, as impliedly they did find, that the incline upon which the plaintiff fell had a grade or slope of 50 per cent. or, in other words, where the plaintiff was injured, an abrupt descent of approximately 1 foot to each 2 feet of distance; that the passageway over and through which the plaintiff passed, at a point just before she reached the point at which she fell, had a grade of at least 22 per cent. the part having the lowest degree of steepness having a gradient of 14½ per cent.; that the degree of grade or slope maintained generally to entrances from sidewalks to buildings employed for business purposes is a maximum of 5 per cent. to 10 per cent. the usual grade, however, being about 3 per cent. Thus, as is suggested by counsel for respondent, it is clear that there was evidence from which the jury could justly have concluded, as manifestly they did conclude, that the grade at the point where the plaintiff fell and was injured, being 50 per cent. was from five to ten times in excess of the maximum grade which it was the custom to establish, maintain and use for entrances to public buildings, and over sixteen times greater than the usual grade of such entrances, which it was testified is 3 per cent.

[1-4] The above is a sufficient reference to the evidence to show that, without question, the case as made by the plaintiff was one which the court was required to submit to the arbitrament of the jury. In other words, the evidence as to the character of the entrance, that is, as to the grade or slope thereof, was such as to make the question whether the defendant was guilty of negligence in thus maintaining it, or whether the entrance as so maintained was unsafe or dangerous for the use for which it was intended and to which it was put, peculiarly one for the jury's solution. And in clear and readily understandable language the question was submitted to the jury by the trial court in its charge, wherein it correctly instructed the jury that the defendant being engaged in conducting a merchandise store which it invited the public to patronize, the duty rested upon it to keep the entrances and passageways to and from the premises as so

occupied and used by it in a safe condition, "and to use ordinary care to avoid accidents or injury to those properly and lawfully entering upon or leaving its premises through such entrances or passageways in connection with the transaction of business on such premises"; and, further, that "if you find that said entrance or passageway (the entrance or passageway where the plaintiff here was injured) was in an unsafe or dangerous condition, and that such condition was the proximate cause of said injuries to plaintiff, defendant is liable therefor if its managers, officers, or agents knew of such alleged unsafe or dangerous condition, or if, as careful and prudent men, they should have known it, provided that plaintiff was in the exercise of ordinary care."

Nor can we say, on the evidence, that, as a matter of law, the plaintiff was herself guilty of negligence proximately causing or contributing to the accident and her consequent injuries. It was, of course, the duty of the plaintiff in passing over the entrance to exercise ordinary care to avoid being injured by reason of the alleged defectiveness of the passageway, or, as the court instructed the jury, to exercise ordinary prudence under the circumstances—that degree of care which would or should be observed under the given circumstances by the average ordinarily careful person. Whether the conduct of the plaintiff when attempting to pass through and over the entrance measured up to that degree of care was, in our view, a question for the jury under the proofs as adduced before them. The plaintiff declared that she started to pass through the passageway in rather a rapid walk, her usual manner of walking. She had frequently passed through the same entrance, but had never particularly noticed the character of the grade from the store to the sidewalk. While she had her mind to some extent on an invalid son, she said she was "not at all out of her mind in any way," and "knew what she was doing all the time." She further testified that it was not a wet or rainy day; that there was no "foreign substance" on the floor of the passageway, by which she meant, undoubtedly, that there was nothing thereon which would cause her to slip or stumble; and that she did not slip or strike anything which would cause her to lose her footing. Counsel for the defendant insist, however, that the plaintiff failed "to look and pay attention to the nature of the passageway as she went out from the store, thereby occasioning her downfall." There is no testimony warranting that assertion, except in so far as such an inference might be drawn from her statement that she had never particularly noticed the nature of the incline, and that she left the store through the entrance at her usual rapid walking gait. But from her statement that she was "not at all out of her mind in any way," "knew what she was doing all the time," referring to the time that she was in the act of passing over the approach, the inference is equally reasonable that she was paying attention to her steps or exercising reasonable care for her own protection when attempting to pass down the incline.

[5, 6] It would seem to be hardly necessary to repeat herein these well-settled propositions: (1) That a motion for a nonsuit is not to be granted when there is any substantial evidence which, with the aid of all legitimate inferences favorable to the plaintiff, would support a verdict or finding that the material allegations of the complaint are true. Burr v. United Railroads, 163 Cal. 663, 665, 126 Pac. 873; Kimic v. San Jose-Los Gatos, etc., Ry. Co., 156 Cal. 379, 104 Pac. 986; Archibald Estate v. Matteson, 5 Cal. App. 441, 90 Pac. 723; Nonrefillable Water Co. v. Robertson, 8 Cal. App. 103, 96 Pac. 324; Bush v. Wood, 8 Cal. App. 651, 97 Pac. 709; O'Connor v. Hooper, 102 Cal. 528, 36 Pac. 939. (2) That "negligence is a question of fact for the jury, even where there is no conflict of the evidence, if different conclusions upon the subject can be drawn from the evidence." Wahlgren v. Market St. Ry. Co., 132 Cal. 656, 62 Pac. 308, 64 Pac. 993. (3) That "it is only where the evidence is such that but one conclusion with respect to negligence could be reached by a reasonable and impartial man that the question becomes one for the court." Burr v. United Railroads, 163 Cal. supra.

Considering the testimony in view of the foregoing rules, it is clear that the motion for a nonsuit was properly disallowed upon both the grounds upon which it was predicated: (1) That the evidence failed to show that the defendant was guilty of negligence in the manner in which it maintained the passageway where the plaintiff was injured; (2) that it was the plaintiff's own negligence which directly caused or contributed to her injuries. After the motion for a nonsuit was denied, the defendant introduced testimony which, naturally enough, tended to destroy the effect of that presented in support of the complaint. The effect, however, was only to create an evidential conflict, which it was for the jury to settle.

[7, 8] It is next contended that the ruling whereby certain architects and building contractors, testifying as experts, were permitted to give testimony relative to the standard or generally approved grade of approaches to public buildings was erroneous and prejudicial. The disposal of this point will at the same time dispose of the statement by counsel for the defendant that the court allowed the same witnesses to testify directly to the dangerous condition of the approach in question.

According to the testimony of the architects and building contractors, as we have already shown, the usual or approved grade for such slopes is 3 per cent. and the maximum no greater than 5 to 10 per cent. The importance and significance of this testimony is obvious, since, accepting it as showing what the customary or standard and approved grade of the inclines to such approaches is, readily it is thus made to appear that the slope of the approach to the defendant's building, where the plaintiff was injured, was greatly in excess of what it should be to render it reasonably safe to those passing over it. The contention is that the testimony involved mere opinions of the witnesses upon a subject not coming within the category of those upon which opinion testimony is required or allowable, and therefore the ruling permitting it to be received involved an invasion of the province of the jury.

But, in point of fact, the testimony referred to, while that of experts, did not involve a direct expression of the opinions of those witnesses as to the safety of the approach in question. They were not asked, nor did they express, their opinions as to the character of the grade or the condition for safety to those using it of the approach where the plaintiff received her injuries. They were merely asked to state as a fact—a matter within their own knowledge—what the standard or generally approved grade of approaches to public buildings is. In reply, they stated what such grade is as a fact of which they had knowledge and not as their opinions of what it is. They stated no conclusion from their own opinions respecting the ultimate issues which it was for the jury to draw. But their testimony, it is to be admitted, was as to a matter not within common knowledge; and if we should concede that it was in the strictest sense opinion testimony, we would still be of the belief that it was not only proper but essential to an enlightened consideration and determination of the questions whether the defendant was negligent in the maintenance of the approach where the plaintiff was injured, and, if so, whether such negligence was the proximate cause of her injuries. In other words, it was proper and necessary to the elucidation of other pertinent facts in issue.

Manifestly, to determine whether there was negligence in the act and fact of maintaining the approach in the condition in which it then was, the jury were required first to find whether the approach, as then maintained, was in and of itself dangerous or unsafe as a passageway to the defendant's store. The average person, without experience in or knowledge of such matters, certainly would not know from his own knowledge or observation what the standard and approved grade of such approaches is. Nor would he probably know or comprehend, from a mere description of the incline or the degree of the grade thereof by others, whether it was of a degree of grade to make it a dangerous place for persons to pass over. By a comparison of what the architects and building contractors declared to be the standard or uniformly approved grade of such approaches with the grade of the approach to the defendant's store, as it was described by the witnesses who had taken measurements of it with a view of ascertaining the degree of the grade thereof, the jury could the more readily and intelligently determine whether the latter approach was safe or unsafe to pass over.

Thus it is clear that the testimony was important and relevant, and that it was competent we make no doubt. It belongs to a class of testimony which has been uniformly sanctioned by the courts and text-writers as essential if, indeed, not well-nigh indispensable, in many instances, particularly in jury trials, to the crystallization of intelligent and just results. In Ruling Case Law, vol. 11, p. 573, we find the rule with respect to opinion testimony, as deduced from the cases, of which there is an almost unlimited number, as follows:

> "It may be stated as a general proposition that there are two classes of cases in which expert testimony as to the facts is admissible. To the one class belong those cases in which the conclusions to be drawn by the jury depend on the existence of facts which are not common knowledge and which are peculiarly within the knowledge of men whose experience or study enables them to speak with authority upon the subject. If, in such cases, the jury, with all the facts before them, can form a conclusion thereon, it is their sole province to do so. In the other class we find those cases in which the conclusions to be drawn from the facts stated, as well as knowledge of the facts themselves, depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence. In such cases not only the facts, but the conclusions to which they lead, may be testified to by qualified experts. The distinction between these two kinds of testimony is apparent. In the one instance the facts are to be stated by the experts and the conclusion is to be drawn by the jury; in the other, the expert states the facts and gives his conclusion in the form of an opinion which may be accepted or rejected by the jury. If the knowledge of the experts consists in descriptive facts which can intelligently be communicated to others not familiar with the subject, the case belongs to the first class."

[9] The last point is as to the testimony of one Williams, who testified for the plaintiff. This witness was permitted, over the objection of the defendant, to testify that he had, on two different occasions prior to the accident to the plaintiff, slipped and fallen while walking over the approach where the plaintiff received the injuries of which she here complains. It is contended that this testimony was inadmissible because it brought into the case a collateral issue, a matter res inter alios acta. The specific ground of objection was, first, that there was no showing that the defendant or any of its officers or agents knew that Williams had fallen upon the incline, "or that they had knowledge that the

incline was of such a character as might reasonably be expected to lead to the fall of some customer." Further objecting, counsel urged that, if the testimony was offered for the purpose of showing that the entrance was inherently unsafe, it was not admissible in the absence of a showing that the circumstances and conditions "surrounding the falls of Williams" were the same as those existing at the time the plaintiff fell, and that no such showing was made.

We think the evidence was admissible upon the general proposition that testimony of previous accidents similar to the one in question not only tends to show the dangerous character of the place, but, where the previous accidents have occurred under substantially the same general circumstances of the subsequent accident, tends to disclose the cause of the latter, and, furthermore, tends to bring home to the person maintaining the place where the injury occurred knowledge of the dangerous condition of such place. Dyas v. S. P. Co., 140 Cal. 296, 305, 306, 73 Pac. 972; District of Columbia v. Armes, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618; Smith v. Seattle, 33 Wash. 481, 74 Pac. 674; Wigmore on Evidence, § 458; Chamberlayne, Modern Law of Evidence, § 3198.

In the Armes Case, a policeman who saw Armes fall on a sidewalk which was defectively constructed and maintained was asked, after testifying to the accident, whether, while on his beat, other accidents had happened at that place. The question was objected to on the ground that it tended to introduce collateral issues into the case, but the objection was overruled, and the witness replied that he had witnessed other accidents there. The United States Supreme Court, replying to the point as thus made with reference to that testimony, said, speaking through Mr. Justice Field:

> "The admission of this testimony is now urged as error; the point of the objection being that it tended to introduce collateral issues, and thus mislead the jury from the matter directly in controversy. Were such the case, the objection would be tenable; but no dispute was made as to these accidents, no question was raised as to the extent of the injuries received, no point was made upon them, no recovery was sought by reason of them, nor any increase of damages. They were proved simply as circumstances which, with other evidence, tended to show the dangerous character of the sidewalk in its unguarded condition. The frequency of accidents at a particular place would seem to be good evidence of its dangerous character—at least it is some evidence to that effect. Persons are not wont to seek such places, and do not willingly fall into them. Here the character of the place was one of the subjects of inquiry to which attention was called by the nature of the action and the pleadings, and the defendant should have been prepared to show its real character in the face of any proof bearing on that subject. Besides this, as publicity was necessarily given to the accidents, they also tended to show that the dangerous character of the locality was brought to the attention of the city authorities."

See, also, Quinlon v. Utica, 74 N. Y. 603; Chicago v. Powers, 42 Ill. 169, 89 Am. Dec. 418. There are many other cases to the same effect, but the doctrine is too well settled to make further citations herein necessary.

[10] It is in effect contended, however, that before previous accidents may be shown it must be made to appear that such previous accidents occurred under circumstances precisely similar to those characterizing the later or subsequent one, and that no such showing was made in this case. We think, though, that the rule is that the previous accidents need only be similar in their general character to the one in question to render proof of them admissible. There is no claim that Williams did not fall upon the approach upon which the plaintiff fell and received her injuries. Nor is there any claim that the approach, as it existed at the time of the accident to the plaintiff, had not been in the same condition continuously for a long period of time prior and down to the time when the plaintiff fell thereon. Indeed, it appears that Williams was able to identify the approach from a photograph thereof which was taken shortly after the plaintiff was injured and which was exhibited at the trial, and this was some evidence that the general conditions surrounding the approach when he fell thereon on the two occasions referred to by him were substantially the same as they were when the plaintiff received her injuries.

We have now considered all the general propositions upon which a reversal is urged, and, as is manifest from the foregoing discussion, we have discovered in the record no just reason for disturbing the result arrived at below.

The judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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(178 Cal. 247)

LOS ANGELES STONE CO. v. NATIONAL SURETY CO. et al. (L. A. 4541.)

(Supreme Court of California. May 8, 1918.)

1. MUNICIPAL CORPORATIONS ⇨373(1) — PUBLIC IMPROVEMENTS—LIENS.

No lien for materials or labor attaches to public improvements.

2. MUNICIPAL CORPORATIONS ⇨347(1) — STREET IMPROVEMENT CONTRACTS—LIABILITY OF SURETY.

A bond executed by a contractor and a surety company, covering a contract for street improvements, which recites that, "if the said principal fails to pay for any materials furnished for the work of improvement described in said contract, or for any work or labor done thereon of any kind, the said sureties will pay the same" to a stipulated amount, is an independent contract to pay for labor and material furnished the contractor, and is distinct from an agreement to faithfully perform the work.

3. MUNICIPAL CORPORATIONS ⇨347(1) — PUBLIC IMPROVEMENT CONTRACTS — SURETY'S LIABILITY.

Where a contractor for street improvements has given a bond, wherein the surety agrees to pay for labor and material furnished the contractor in doing the work described in the contract, the bond to inure to the benefit of any and all persons, companies, or corporations who perform labor on or furnish materials to be used in such work, the right of a materialman to recover on the bond is not affected by the fact that the materials were furnished and used under an unauthorized extension of time for the completion of the contract.

4. PRINCIPAL AND SURETY ⇨102 — DISCHARGE OF SURETY—ASSIGNMENT.

A surety on the bond of a contractor for street improvements is not released because the contractor has assigned his contract, where such assignment is made to enable the assignee to complete the contract as the assignor's agent.

In Bank. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the Los Angeles Stone Company against the National Surety Company and another. From a judgment for plaintiff, defendant Surety Company appeals. Affirmed.

Carroll Allen and Bertin A. Weyl, both of Los Angeles, for appellant. Gurney E. Newlin, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. Acting under the city charter and pursuant to the provisions of the Vrooman Act (St. 1885, p. 147), the board of public works of the city of Los Angeles duly entered into a contract with defendant Standard Construction & Development Company for the improvement of Melrose avenue in said city. By the terms of the contract the work was to be completed within 210 days from the date thereof, which was September 14, 1912. With the execution of the contract the contractor, as principal, and the National Surety Company, as surety, in pursuance with the provisions of section 6½ of the act under which the proceedings were had and taken (Act 3930, Gen. Laws 1915, p. 1722) executed a bond which, after reciting that the principal therein named had entered into a contract for doing the work specified therein, obligated itself as follows:

> "Now, therefore, if the said principal fails to pay for any materials furnished for the work of improvement described in said contract, or for any work or labor done thereon of any kind, the said sureties will pay the same to an amount not exceeding said sum of $25,600. This bond shall inure to the benefit of any and all persons, companies, or corporations who perform labor on or furnish materials to be used in said work of improvement."

The bond was duly approved, and the contractor entered upon the performance of the work, which under extensions duly granted by the board of public works, it, and its assignees, continued to June 11, 1913, on which day the time for completing the improvement, within the extensions of the contract theretofore duly made, expired. Notwithstanding such termination of the contract, and the fact that by reason thereof the board of public works was divested of all power to further extend the time for completing the improvement, said board did, on June 12th, make a purported order further extending the time within which, and other like extensions made, the work of improving the street was completed in accordance with the specifications therefor.

This action was to recover upon said bond and from the surety thereof the value of labor and materials furnished by plaintiff and used in doing the work at a date subsequent to June 11, 1913, when, as stated, the time for doing the work had expired. Judgment went for plaintiff, from which the defendant National Surety Company appeals.

[1] Appellant's chief contention is that since, under the terms and extensions of the contract, the time for doing the work specified therein expired on June 11th, no recovery can be had on the bond for the value of materials furnished by plaintiff subsequent to said date. No lien for materials or labor attaches to public improvements, and the purpose clearly intended by the Legislature in requiring the giving of such bond was to provide a security for materialmen and laborers to which they could confidently look for protection against loss. The bond under consideration is in the terms of the statute, and, in addition to stating that, if the contractor named as principal therein failed to pay for material furnished for the work described in the contract or labor done thereon the surety would pay the same, contained the provision that:

> "This bond shall inure to the benefit of any and all persons, companies, or corporations who perform labor on or furnish materials in said work of improvement."

The only purpose served by such reference to the contract (for the faithful performance of which another bond is required) was to identify the particular work to which the bond related. The obligation of the surety does not depend upon the validity of the contract or the faithful performance thereof by the contractor. It exists independently of such facts. The covenant is that in case the principal fails, not in the performance of his contract with the city but in his obligations, express or implied, to pay for materials furnished in doing the work described in his contract with the city, the surety will pay them. "The surety is charged with notice that he is entering into what is in a very proper sense a public obligation, and one that will be relied upon by persons who can in no manner control the conduct of the nominal obligee and with respect to whom the latter is a mere trustee." Equitable Surety Co. v. United States, 234 U. S. 448, 34 Sup. Ct. 803, 58 L. Ed. 1394. Hence the question as to whether the contract under which the work is done be a valid one, or whether the contractor fails to perform it according to its terms and specifications, entitling him to an acceptance of the same as completed, is no concern of the persons furnishing materials for the work. Unaffected by irregularities in the procedure of defects which render the contract void, the materialman may look to the covenant of the surety, which, in effect, is an express promise, in case of failure so to do by the principal, to pay any and all debts of the contractor, in so far as they are incurred for labor and materials furnished in performing the work. French v. Powell, 135 Cal. 636, 68 Pac. 92. Otherwise, and "if the sureties on the bond can defeat the claims of laborers and materialmen because of irregularities in the making of the contract referred to in the bond, it follows that every man, who contemplates selling a foot of pipe to a contractor, and every laborer, before commencing work with his shovel, must employ counsel learned in the law to ascertain whether the corporation counsel has properly performed his duties," verify the statement of the surety that the contract, reference to which is made in the bond is valid and binding, and see that it is faithfully performed. Bell v. Kirkland, 102 Minn. 213, 113 N. W. 271, 13 L. R. A. (N. S.) 793. Obviously, to so interpret the statute would defeat the purpose of its enactment. In the case of Kansas City Hydraulic Press Brick Co. v. National Surety Co. (C. C.) 149 Fed. 507, the court in considering a like question under a similar statute said:

> "The simple proposition, so far as this question is concerned is this: The plaintiff furnished material to Atkin. Atkin agreed to pay for it. The surety company agreed that, if Atkin did not, it would, and the consideration of this agreement to do so was the furnishing of material by plaintiff to Atkin and the payment of the usual premiums * * * for signing such bonds, and in the opinion of this court that contract stands untainted and in full integrity regardless of the invalidity of the contract between Atkin and the city of Kansas City."

[2, 3] The bond on the part of the surety company must be deemed an independent contract, whereby it agreed, subject to payment by the principal therein named, to pay for labor and materials furnished the contractor in doing certain street work specified in a contract with the city therefor; and the right of a materialman to recover thereon is unaffected by the fact that the materials constituting the subject of the action were furnished and used in completing the work under an extension of time for so doing made by the board of public works, which by reason of the time of completion having expired such board had no power to make.

While appellant concedes that all orders extending the time for doing the work made prior to June 12th were lawfully made, it nevertheless insists the effect of such extensions so made was to release the surety from liability to materialmen. This contention is based upon the claim that, since the contract as originally drawn fixed the time for the performance thereof, the extension granted constituted a material alteration of the contract by reason of which since the surety is entitled to stand upon the strict terms of his contract it is exonerated. The principle invoked has no application to the bond under consideration, for the reason that, as heretofore stated, the surety's obligation is not for the performance of the contract so claimed to have been altered, but independent thereof, and given for a wholly different purpose. U. S. Fidelity & Guaranty Co. v. United States, 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242. The covenant contained in the bond is not for the benefit of the city as a party to the contract for doing the street work, but for the benefit of all persons furnishing labor and materials to the contractor for doing the same.

[4] There is no merit in the contention that the surety was exonerated from liability by reason of the fact that the contractor without the consent of appellant made assignments of the contract for doing the work. As to these assignments the court by findings upon which no attack is made found that the assignment made to Powell was to secure the latter for money advanced by him to enable the contractor to do the work. None of the work was done by Powell and no materials furnished to him. Subject to the right of Powell under this naked assignment, the contractor for the purpose of enabling J. L. Davis, as its agent, to complete the contract, assigned the same to him, who thereafter, as the duly authorized agent of and acting for the contractor, completed the improvement, the materials for which were delivered to Davis, as such agent of the contractor, who agreed to pay therefor.

While these findings dispose of appellant's contention, we may say that the rule which permits a surety to stand upon his strict legal rights should not be construed as limiting the benefits of a bond of this character to those only who supply labor and materials directly to the contractor. The covenant in the bond should be read in the light of the statute, the purpose of which was to protect those who furnish labor and materials for work described in the contract, and not the particular engagements under which the work is done. See French v. Powell, 135 Cal. 636, 68 Pac. 92; Williams v. Tingey, 26 Cal. App. 574, 147 Pac. 584; Hill v. American Surety Co., 200 U. S. 197, 26 Sup. Ct. 168, 50 L. Ed. 437; Flagstaff M. Co. v. Cullins, 104 U. S. 176, 26 L. Ed. 704.

Under the provision of section 6½ of the act, materialmen and laborers, in order to maintain suit to recover therefor, are required to file their claims with the proper officer "within 30 days from the time the improvement is completed." Appellant insists that part of plaintiff's claim while filed within 30 days after the acceptance of the work, was not filed until the expiration of 30 days from actual completion thereof. The court, however, found that plaintiff, as provided in section 6½ of the act, did file its claim in the proper office within 30 days from the completion of the work. In the absence of any evidence to the contrary, disclosed by the record, appellant is bound by this finding.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SLOSS, J.; WILBUR, J.; RICHARDS, Judge pro tem.

(178 Cal. 264)

HUB HARDWARE CO. v. ÆTNA ACCIDENT & LIABILITY CO. et al.

(L. A. 4176.)

(Supreme Court of California. May 10, 1918. Rehearing Denied June 6, 1918.)

1. PRINCIPAL AND SURETY 🔑347(2)—PUBLIC IMPROVEMENT CONTRACTS—PRINCIPAL'S ASSIGNEE.

A bond given by a contractor, specifying, as St. 1911, p. 738, expressly provides, that the principal and surety are bound to any and all persons, companies, or corporations who perform labor on or furnish material to be used in the improvement, inures to the benefit of the contractor's assignee.

2. PRINCIPAL AND SURETY 🔑59 — SURETYSHIP CONTRACT—CONSTRUCTION.

If a surety enters into suretyship contract with the law before him, the law becomes part of the agreement.

3. MUNICIPAL CORPORATIONS 🔑353—PUBLIC IMPROVEMENTS — ASSIGNABILITY OF CONTRACT.

A street improvement contract is assignable by the contractor.

4. MUNICIPAL CORPORATIONS 🔑347(1)—PUBLIC IMPROVEMENT CONTRACTS — SURETY'S DEFENSES.

That a city has failed to establish an official street grade as it was authorized to do by Improvement Act 1911, does not release the liability of the surety on a contractor's bond to pay for material and labor used in the improvement, since the invalidity of the contract with the city does not involve the liability of the surety.

5. MUNICIPAL CORPORATIONS 🔑347(1)—PUBLIC IMPROVEMENT CONTRACTS — SURETY'S DEFENSES.

That materials have been furnished and used for a street improvement after the expiration of the time for completing the contract does not relieve a surety on a bond for the payment of material and labor used, the surety's liability being independent of the contract between the contractor and the city.

6. MUNICIPAL CORPORATIONS 🔑373(3)—PUBLIC IMPROVEMENT CONTRACTS—TIME OF FILING CLAIM.

Where a contract for street improvements provided that an assessment should be levied after two blocks of the improvement was completed, a materialman, who had furnished material used in the two blocks, but had not filed his claim therefor within 30 days of the completion of such two blocks, was not deprived of his remedy, where his claim was filed within 30 days after the completion of the total improvement.

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by the Hub Hardware Company against the Ætna Accident & Liability Company and another. From a judgment for the plaintiff, the named defendant appeals. Affirmed.

Gibson, Dunn & Crutcher and J. Karl Lobdell, all of Los Angeles (Edward E. Bacon, of Los Angeles, of counsel), for appellant. Arthur M. Ellis and G. C. De Garmo, both of Los Angeles, for respondents. Neice & Packard and Crouch & Crouch, all of Los Angeles, amicus curiæ.

MELVIN, J. Plaintiff was given judgment on the pleadings, and the corporation, which had executed a surety bond, appeals from the judgment.

The material facts are as follows: The superintendent of streets of Colton entered into a contract, on May 28, 1913, with one Paonessa for the improvement of a certain street in that city. Appellant, as surety, executed the required statutory bond for the payment of laborers and for materials furnished. Paonessa assigned the contract, and plaintiff furnished materials to the assignees, who actually performed the work. The so-called "Improvement Act of 1911," under which the work was done, authorizes the levy of an assessment upon the completion of two blocks or more of the improvement without waiting for the completion of the whole. This plan was followed in the matter of the work in question upon completion of that part of it upon which the materials furnished by plaintiff were used. Plaintiff, being unable to collect its claim from the assignees of the original contractor, who had received the amount due from the city, sued said assignees and the surety company. The original contractor, Paonessa, was not made a party defendant. Plaintiff recovered judgment against the surety company alone.

Appellant's first contention is that its lia-

bility under the statute is not and cannot be extended to the assignees of the contractor— that it is bound only to indemnify creditors of the contractor. In this behalf its counsel quote from the act (Stats. 1911, p. 738) the following language:

> "If the contractor, person, company or corporation to whom said contract was awarded fails to pay for any materials so furnished for the said work or improvement, or for any work or labor done thereon of any kind, that the sureties will pay the same, to an amount not exceeding the sum specified in said bond."

And they cite County of Sonoma v. Hall, 132 Cal. 589, 62 Pac. 257, 312, 65 Pac. 12, 459, and Towle v. Sweeney, 2 Cal. App. 29, 83 Pac. 74, to the effect that sureties may not be held unless the principal, sued independently of the bond, would be liable. If the quoted portion of the statute were all the provision for a surety bond there would be great force in the argument of appellant's counsel, but the statute also provides in the same section of which a part is quoted by them that the bond "shall be made to inure to the benefit of any and all persons, companies or corporations who perform labor on, or furnish materials to be used in the said work or improvement."

[1, 2] The bond itself specifies that the principal and surety "are held and firmly bound unto any and all persons, companies or corporations, who perform labor on, or furnish materials to be used in the said work of improvement aforementioned, in the sum of seventeen thousand five hundred dollars." Statutes upholding liability inuring to the benefit of those with whom the person bound has no contractual relation have been repeatedly sustained. If the surety makes the contract with the law before him the law enters into and becomes a part of the agreement. Jones v. Great Southern Fireproof Hotel Co., 86 Fed. 370, 30 C. C. A. 108; Hollenbeck-Bush Planing Mill Co. v. Amweg, 170 Pac. 148.

[3] In this case the surety did bind itself, in conformity with the requirement of the statute, to pay for any materials furnished to be used in the described work. Clearly, the obligation was not merely for the benefit of the contractor. That such contracts as the one made by Paonessa and the city are assignable may not be doubted. Taylor v. Palmer, 31 Cal. 241. It has been held that such an action as this is not based upon the personal liability of the original contractor, but upon the obligation of the bond. Williams v. Tingey, 26 Cal. App. 574, 147 Pac. 584. To be sure, that was a case in which the materials were furnished to a subcontractor, not to an assignee, and appellant seeks to draw a distinction, asserting that "it may well be that a different rule should apply" to a subcontractor from that invoked in favor of an assignee. We can see no reason why there should be a different rule under the very broad liability assumed by this appellant on the execution of the bond. In French v. Powell, 135 Cal. 636, 68 Pac. 92, the court was considering an assignment of a contract made by one who had contracted with a city. The surety was made responsible for all work of any kind done upon the tunnel to be constructed, which the contractor did not pay for. The court held that neither the contractor nor the surety could shift the burden of their obligation by assignment "without the consent of the parties entitled to its benefits." That case is authority which supports respondent's theory that the assignment of the contract by Paonessa did not release appellant.

There is no force in the contention that the surety could be bound only for the reasonable value of the materials furnished and not for the agreed price. No issue was made in the pleadings upon this matter. Appellant admitted by its answer that any materials used in the street work, "as alleged in said complaint," were "sold and furnished" to the assignees of Paonessa.

[4] Appellant calls attention to one of the defenses pleaded in its answer that failure to establish the official grade of the street was fatal to the proceedings, and that therefore the bond was unauthorized, without consideration, and void. It is argued that, since the "Improvement Act of 1911" authorizes the council to grade or regrade a street "to the official grade," it has no jurisdiction to perform the work and to require the bond unless the official grade has been established. It is argued that without the establishment of the official grade the contract is void, and all concomitants, including the bond, are likewise of no effect. A similar contention was made in a case involving a surety bond, upon the ground that the original contractor had secured the work in violation of the statute requiring competitive bidding. It was held that the invalidity of that contract did not involve the liability of the surety company, the bond having been given to secure, not the performance of the work by the original contractor, but the independent contracts of materialmen and laborers. Kansas City Hydraulic P. B. Co. v. National Surety Co., 167 Fed. 496, 93 C. C. A. 132. The same principle is declared in Bell v. Kirkland, 102 Minn. 213, 113 N. W. 271, 13 L. R. A. (N. S.) 793, 120 Am. St. Rep. 621; Kansas City v. Schroeder, 196 Mo. 281, 93 S. W. 405; National Surety Co. v. Wyandotte Coal & Lime Co., 76 Kan. 914, 92 Pac. 1111; United States v. National Surety Co., 92 Fed. 549, 34 C. C. A. 526; Kiessig v. Allspaugh, 99 Cal. 452, 34 Pac. 106; McMenomy v. White, 115 Cal. 339, 47 Pac. 409; Summerton v. Hanson, 117 Cal. 252, 49 Pac. 135.

[5] Appellant also asserts that as part of the materials were furnished after the time limited in the contract with the city, it cannot be held liable for all the supplies. Plaintiff's claim is based upon materials furnished "between the 27th day of September, 1913, and the 22d day of November, 1913," while the time for the completion of the contract was fixed at 150 days from June 12,

1913, a period which expired November 9, 1913. But the respondent correctly argues that whatever may be the effect between the contractor and the municipality of this irregularity the surety, having undertaken to pay for all labor and materials furnished for that particular work, cannot be relieved because of any irregularity in the performance of the contract. Los Angeles Stone Co. v. National Surety Co., L. A. No. 4541, 173 Pac. 79, opinion filed May 8, 1918.

[6] It is next contended that plaintiff's claim was not filed with the superintendent of streets within the time prescribed by the statute. Section 19 of the "Street Improvement Act of 1911" provides that a person furnishing materials and one whose claim has not been paid by the contractor "may, within thirty days from the time said improvement is completed, file with the superintendent of streets a verified statement of his or its claim, together with a statement that the same, or some part thereof, has not been paid." It is alleged in the complaint that on January 8, 1914, "and within thirty days after the completion and acceptance of that portion of said street work between H street and A street" plaintiff filed the verified notice prescribed by the statute. The answer admitted the fact of completion and acceptance, but denied the date thereof set forth in the complaint, and denied that any statement of claim was served upon or filed with the street superintendent within 30 days after the completion of said improvement or work. Conceding that the claim was not filed within 30 days after the completion of that part of the improvement on which plaintiff's materials were used, namely, the area between H street and A street, respondent insists that it is in time because its claim went in before the completion of the portion lying between A street and Mill street. It has been held that such a claim may be filed before the contract is completed (French v. Powell, supra), and since the "improvement" for which Paonessa secured the contract involved both parts of North Eighth street, respondent insists that it was in time in filing its claim at any date before the completion of the whole work specified in the agreement, notwithstanding the fact that the supplies furnished were used only upon the portion required to be graded and paved with concrete and asphalt. This contention must be upheld. While two sorts of paving were contemplated and bargained for, the price to be paid Paonessa was a lump sum, and the "improvement" was a single one. An assessment was levied, it is true, upon completion of a part of the work, but this is permitted and authorized by the statute. It is also true that the materials were used upon that part of the street covered by the assessment, but the surety, under its responsibility for materials furnished upon all the area included in the contract, may not complain unless the claimant fails to file the prescribed statement with the superintendent of streets until more than 30 days after "the time said improvement is completed."

The judgment is affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

(178 Cal. 810)

C. C. HARRIS OIL CO. v. STANDARD CONSTRUCTION & DEVELOPMENT CO. et al. (L. A. 4540.)

(Supreme Court of California. May 8, 1918.)

In Bank. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the C. C. Harris Oil Company against the Standard Construction & Development Company and others. From a judgment for plaintiff, defendant National Surety Company appeals. Affirmed.

Allen & Weyl, of Los Angeles, for appellant. Cates & Robinson, of Los Angeles, for respondent.

PER CURIAM. The appeal in this case is from the judgment entered against National Surety Company, appellant. The questions presented are the same as those considered in Los Angeles Stone Co. v. National Surety Co., L. A. No. 4541, 173 Pac. 79, opinion in which has this day been filed. We refer to that decision for the reasons in support of the judgment made herein.

The judgment appealed from is affirmed.

(178 Cal. 243)

LOS ANGELES & ARIZONA LAND CO. v. MARR. (L. A. 4229.)

(Supreme Court of California. May 8, 1918. Rehearing Denied June 6, 1918.)

1. DEEDS 🔑170—RESTRICTIONS—CONSTRUCTION.

Restriction, in deed providing forfeiture of title for breach, was not uncertain as to what property it affected, where, by disregarding an exception of property which deed did not cover, the description was plain.

2. PLEADING 🔑35 — RESTRICTIONS — VIOLATION—REMEDIES.

Where deed contained restrictions violated by purchaser, and grantor sued to recover land, and asked reformation to apply the restrictions more definitely, when in fact they did apply as written, his allegations looking to reformation should be disregarded as superfluous.

Department 1. Appeal from Superior Court, Los Angeles County; Louis R. Works, Judge.

Action by the Los Angeles & Arizona Land Company against Winifred F. Marr. From a judgment granting motion for nonsuit, plaintiff appeals. Reversed.

Goodrich & Martinson, of Los Angeles, for appellant. E. R. Young, of Los Angeles, for respondent.

SLOSS, J. The plaintiff appeals from a judgment against it, entered upon the granting of a motion for a nonsuit.

Plaintiff's predecessor, Verdugo Canyon

Land Company, was the owner of a tract of land in Los Angeles county, and had made a contract with the defendant for the sale to her of a lot in said tract. A deed conveying the lot was executed subsequently. The contract, as well as the deed, contained various restrictive covenants, with a provision that in the event of any violation by the grantee, title should revert to the grantor. The complaint was framed upon the theory that the contract and the conveyance were uncertain with respect to both the description of the land conveyed and the terms of the restriction, and that the uncertainties were the result of mutual mistake of the parties. It was further alleged that the defendant had violated the covenant. The prayer was that the contract and the deed be reformed to express the true intent of the parties, and that the plaintiff be declared to be the owner of the lot and recover its possession.

The effort to have the instruments reformed has brought needless complication into the suit. Both parties are now agreed that the description of the lot purchased was clear and definite, and that no reformation was required in this respect. We are satisfied that the contract and deed, read with the aid of the map to which they refer, contain as well an adequate definition of the terms and scope of the restrictive covenants.

The grantor's land was known as tract No. 250. It contained several hundred acres, and was shown, with its subdivisions, on the above-mentioned map, which was on file in the office of the county recorder. The tract was traversed by an avenue, called Canada boulevard, running north and south, and was subdivided into numbered blocks and lots, the numbers of lots running consecutively through the entire tract. Block 205, containing some 39 acres, lay at the southerly end of the tract. It had not been divided into lots. The property purchased by the defendant was lot 54. It lay to the west of Canada boulevard, some distance northerly from the limits of block 205.

The conditions embodied in the deed read as follows:

"This instrument is hereby made and executed upon the express condition and reservation that no malt, vinous or spirituous liquors shall be sold, given away or distributed directly or indirectly upon the property herein described, except under a restaurant license on the south 20 acres of block 205 thereof, and no building except for residence, hotel, church or school purposes (and the necessary outhouses, to be used in connection therewith) shall be erected or maintained upon the herein described property lying west of Canada boulevard (except block 205 thereof), *and no residence, hotel, church or schoolhouse shall be erected or maintained upon the property last above described of a less value than $2,000.* * * *

"In the event of a violation of any of these conditions or reservations this instrument shall become null and void, the grantee herein shall forfeit all right or title to said property and all interest therein shall revert without notice to the grantor herein."

The dispute arises on the italicized portion of the provisions above quoted.

[1] The contention of the respondent is that the restriction is so indefinite with reference to the property affected as to be meaningless and inoperative. And this was apparently the view taken by the plaintiff at the time its complaint was framed. It may be admitted that terms more apt to express the intent of the parties might readily have been chosen. The restrictive clause, read as a whole, seems to refer, not only to the lot conveyed by the deed, but to the entire tract delineated upon the map. In all probability the language was simply copied from some prior instrument which defined the conditions upon which the various lots in the tract were to be sold. Thus, the clause begins by prohibiting the sale of liquors upon the property "herein described, except on the south 20 acres of block 205 thereof." Block 205 was not a part of the property described in the deed, and the exception, while proper in an instrument referring to the entire tract, was meaningless in a contract or conveyance covering only a parcel of property entirely outside of block 205. Coming to the specific restriction here involved, it is provided that "no residence * * * of a less value than $2,000 * * * shall be erected upon the property last above described." The property "last above described" is "the herein described property lying west of Canada boulevard (except block 205 thereof)." This sufficiently designates lot 54, which is "the herein described property," and is "lying west of Canada boulevard." The only possible question arises from the exception of block 205, which, as we have seen, was not a part of the property described, and hence could not be excepted from it. There is, therefore no uncertainty or doubt about the property designated as to which the restriction shall apply. There is merely a meaningless or unintelligible attempt to exclude from the operation of the restriction something which could not be included or excluded. It will not be doubted that the parties to this transfer intended that the restrictive covenants should apply to lot 54, which was the subject of the dealing between them. They were certainly not contracting with reference to block 205, which was remote from the land which was being sold. Obviously the exception of block 205 is a false reference in the description, and as such it must be rejected, thus giving effect to the deed according to the true intent of the parties. More v. Massini, 37 Cal. 432; Irving v. Cunningham, 66 Cal. 15, 4 Pac. 766. "If the land * * * is described as an entire tract excepting a parcel described, and the description of the parcel in the exception is vague and uncertain, the uncertainty will affect the exception only, and that will fail and not the grant." 2 Devlin on Real Estate (3 Ed.) § 1013c; De Roach v. Clardy, 52 Tex. Civ. App. 233, 113 S. W. 22; Bromberg

v. Smee, 130 Ala. 601, 30 South. 483; Loyd v. Oates, 143 Ala. 231, 38 South. 1022, 111 Am. St. Rep. 39. On similar considerations, it must be held that the words "except block 205 thereof" are not to be regarded, and that the words "the herein described property lying west of Canada boulevard" are apt and sufficient to designate the property conveyed, i. e. lot 54.

[2] We may, therefore, view as immaterial the allegations designed to show a mistake in the framing of the instrument, and the prayer for reformation. The plaintiff had a right to seek redress for the violation of the restrictions contained in the deed as it was executed. There was in the complaint a sufficient basis for this relief, and the matter relating to reformation is to be treated as superfluous.

The validity of restrictions of this kind, when imposed, as was the covenant in this case, for the benefit of other lands owned by the grantor, is not questioned. Quatman v. McCray, 128 Cal. 285, 60 Pac. 855; Firth v. Marovich, 160 Cal. 257, 116 Pac. 729, Ann. Cas. 1912D, 1190. There was a sufficient prima facie showing of the defendant's violation of the restriction, continuing after repeated demands for compliance. The nonsuit should not, therefore, have been granted.

The judgment is reversed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

(178 Cal. 253)

SCHERER v. DANZIGER. (L. A. 4180.)

(Supreme Court of California. May 8, 1918.)

1. MASTER AND SERVANT 🔑278(13)—INJURY—NEGLIGENCE—PLACE TO WORK—SUFFICIENCY OF EVIDENCE.

Evidence in action for injury to engineer of pumping plant on ranch by hand being drawn into exposed cogwheel of pump, *held* to warrant jury's finding of employer's failure of duty as to furnishing safe place to work.

2. MASTER AND SERVANT 🔑125(9)—INJURY—NEGLIGENCE—NOTICE.

Relative to negligence of master as to furnishing safe place to work, it need not be shown he had personal knowledge of removal of cover of cogwheel; the foreman in full charge of the plant having notice.

3. MASTER AND SERVANT 🔑107(5)—INJURY—UNSAFE PLACE — CHANGE SUGGESTED BY EMPLOYÉ.

That the place would not have been dangerous but for changes made on suggestion of the injured employé does not affect employer's liability; the dangerous condition arising from elimination of an important part of the employé's plan.

4. NEGLIGENCE 🔑101—CONTRIBUTORY NEGLIGENCE—EMPLOYERS' LIABILITY ACT—COMPARATIVE NEGLIGENCE.

Under Employers' Liability Act (St. 1911, p. 796), not only are defenses of assumption of risk and fellow servant's negligence unavailable, but contributory negligence, if slight, while employer's negligence is gross, in comparison, does not bar recovery, but only permits diminution of damages.

5. MASTER AND SERVANT 🔑289(25) — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

Evidence in servant's action for injury to engineer, through rag which he was carrying catching in exposed cogwheel, *held* to make question of contributory negligence one for the jury.

Department 1. Appeal from Superior Court, Los Angeles County; Willis I. Morrison, Judge.

Action by John Scherer against J. M. Danziger. From an adverse judgment and order, defendant appeals. Affirmed.

W. N. Goodwin and Hunsaker & Britt, all of Los Angeles, for appellant. Gray, Barker & Bowen, and Wheaton A. Gray, all of Los Angeles, for respondent.

SLOSS, J. Plaintiff recovered damages for personal injuries suffered by him while in the employ of the defendant. The defendant appeals from the judgment and from an order denying his motion for a new trial.

The plaintiff was an engineer, and was employed to run a pumping plant on defendant's ranch. The plant, comprising a gasoline engine and two pumps, was located in a pumphouse. The engine and one of the pumps stood on the main floor of the house, and the other pump was in the basement. Power was transmitted from the engine to the pumps by means of belts. The pump on the main floor was fitted, among other parts, with a cogwheel 20 inches in diameter, which meshed with a smaller gear wheel or pinion. The plaintiff had been tightening the nuts on stuffing boxes on the side of this pump. Having done this, he wiped the nuts with a rag held in his right hand. He then turned to leave the pump, and as he was passing by the cogwheels the rag which he held was caught in the gears, drawing his hand into the wheels, and causing the injuries of which he complained. The negligence charged consisted of the defendant's act in requiring the plaintiff to remove from the cogwheels a cover which he had theretofore placed over the same, thus leaving the cogwheels uncovered and unprotected. There will be no occasion to discuss the further claim that defendant was negligent in failing to furnish plaintiff with cotton waste for wiping the machinery. The answer denied any negligence on the part of the defendant, and set up an affirmative plea that plaintiff's injuries were caused by his own negligence.

It is argued that the evidence was insufficient to warrant a finding of negligence on the part of the defendant. This contention cannot be sustained. Taking, as upon this appeal we are bound to do, the version of the evidence most favorable to the plaintiff's claims, we may fairly say that the record shows this state of facts: During the entire time of plaintiff's employment, one Moebius was in general charge of the defendant's ranch as foreman. His authority was superior to that of the plaintiff, and he had power of direction and control over the latter. Soon after the plaintiff entered the defendant's employ, he suggested certain changes in the arrangement of the pumphouse, and these were carried out with the defendant's consent. The belt transmitting power to the lower pump ran down one side of a flight of stairs leading to the basement. Among other changes, the plaintiff extended a wooden platform over this side of the stairs, and moved to the edge of the extension an iron railing which before had run within a few inches of the cogwheels on the upper pump. This left a space of some 18 inches between these wheels and the railing. The purpose of the alterations was to give plaintiff easier access to the upper pump, and to obviate the danger of contact with the belt. With things in this condition, the plaintiff regarded the exposed cogwheels as dangerous, and constructed a sheet iron cover, which he placed over the cogwheels. Soon thereafter Moebius, the foreman, objected to the cover, which apparently caused some noise in the operation of the machinery. After several discussions, he finally ordered the plaintiff to take the cover off. The plaintiff replied, "If I have to take it off now, I will take it off; but you have to take the responsibility if any one gets hurt." The foreman persisted in his command, and the plaintiff removed the cover. On the following day the accident occurred.

[1-3] This evidence fully warranted the jury in finding that the defendant had failed in his duty to use ordinary care to furnish to his employé a reasonably safe place in which to work. The plaintiff was not obliged to prove that the defendant had personal knowledge of the removal of the cover. Moebius was in full control of the plant, and notice to him was, of course, notice to his principal. There is no force in the claim that there would have been no element of danger in the situation if the location of the railing had not theretofore been changed in accordance with the plaintiff's own suggestions. The alterations had the approval of the defendant, and, if carried out according to plaintiff's ideas, would have included the covering of the cogwheels. The dangerous condition was created, not by the adoption of plaintiff's plan, but by the elimination of an important part of that plan.

[4, 5] When the accident occurred, the Employers' Liability Act of 1911 (Stats. 1911, p. 796) was in force. Under that law the defenses of assumption of risk and negligence of a fellow servant were not available to the defendant. Nor, under that statute, was the plaintiff's right of action destroyed by the fact that he may have been guilty of contributory negligence. He was still entitled to recover, if his contributory negligence was slight and that of the employer was gross in comparison; the jury being permitted to diminish the damages "in proportion to the amount of negligence attributable to such employé." Perry v. Angelus Hosp. Ass'n, 172 Cal. 311, 156 Pac. 449. Regardless, however, of any comparison of negligence, it cannot be said that the evidence required a finding that the plaintiff was guilty of negligence at all. He was, it is true, aware of the uncovered condition of the gears, and of the danger involved in coming in contact with them. But his duties required him to work at the pump to which the gears were attached, and it was clearly a question for the jury whether, in leaving the pump, he was exercising ordinary care in his manner of carrying the rag which caught in the gears, or in other respects. It appeared that the engine was fitted with two clutches, by means of which either pump might be stopped without interrupting the motion of the engine or of the other pump and it is argued that it was negligent for the plaintiff to go to the pump to tighten the nuts on the stuffing boxes without first stopping the pump by means of the clutch. But this again was a question of fact for the jury. The plaintiff testified that the stuffing boxes had to be tightened frequently, that it was not customary to stop the pump when that work was done, and that "no employer would stand for anybody stopping a pump" for such work. The facts do not bring the case within the exceptional class of those in which a court is warranted in declaring, as matter of law, that negligence has been established. In any event, the jury was certainly authorized to find that the plaintiff's negligence, if any, was slight, and that of the defendant, comparatively speaking, gross, and to diminish the damages accordingly. Proper instructions covering this phase of the law were given.

The court's charge to the jury, as a whole, was full, clear, and correct. The appellant attacks certain instructions given or modified, but we think his criticisms, if well founded at all, are directed to points too unimportant to have affected the result. Of the single assignment of error in the admission of evidence, it may likewise be said that the ruling did not work substantial prejudice to the defendant.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

(178 Cal. 231)

LEVINGS et al. v. PACIFIC ELECTRIC RY. CO. (L. A. 4245.)

(Supreme Court of California. May 7, 1918. Rehearing Denied June 6, 1918.)

1. STREET RAILROADS 🔑114(14)—COLLISIONS—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Evidence *held* sufficient to sustain finding, that automobilist killed by street car at street crossing was not negligent.

2. COSTS 🔑260(4) — FRIVOLOUS APPEALS — PENALTY.

Where defendant was extremely negligent, bordering on criminality, and there was very clear evidence to the effect that a person killed was not negligent, an appeal on the ground that deceased was negligent as a matter of law, and that defendant was entitled to a directed verdict, was frivolous, and a penalty will be added to the damages.

Department 1. Appeal from Superior Court, Los Angeles County; F. E. Densmore, Judge.

Action by Ella H. Levings and others against the Pacific Electric Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Frank Karr, R. C. Gortner, E. E. Morris, and A. W. Ashburn, all of Los Angeles, for appellant. John F. Poole and George A. Boden, both of Los Angeles, for respondents.

RICHARDS, Judge pro tem. This is an appeal from a judgment in favor of the plaintiffs in an action for damages for the alleged negligence of the defendant in the operation of one of its cars, by which a collision occurred with an automobile being driven by one Willard F. Levings, husband of the plaintiff Ella H. Levings, and father of the other plaintiffs, in which the said Willard F. Levings lost his life. The collision occurred at the intersection of Colorado street and El Molino avenue, in the city of Pasadena, where, upon the afternoon of September 14, 1913, an east-bound car being operated by the defendant's employés on Colorado street struck the automobile of the deceased going north on El Molino avenue and attempting to cross Colorado street. The appellant presents but one question upon this appeal, and that is the question whether upon the facts of the case the deceased was chargeable with such contributory negligence, as a matter of law, as would prevent a recovery of damages for his death. It is admitted by the appellant that the car which collided with the automobile of the decedent was being operated at a speed in excess of that allowed by the ordinances of Pasadena, which provide for a maximum speed of 20 miles an hour within said city. Aside from this admission, however, there is ample evidence tending to show that the car, immediately before and at the time of the collision, was being run at a rate of speed so greatly in excess of the aforesaid speed limit as to amount to negligence so reckless as to be near the border line of criminality. A number of witnesses to the accident declared that the car came down Colorado street at a rate of speed of from 40 to more than 60 miles an hour. Others described this speed as "terrific" and "furious." The occupants of the automobile who survived the collision declared that no bell was rung or other warning given until just before the car crashed into the automobile. There was also evidence showing that after the impact the car, in spite of efforts of the motorman to stop it, ran 300 feet before being brought to a standstill.

It will thus be seen that there was ample proof that the defendant's negligence was of the most gross and inexcusable kind. Upon the question of the contributory negligence of the deceased driver of the automobile, the uncontradicted evidence of its surviving occupants was to the effect that the automobile as it approached the intersection of El Molino avenue with Colorado street was traveling at a rate of speed of from 10 to 15 miles an hour; that its deceased driver and its other occupants looked in both directions up and down Colorado street through the palms which line the avenue, but only partly obstruct the view, and that no car was in sight, and that there was no sound nor warning given of an approaching car. One of the occupants of the machine was a musician with an ear trained to distinguish sounds, and she testified that she heard no sound of warning of the car's approach. The distance from the southerly curb line of Colorado street to the street car track was 26 feet. As the automobile emerged from El Molino avenue to cross this distance the car was for the first time seen approaching at the speed above indicated, but at the top of the hill more than a block away. The driver of the automobile at once attempted to stop it, but could not do so before reaching the track. The car traveled the length of the block, which was shown to be 300 feet, while the automobile was going a distance of not to exceed 26 feet, and after striking and demolishing it, went a further distance of 300 feet before being brought to a stop.

[1, 2] Upon this state of the record the appellant contends that the deceased driver of the car must be held to have been guilty of contributory negligence as a matter of law, and that the appellant was entitled to a verdict in its favor upon that ground alone. This contention has not the slightest semblance of merit. The cases cited by appellant to sustain it have no application to a state of facts such as the record herein discloses. The appeal is entirely without merit, and a clear case is presented for the imposition of a penalty upon the appellant for

having begun and prosecuted a frivolous appeal.

The judgment is affirmed, with $100 added damages for an appeal, which was frivolous and taken for delay.

We concur: SLOSS, J.; SHAW, J.

(178 Cal. 237)

ROBINSON et al. v. BRIEST. (L. A. 4212.)

(Supreme Court of California. May 8, 1918. Rehearing Denied June 6, 1918.)

1. QUIETING TITLE ⚿44(1) — BURDEN OF PROOF.

In a suit to remove cloud on title, plaintiff has the burden to prove the facts alleged, and on which the claim for judgment is based.

2. MINES AND MINERALS ⚿23(6) — ASSESSMENT WORK—NOTICE OF FAILURE TO CONTRIBUTE.

Rev. St. U. S. § 2324 (U. S. Comp. St. 1916, § 4620), provides for assessment work on mining claims, and that upon the failure of a co-owner to contribute his proportion, the co-owner, who has performed the labor, may give notice to the delinquent for 90 days, and if at the expiration of such time the delinquent fails or refuses to contribute his interest, the claim shall become the property of the co-owner who has made the improvements. Civ. Code, § 1426*o*, provides that when the notice in Rev. St. U. S. § 2324, is given it may be recorded in the office of the county recorder, and the original or certified copy of the record shall be prima facie evidence that the delinquent has failed or refused to contribute his proportion of the assessment work. A co-owner filed a notice provided for in these two sections, but did not file it within 90 days after service. *Held*, that such notice did not invoke the rule of evidence within section 1426*o*.

Department 2. Appeal from Superior Court, Riverside County; John M. York, Judge.

Action by Catharine N. Robinson and another against Grant A. Briest. Judgment for plaintiffs, and defendant appeals. Reversed.

Ben Goodrich, Olin Wellborn, Jr., and Stephen Monteleone, all of Los Angeles (Alfred H. McAdoo, of Los Angeles, of counsel), for appellant. McFarland & Irving, of Riverside, for respondents.

VICTOR E. SHAW, Judge pro tem. This action grew out of the following facts: Plaintiff, Catharine N. Robinson (wife of James M. Robinson), and defendant were co-owners of two certain groups of mining claims, upon one of which defendant asserted that he, at his own expense, had done the assessment work required by section 2324 of the Revised Statutes of the United States (U. S. Comp. St. 1916, § 4620) for the years 1910 to 1912, both inclusive; and that upon the other group he had done said assessment work for the years 1908 and 1912, both inclusive.

On November 5, 1913, he caused to be served upon plaintiff, as such co-owner, the notice provided by said section, wherein it was stated that if the co-owner neglected to pay and contribute her share of the expenditure so claimed to have been made by defendant within 90 days from the date of service, her interest in said mining property would become that of defendant.

The complaint, filed February 3, 1914, after stating the fact of service of said notices, alleged that plaintiff and defendant jointly, and not defendant alone, had done the assessment work, each contributing one-half the cost and expense thereof; that notwithstanding such fact defendant threatened to and would, unless restrained from so doing, file the notices so served, and an affidavit of service thereof, with the recorder of Riverside county, in which said mining claims were located, as provided in section 1426*o*, Civil Code, thus depriving plaintiff of the record title to a one-half interest therein, all to her irreparable damage, and prayed that it be adjudged that no sum whatsoever was unpaid by plaintiff on account of work and labor done in performing the annual assessment work on said mining claims, and asked that defendant be enjoined from filing the notices and affidavits of service thereof in the recorder's office of Riverside county. No injunctive order, however, was at any time issued.

By his answer, filed March 3, 1914, defendant, admitting that plaintiff was a co-owner of said property up to the expiration of 90 days after service of the notices, denied that she had, as alleged, contributed anything towards said assessment work for the years specified in the notices, and alleged the doing of the work by himself alone, as stated in the notices so served upon plaintiff, which notices, given pursuant to section 2324, United States Revised Statutes, together with affidavits of service thereof, were, on February 9, 1914, filed for record in the recorder's office of Riverside county.

The sole purpose of the action, as stated in the complaint, was to obtain an injunction restraining defendant from filing for record the notices and affidavits of service, as provided in section 1426*o*, Civil Code, which is as follows:

> "Whenever a co-owner * * * of a mining claim shall give to a delinquent co-owner * * * the notice in writing * * * provided for in section twenty-three hundred and twenty-four, Revised Statutes of the United States, an affidavit of the person giving such notice, stating the time, place, manner of service, and by whom and upon whom such service was made, shall be attached to a true copy of such notice, and such notice and affidavit must be recorded in the office of the county recorder, in books kept for that purpose, in the county in which the claim is situated, within ninety days, after the giving of such notice. * * * The original of such notice and affidavit, or a duly certified copy of the record thereof, shall be prima facie evidence that the delinquent mentioned in section twenty-three hundred and twenty-four has failed or refused to contribute his proportion of the expenditure required by that section."

The theory of the plaintiff, as alleged in the complaint, was that the filing of the notices, with affidavits of service thereof, would, under this provision of the statute, vest in defendant record title to the interest in the property theretofore owned by her, to which, however, if plaintiff had, as she alleged, contributed her share in doing the assessment work, he would not be entitled and therefore should be restrained from doing an act which would cloud her title. Thompson v. Pack (D. C.) 219 Fed. 624. As heretofore stated, however, the notices and affidavits, in the absence of any injunctive order, were filed on February 9, 1914.

[1] At the trial of the issues so joined by complaint and answer plaintiff declined to offer any evidence in support of the allegations contained in the complaint, and having rested, the defendant moved for a nonsuit, which motion was denied. This ruling, in our opinion, was clearly erroneous. The act which it was sought to enjoin having been performed, no purpose could be served by the making of an order enjoining its performance. On the other hand, assuming as the trial court apparently did that the complaint was sufficient in stating a cause of action to quiet title as against the defendant's claim based upon the admitted service of the notices as provided by section 2324, U. S. Rev. Stats., by reason of which, if the facts therein stated were true and plaintiff neglected within 90 days after such service to contribute her share, her interest in the mines would become the property of defendant, it devolved upon her to affirmatively prove that, as alleged, she had contributed her share towards doing the assessment work. From the effect declared by section 2324 to follow from the service of the notices, plaintiff, as such co-owner, if not delinquent, might safely rest until defendant by affirmative action invoked a judicial determination of the question, in which case the burden of proof would rest upon him to establish the facts upon which he based his claim to her interest in the property. O'Hanlon v. Ruby Gulch Min. Co., 48 Mont. 65, 135 Pac. 913. Having, however, sought affirmative relief upon the theory that the acts of defendant clouded her title, the burden was upon her as plaintiff to prove the facts alleged, and upon which she based her claim to recover judgment quieting her title. In Pixley v. Huggins, 15 Cal. 128, in discussing the test as to whether or not a certain instrument would cast a cloud upon the title of the plaintiff's property, it was said:

> "Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; if the proof would be unnecessary, no shade would be cast by the presence of the deed."

The statute (section 1426*o*, Civil Code) provides that the filing of the documents shall be within 90 days after the service of notice, which service was had on November 5th. As appears from the pleadings, they were not filed until after the expiration of 90 days; hence, by such act of filing, defendant obtained none of the rights or advantages which he might have secured by a compliance with the provision of section 1426*o*. Therefore, there was no cloud of record upon her title. Construing the complaint as stating a cause of action based upon the allegation that plaintiff had paid her full share for work done upon the mines, it devolved upon her, since such allegation was denied, to prove such fact. This she did not do, and in the absence of such proof it follows that the court erred in denying defendant's motion for nonsuit.

[2] With his answer defendant filed a cross-complaint, alleging that he had performed the required assessment labor upon the property for the years designated in said notices, which were served on November 5, 1913, and that on February 9, 1914, he filed with the recorder of Riverside county, wherein the mining property was located, the original of said notices, together with affidavits of service thereof, and asked that his title to the entire property be quieted as against plaintiff. To this cross-complaint plaintiff filed an answer denying the allegation that defendant had contributed other than one-half the entire expense of doing said work. After the denial of defendant's motion for nonsuit, the trial of the issues so joined by cross-complaint and answer proceeded, defendant offering in evidence the notices and affidavits of service filed with the recorder of Riverside county on February 9, 1914, upon the theory that, under the provisions of section 1426*o*, Civil Code, they constituted prima facie evidence that plaintiff had failed or refused to contribute her proportion of the expenditure upon said mines required by section 2324, Rev. Stats. of the United States, to which section 1426*o* is supplementary. But the provision contained in section 1426*o* requires that the documents shall be filed within 90 days after the making of such service; otherwise the filing is a futile act. It appears from his pleading that they were not filed until 5 or 6 days after the expiration of such time, and hence did not constitute prima facie evidence under the provisions of the rule specified in the section. Conceding that defendant was under the allegations of his cross-complaint, entitled to a decree of forfeiture, nevertheless, since the documents were not filed within 90 days from service, he was in no position to invoke the rule of evidence declared in section 1426*o*, Civil Code. It devolved upon him, in accordance with the ordinary rules of evidence, to establish the facts which entitled him to the forfeiture provided for by section 2324, Rev. Stats. of the United States, namely, that he and plaintiff were co-owners of the property; that he had done the annual assessment work as claimed; that plaintiff had not contributed her share of the expense of doing the same; that he had served upon her the notice pro-

vided for in said section; and that she failed or refused to contribute her proportion of such expenditure within 90 days from the service of such notice.

The judgment rendered in favor of plaintiff quieting her title was not within the issues joined by the complaint and answer, and no such relief was asked. Moreover, conceding such issue to have been joined, no evidence was offered by her in support of the allegations of her complaint.

The judgment is reversed.

We concur: MELVIN, J.; WILBUR, J.

(36 Cal. App. 644)

MORTON v. ANGST. (Civ. 2151.)

(District Court of Appeal, Second District, California. March 30, 1918.)

APPEAL AND ERROR ⟹1002—REVIEW—FINDINGS OF FACT.

Where there is a conflict in the evidence, the finding of the trial court will be affirmed.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Jennie Morton against Avis E. Angst, executrix of the estate of Annie E. Luscombe, deceased. From judgment for defendant, plaintiff appeals. Affirmed.

Arthur H. Barendt, of San Francisco (Arthur Wright, of Los Angeles, of counsel), for appellant. Frank Stewart and J. W. Howell, both of Los Angeles, for respondent.

CONREY, P. J. This is an action to recover upon a rejected claim against the estate of a deceased person. As stated by counsel for appellant, the cause of action is upon a quantum meruit for services alleged to have been rendered to the decedent by the plaintiff, both claim and complaint containing the incidental allegation that the decedent had promised to provide for plaintiff by will, but had not done so in the will admitted to probate.

An agreement to make any provision for any person by will is invalid, unless the same or some note or memorandum thereof is in writing, subscribed by the party to be charged or by his agent. Civ. Code, § 1624, subd. 7. It is in evidence that in April, 1913, the decedent made a will which by its terms gave to the plaintiff the sum of $150, and also made the plaintiff one of four residuary legatees, but this will was revoked by the later will which has been admitted to probate and in which no provision is made for the plaintiff. The court found the facts to be that the plaintiff did not render any services to the decedent in reliance upon or because of any promise of decedent to make plaintiff a beneficiary under her will, and that no contract was ever made by the decedent or on her behalf, either in writing or otherwise, wherein the decedent promised to compensate the plaintiff by bequest or otherwise for any services rendered to the decedent by the plaintiff. This finding is sustained by the evidence. The only testimony to which our attention is directed by counsel and upon which he relies as constituting proof that plaintiff rendered services because of or in reliance upon the existence of a will in her favor is so vague, indirect, and unsatisfactory that the court could not very reasonably have made any other finding than that which it did make.

Concerning the services alleged to have been rendered to the decedent for which the plaintiff seeks to be compensated, the court found that the plaintiff occasionally did perform some acts of service for the decedent, but that the same were done and performed voluntarily by the plaintiff without the expectation of making any charge therefor; that said services were rendered solely on account of friendship which had existed for a long time between the plaintiff and the decedent, and that the decedent treated such services as and believed them to be only acts of friendship; that decedent had no knowledge that plaintiff intended to make any charge for such services, and did not intend or expect to compensate the plaintiff therefor, otherwise than by reciprocal acts of friendship; that the value of the services rendered by plaintiff is not the sum of $1,000 nor any other sum. These findings also are amply supported by the evidence. It does appear that the plaintiff and the decedent for many years were intimate friends; that from time to time each of them visited the other; that the plaintiff did perform on behalf of the decedent certain acts of service in relation to shopping, hat making, letter writing, etc. They were such acts as one woman might do for another as acts of friendship, although some of them were also such acts as might have been done by a secretary or companion or milliner. But the court had before it all the evidence of these circumstances, related in detail by various witnesses, and made its findings as above stated. The utmost that can be said in favor of the appellant on this question is that there was a conflict in the evidence. That being so, it is a familiar rule that the findings must be affirmed. It appears to us that the claim of the plaintiff is without merit.

The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

(36 Cal. App. 660)

FITZGERALD v. SOUTHERN PAC. CO. et al. (Civ. 2379.)

(District Court of Appeal, First District, California. April 3, 1918. Rehearing Denied by Supreme Court May 31, 1918.)

1. CARRIERS 🔑315(4)—INJURY TO PASSENGER—PLEADING—VARIANCE.

Where plaintiff's complaint alleged that she was injured by being thrown from the train, and defendant's answer denied that she was injured by any fall, or by being thrown from the train, evidence that plaintiff fell from the train did not create a variance.

2. PLEADING 🔑387—CONSTRUING COMPLAINT AND ANSWER TOGETHER.

The complaint and the answer are to be read together in determining whether there is a variance between allegations and proof.

3. APPEAL AND ERROR 🔑1170(5)—VARIANCE—HARMLESS ERROR.

Defendant, not prejudiced as to any substantial right by a variance, is not entitled to reversal because of the same in view of Code Civ. Proc. § 475, providing that there shall be no reversal for an error which is not prejudicial.

4. CARRIERS 🔑280(1)—DUTY TO PASSENGER.

Carriers of passengers must use the utmost care and diligence for their safety, and are liable for injury caused by slight negligence.

5. CARRIERS 🔑247(4)—RELATION OF PASSENGER AND CARRIER.

The relation between carrier and passenger continues until the passenger has alighted.

6. CARRIERS 🔑280(1) — AFFORDING PASSENGER OPPORTUNITY TO ALIGHT.

A carrier must exercise as high a degree of care in affording a passenger a reasonable opportunity to alight in safety as in carrying safely.

7. CARRIERS 🔑347(11)—INJURY TO PASSENGERS — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

While particular circumstances may in some cases justify the court in declaring as a matter of law that a passenger is negligent in alighting from a moving train, the general rule in such case is that contributory negligence is a question for the jury.

8. CARRIERS 🔑347(11)—INJURY TO PASSENGERS — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

Whether plaintiff passenger was guilty of negligence in alighting from a train after it had started to leave the station, *held* a jury question.

9. DAMAGES 🔑132(2)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Where plaintiff, an able-bodied woman performing the housework for a family, was rendered helpless by the breaking of her hip, requiring the constant assistance of others, *held*, that a verdict for $5,000 was not excessive, in view of the probability of permanence of injury, pain suffered, and amount of medical bill.

10. APPEAL AND ERROR 🔑1066 — INSTRUCTIONS NOT APPLICABLE—HARMLESS ERROR.

Instructions based upon theory that plaintiff passenger was thrown from the car, while perhaps not applicable, could not have misled the jury, where the evidence on the point was perfectly clear.

11. TRIAL 🔑267(3) — REQUESTED INSTRUCTIONS—MODIFICATION.

Defendant's requested instructions to find for defendant if plaintiff passenger was injured in any other way than by being violently thrown from the car excluded every other cause of injury, and was properly modified, so as to include the other theories upon which the cause was tried.

12. TRIAL 🔑267(2) — REQUESTED INSTRUCTIONS—MODIFICATION.

Defendant's requested instruction being lengthy, involved, and argumentative, and therefore calculated to mislead the jury, was properly modified, so as to remove in a measure the objectionable features.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Mary Fitzgerald against the Southern Pacific Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Louis Oneal and James P. Sex, both of San Jose, for appellants. E. M. Rea and John P. Fitzgerald, both of San Jose, for respondent.

BEASLY, Judge pro tem. Plaintiff was injured on the 9th day of November, 1912, while leaving a Southern Pacific train at Madrone station in Santa Clara county, and defendant appeals from a judgment in her favor on account thereof entered pursuant to the verdict of a jury.

[1] The first claim of defendant is of a variance between the complaint and the proofs of plaintiff; it being claimed that the complaint alleged only that plaintiff was thrown from the train, and that this is not shown by the evidence.

Plaintiff's cause of action as stated in her complaint is that while she was a passenger on defendant's train, and when in the act of getting out of and off from its car and being still thereon the said car was, through the negligence of defendant and its agents, servants, and employés, suddenly started without allowing plaintiff sufficient time to get off, and in further consequence of the insufficient alarm preparatory to starting the train, and of the negligence of defendant's employés in running and conducting the train, the plaintiff was violently thrown therefrom to her injury.

The testimony shows that Miss Fitzgerald was a passenger on a train of the defendant from San Jose to her home at Madrone station on the day of her injury; that she was sitting in the rear coach about one-fourth of the way back from its front door when the train stopped at Madrone; that the train stopped there for a very brief time, the brakeman being ready to give the signal to start the train when it stopped, and no warning being given her of the starting of the train; that when she knew the train had stopped at Madrone she left her seat and walked as fast as she could to the front platform of the coach, and that when she got inside of the steps she saw that the train was very slowly moving; that she then got down as quickly as she could and got off the step, or, as she says at one point of her testimony, "jumped off"; that while she could see that the train was moving it was not going very fast, but that it was just moving and that was all. She fell on the platform, and was picked up suffering from a broken hip. There was, in addition to these facts, the evidence of several impartial witnesses, who were either passengers on the train, or had business at the platform when the train stopped, from which the jury was warranted in finding that the train stopped for an unusually short interval on this occasion. It further appears that Miss Fitzgerald was 71 years old; that had she been carried past her station the next stop would have been four miles away; that her train check, showing that she was a passenger for Madrone, was not taken up by the conductor, thus indicating that the train officer overlooked the fact that she was destined for Madrone station; and it further appears that the conductor was an extra conductor, on that run for the first time. From all this it appears that the jury were justified in finding that the train was started so quickly as to give the plaintiff no sufficient time to leave it, and that in consequence thereof she fell and was injured. The complaint appears to be a sufficient basis for the admission of this evidence.

[2, 3] That the defendant knew the case which it must meet to be that which the plaintiff presented appears from the defendant's answer in which it denies that she sustained her injury "by reason of any fall from said train, or by reason of being thrown therefrom," and avers "that she willfully attempted to alight from said train while it was in motion." The distinction upon which defendant bases its claim of a variance is one of verbiage, not of meaning; and the defendant was in no way surprised or misled thereby. Further, this objection of defendant was not definitely pointed out at the trial when, if sound, it might have been removed by a simple amendment. Even if plaintiff's contention as to variance were correct, still the complaint and answer are to be read together, and as it appears by so doing that the defendant was not prejudiced thereby in any substantial right, the matter is within the rule of section 475 of the Code of Civil Procedure, and the case will not be reversed on this ground.

It is contended that as a matter of law the evidence shows the plaintiff to have been guilty of contributory negligence in getting off the train, and that the manner in which she did so, and not any of the alleged acts of the defendant, was the sole proximate cause of her injury.

[4-6] Carriers of passengers must use the utmost care and diligence for their safety, and are liable for injury caused by their slight negligence. The relation between carrier and passenger continues until the passenger has alighted. The carrier must exercise as high a degree of care in affording passengers a reasonable opportunity to alight in safety as in carrying them safely. Maxwell v. Fresno City Ry. Co., 4 Cal. App. 746, 89 Pac. 367.

It was conceded upon the oral argument that there was sufficient evidence to warrant the jury in finding negligence on the part of the defendant in not stopping its train for a sufficient length of time to enable the plaintiff to depart therefrom in safety. The facts which it is claimed establish negligence of the defendant and contributory negligence of the plaintiff are interwoven. The questions are questions of fact for the jury. Carr v. Eel River R. R. Co., 98 Cal. 366, 33 Pac. 213, 21 L. R. A. 354; Raub v. Los Angeles, etc., R. R., 103 Cal. 474, 37 Pac. 374.

In the former case the Supreme Court said:

> "It is the duty of a railroad company to stop its train at a station for a reasonable time, in order that passengers may get on and off its cars with safety to themselves, and if it fails so to do, and injury results to passengers from the starting of the train while passengers are alighting, the company is guilty of negligence, and is responsible in damages for such injury. A common carrier of passengers for hire is bound to use the greatest care and diligence in their transportation consistent with the carrying on of his business. The act of a passenger in jumping from a moving train is not negligence per se but it is for the jury to say under all of the circumstances of the case whether the act of jumping was justifiable or not; and if the passenger jumped when carried less than 100 feet beyond the station after an attempt to alight at the station, where there was no sufficient time to alight with safety, and there is no evidence as to the speed of the train at the time of jumping, it is proper to instruct the jury that if they find that the train did not stop a reasonable length of time to allow the plaintiff to get off, and that she jumped therefrom while the train was in motion, and under such circumstances that an ordinarily cautious, careful, and prudent person would not have apprehended danger therefrom, she was entitled to recover; but if they found that the jumping was under circumstances where such a person would have apprehended danger, it was an act of carelessness which would relieve the defendant from responsibility, and entitle it to a verdict."

In the latter case the rule was stated substantially thus:

> "It is the duty of a railroad corporation to afford a reasonable time for passengers to alight from its cars at the station to which it has assumed to carry them, and if a passenger is injured while attempting to alight at such station, by reason of the sudden and unannounced starting of the train, the burden is thrown upon the company of showing that the injury was not the result of its own act or negligence. * * * Where it appears that when the train reached the station it stopped a short distance beyond the platform, and that while the plaintiff was in the act of alighting, and when he had reached the lower step of the car, the train started without any warning, throwing plaintiff to the ground, which caused the injuries for which the action was brought, the facts do not prove contributory negligence per se, but the question of the plaintiff's negligence should be submitted to the jury."

[7] These are plain statements of a simple rule of law. It is not necessary to analyze the facts out of which they arose in order to understand them. In the Raub Case the plaintiff was shown to have jumped from the train while it was moving; but no real

distinction is made in the application of the rule between jumping from a moving train and stepping therefrom. The rule applies to both sets of facts. That these questions are questions of fact is not only the settled rule in California, but while particular circumstances may, in some cases, justify the court in declaring as a matter of law that a passenger is negligent in alighting from a moving train, the general rule is that whether or not alighting from a train when it is in motion constitutes contributory negligence is a question of fact for the jury to determine in view of all of the circumstances of the particular case. See note to Hoylman v. K. & M. Ry. Co., 22 L. R. A. (N. S.) 741.

Here there are no particular circumstances which take the case out of the general rule, and the trial court properly left the question of negligence and contributory negligence to the jury. The appellants rely upon three cases which they claim are in conflict with the two cases last above cited. These cases are Campbell v. Los Angeles Ry. Co., 135 Cal. 137, 67 Pac. 50; Craven v. Central Pacific R. R. Co., 72 Cal. 345, 13 Pac. 878; Joyce v. Los Angeles Ry. Co., 147 Cal. 274, 82 Pac. 204.

Campbell's Case was a clear case of due care on the part of the carrier, a street car company, and of negligence on the part of the plaintiff. The plaintiff asked the conductor to stop the car so that he might alight. The conductor did not hear his first request. He repeated it, and the conductor then heard it and took steps to stop the car, at the same time admonishing him not to alight until the car had stopped. The passenger did leave the car before it stopped, and, in doing so, was injured. The court found that the plaintiff was negligent in so doing, and that his negligence was the sole cause of the injury. It will be noted that the court found from the facts of the case that the sole cause of the injury was the negligence of the plaintiff. The defendant's employé was doing all he could to comply with the request that the car be stopped. In defiance of the warning not to do so, and when he had no excuse, as his request to stop was being complied with, he stepped open-eyed into the danger by which he was injured.

In the case of Mrs. Craven the court stated the problem thus:

> "The whole evidence revolved around this one question, Did the plaintiff, at the very time of the accident, negligently jump off the train while it was moving, and thus cause or contribute to the injury? If she did not, then the verdict should have been for plaintiffs. If she did, then there can be no doubt that her negligence contributed proximately to the injury."

It will be noted that in stating the problem the court incorporated the idea of negligence in jumping off the train while it was moving, thus importing that it might be possible to get off a moving train without negligence. The jury found a verdict for the defendant in that case upon conflicting evidence as to whether, after the train had stopped, it was started carelessly and suddenly without giving Mrs. Craven a reasonable chance to alight, thus causing her to fall, or whether she jumped from the train while it was in motion, and thus caused or contributed to her own injury. The trial court refused to grant a new trial, and the Supreme Court sustained this order. There is nothing in the case supporting counsel's contention that jumping from a train or getting off a train while in motion is, in and of itself, conclusively negligent. Indeed in that very case the Supreme Court approved an instruction reading that, "if you believe the defendant did not afford the plaintiff Mrs. Craven a reasonable time for this purpose, but started the train suddenly while she was in the act of getting off the car and before she had time to alight, it failed to perform its duty, was guilty of negligence, and is liable to her for damages she has suffered thereby," given in connection with another instruction to the effect that if the negligence of the plaintiff caused or contributed to her injury she was not entitled to recover.

In Joyce v. Los Angeles Ry. Co. the plaintiff asked the conductor to stop at Hewitt street, and he told her that he would do so, and that Hewitt street was three blocks further on. While the conductor was on the street in front of the car, according to custom, signaling the car on its crossing a steam railroad track, the plaintiff, without notice to or knowledge of either conductor or motorman that she intended to leave the car, alighted therefrom two blocks before reaching Hewitt street and on the wrong side, and in consequence thereof was injured. She was warned by one of the passengers not to get off the car as it was in motion. She had no reasonable excuse for leaving the car. The jury found against her, and the Supreme Court held that this finding was sustained by the evidence. In both this case and Campbell's Case the car was not yet stopped, and in each of these cases the official of the car had been asked to stop it at a certain point by the passenger who was injured, and the passenger left the car while in motion and before the motorman had an opportunity to comply with the request to stop the car. In each case it was held that the carrier was not negligent. It is true that the court employed some general language in both the Joyce Case and Campbell Case, which seems to be, on first reading and if construed without reference to the facts to which the court was applying it, in conflict with the rule as laid down in the case of Carr v. Eel River and Raub's Case. This language is all embodied in the Joyce Case and the gist of it is embraced in the following quotations:

> "It is said in Booth on Street Railway Law, § 337: 'But it has been held to be negligence per se, which justifies a nonsuit, to step off the car while it is being slowed up, in order to stop in response to a passenger's request or when incumbered by a load or bundle.'"

And further:

> "It is said in Schouler on Bailments and Carriers (3d Ed.) § 662: 'Thus a railway passenger is not justified in jumping from the train while it is in motion, even though the carrier was negligent, whether in carrying him past the station or in starting before he had due opportunity to land.'"

The language quoted is not, however, necessarily in conflict with the rule that the question whether a passenger leaving a moving train is guilty of contributory negligence is in this state a question for the jury. The most that can be said is that it was held to be negligence per se to leave a rapidly moving car while it was being slowed up in response to a passenger's request, and that the quotation from Schouler is no more than a statement of what has been held in some cases to be the law, quoted by way of argument to show how far some authorities have gone, and was not intended to lay down a rigid rule to the effect that getting off a moving train or car is in itself conclusively a negligent act.

[8] These cases are thus seen to be reconcilable with Carr v. Eel River and the Raub Case, supra, which are therefore held to state the rule in California. In all the cases cited by appellant on this point the carrier was either found to have been guiltless of negligence or particular facts sustained a finding that under all the circumstances plaintiff was negligent in getting off the moving train. It is nowhere held that leaving a moving train constitutes negligence per se, and the cases cited by defendant in support of the contention are all thus seen to be either causes which particular facts took out of the general rule, or where the court found "negligence" in getting off the train while it was in motion, which upon all the facts is tantamount to a finding of contributory negligence. In this case it does not appear as a matter of law under all the circumstances that plaintiff was negligent in alighting from this train. The question was properly left to the jury for decision.

[9] It is claimed that the damages awarded by the jury were excessive. The verdict was for $5,000. As a result of her fall the plaintiff, who prior thereto was an able-bodied woman performing the housework for a family, was rendered helpless, requiring the constant assistance of others. She was in a hospital for a long time and suffered great pain from the injury. The trial occurred over 2½ years after the injury, and during all the time between the injury and the trial the plaintiff was in constant pain. She was unable to walk, except with crutches, at the time of the trial. Her broken hip had not united, and to all appearances her condition will be permanent. Her hospital bills and the services of one among several doctors whose services were necessary cost her $527. We cannot say under these circumstances that the amount of damages awarded by the jury were excessive.

[10] Many complaints were made of instructions given by the court and of the refusal to give instructions requested by the defendant; but an examination of the instructions as a whole discloses no reason for a reversal of this case. Without reciting the various instructions, it may be said that of those given by the court No. 5 was copied substantially from Carr v. Eel River, 98 Cal. 366, 33 Pac. 213, 21 L. R. A. 354, and correctly stated the law; Nos. 8 and 9 were based upon the theory that Miss Fitzgerald was thrown from the car and while perhaps not applicable in this case, nevertheless could not have misled the jury, as the evidence on that point was perfectly clear; Nos. 10 and 11 correctly stated the law; and No. 12 was generously fair to the defendant. No. 16, which is criticized because of its assumption that the plaintiff's nervous system was shocked by her injury, is not objectionable on this score because the evidence beyond question shows that her nervous system was shocked and injured.

[11] The instructions requested by defendant were correctly modified by the court, and those refused were properly refused; for example, as originally presented, defendant's requested instruction No. 5 directed the jury to find a verdict for the defendant if Miss Fitzgerald was injured in any other way than by being violently thrown from the train, thus excluding every other cause of injury, and it was for this reason incorrect. The court modified it properly so as to include the other theories upon which the case was tried.

[12] Defendant's instruction No. 12 was a lengthy, involved, and argumentative instruction calculated not intentionally but in fact to mislead the jury, and was properly modified so as to, in a measure, remove these objectionable features. Defendant's instruction No. 13, as presented by the defendant, undertook to state to the jury that if they believed Miss Fitzgerald's testimony that she was injured in consequence of voluntarily alighting from the train while it was moving, they must bring in a verdict in favor of the defendant, thus holding her guilty of contributory negligence, whereas, as a matter of law, as we have seen, the question of contributory negligence was one for the jury to decide.

The criticism of other instructions is not sufficiently important to require mention.

Judgment and ordered affirmed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

(36 Cal. App. 617)

WALKER et al. v. KINGSBURY, State Surveyor General. (Civ. 1805.)

(District Court of Appeal, Third District, California. March 29, 1918. Rehearing Denied by Supreme Court May 27, 1918.)

1. Public Lands 🔑53—Grants of State for Schools — Lands in Reservations—Lieu Lands.

Land withdrawn by the Secretary of the Interior pending determination as to the advisability of including it within a forest reservation is within a reservation within Rev. St. U. S. § 2275, as amended by Act Cong. Feb. 28, 1891, c. 384, 26 Stat. 796 (U. S. Comp. St. 1916, § 4860), appropriating and granting to and authorizing the state to select other lands where the school lands are within any reservation.

2. Public Lands 🔑106(2) — Determinations of Interior Department—Conclusiveness.

The question whether lands withdrawn from entry and settlement pending determination whether they should be included in a forest reservation and released thereafter were eliminated from the forest reserve is one of law as to which the courts are not controlled by departmental rulings.

3. Public Lands 🔑53—Lieu Lands—"National Forests"—"Forest Reservations."

Forest reservations authorized in 1891 are identical with "national forests" as they are called in Act Cong. March 4, 1907, c. 2907, 34 Stat. 1269 (U. S. Comp. St. 1916, § 5122), and in St. Cal. 1917, p. 1218, authorizing reselection when lands once selected as lieu lands are closed on account of the release of base lands from national forests, and neither act requires that the land shall have been permanently included in a national forest as a prerequisite to reselection, but it is sufficient if the lands have been withdrawn from settlement and entry pending determination of advisability of including it within the national forest.

4. Mandamus 🔑10—Reselection of Lieu Lands—When Issuable—Futile Acts.

The mere fact that the Land Department at Washington might refuse a reselection of lieu land where base land has been released from a national forest does not prevent award of writ of mandamus to compel the surveyor general of the state to make the reselection where petitioners had the clear right to a reselection, since the court could not assume that the Secretary of the Interior would arbitrarily interfere with such right.

Original petition in mandamus by Thomas B. Walker and the Waland Lumber Company, Incorporated, against W. S. Kingsbury, as Surveyor General of the state. Writ granted.

A. E. Bolton, of San Francisco, and Pardee & Pardee, of Susanville, for petitioners. U. S. Webb, Atty. Gen., and R. T. McKisick, Deputy Atty. Gen., for respondent.

CHIPMAN, P. J. Mandamus. It appears from the petition that on January 9, 1907, section 16, township 46 north, range 3 east, Mt. Diablo base and meridian, in this state, was unsurveyed land, and on that date was, by order of the Secretary of the Interior, "withdrawn from all forms at disposal under the public land laws of the United States, except the mineral laws, as a proposed addition to the Modoc Forest Reserve, in California"; that prior to June 4, 1908, J. E. Pardee, petitioners' assignor, made application to the state surveyor general to purchase certain described lands, "as indemnity state school land," said land so selected being vacant public land and subject to selection by the state as indemnity state school land; that about June 4, 1908, the state surveyor general filed in the Susanville land office indemnity state school land selection list No. 5765, for the land described in the Pardee application, assigning as a base certain land in said section 16; that thereafter the said application was approved by the surveyor general, and on May 25, 1909, a certificate of purchase, No. 5853, for said selected land, was issued to said Pardee, who assigned said certificate to petitioner Walker, and the latter conveyed to petitioner lumber company an interest therein; that on December 26, 1911, said section 16 was restored to settlement, and to entry on January 25, 1912; that thereafter, to wit, on November 14, 1912, said selection, No. 5765, was held for cancellation by the commissioner of the general land office, "for the stated reason that said base land in section 16 * * * had since the date of said selection, been eliminated from the Forest Reserve," and, thereafter, to wit, August 3, 1915, "the said selection was canceled by the United States Land Department for the same stated reason for which it had been held for cancellation as aforesaid"; that said selected lands are subject to selection by the state as indemnity state school lands; that on October 9, 1917, petitioners made application to the respondent as state surveyor general, to reselect said lands pursuant to the act of the Legislature of the state of California approved May 26, 1917 (Stats. 1917, p. 1218), sometimes referred to as chapter 674 of the Statutes of 1917, but the surveyor general refused and still refuses to make such reselection.

In his answer respondent admitted certain of the facts alleged in the petition, including those averments setting forth certain official actions and the dates thereof; alleged that the withdrawal of said lands in section 16 "was but temporary, and was made for the purpose of examining their adaptability and fitness to be added to and included within said Modoc Forest Reserve"; admits that said section 16 was restored to settlement and entry as alleged, but denies that the order of the secretary of the interior "eliminated said section 16 from said Modoc Reserve or from any national forest, and denies that said section 16 was at any time in said complaint mentioned, or ever, or at all, a part of or included within the exterior boundaries of any National Forest whatever," and denies that said section was ever or at all excluded from said Modoc forest reserve or from any national forest.

At the hearing respondent filed copy of certain official correspondence relating to the subject of the action. From these documents it appears that on November 14, 1912, the Commissioner of the General Land Office wrote to the register and receiver of the Susanville land office, in which attention was called to the filing by the state the indemnity land selection in question "included within the boundaries of a temporary forest withdrawal." The letter proceeds:

"An examination of the records of this office shows that the above-described lands were included in departmental withdrawal of January 5, 1907, for a proposed addition to the Modoc national forest, but were restored to settlement December 26, 1911, and to entry January 25, 1912. These lands having now been eliminated from the forest reserve, there appears no reason which requires or justifies any exchange of lands with the state. The selection in lieu thereof is therefore held for cancellation."

It further appears that transferee Pardee appealed from this decision to the Secretary of the Interior. In his decision, April 6, 1915, the secretary of that department said:

"The appeal contends that the base tracts were at the time of selection and when the selection was completed a portion of unsurveyed section 16 within an established reservation for forest purposes and so was a proper legal and unsatisfied base. This contention is not well founded. Said section 16, within which the land lies, had been withdrawn temporarily with a view to inclusion in a forest reserve, but October 11, 1911, it was restored from said withdrawal never having been in fact included in any established forest reserve. Land temporarily withdrawn and not included in any forest reserve is not proper base for indemnity school selection. State of California, 37 Land Dec. 499. The decision is correct and is affirmed."

Petitioners claim the right to have the state make a reselection of the land originally selected, basing their claim upon the act of May 26, 1917 (Stats. 1917, p. 1218), section 1 of which reads as follows:

"Section 1. Where the state has made a selection of other land in lieu of a sixteenth or thirty-sixth section within a national forest and such selection has been or may be rejected or held for rejection by the general land office for the stated reason that since the date of such selection the base land has been excluded from such national forest, it shall be the duty of the surveyor general, where the state has sold the selected land and upon application therefor by the holder of the certificate of purchase, to reselect the land on basis of the character of the bases used at the date the original selection was made, whenever such bases are available; provided, that the party applying for such reselection shall pay all of the fees and expenses required under the rules of the United States Land Office."

The position taken by the Interior Department was that, the withdrawal being but temporary, and the land not having as yet been incorporated as part of a forest reserve, and having been, when the case was acted upon, restored to entry, the state could not use it as base for indemnity and hence the selection was disallowed and was on August 3, 1915, canceled. We do not understand that petitioners claim any right arising from the original selection made under Mr. Pardee's application except as it brings them within the class of persons for whose benefit the act of May 26, 1917, was passed. We are thus brought to the question: Was the act intended to apply to selections made in lieu of school land not only situated within the boundaries of a forest reserve, but also to land temporarily withdrawn and for the time added to and forming a part of such reserve? The language of the act is:

"Where the state has made a selection of other land in lieu of a sixteenth or thirty-sixth section within a national forest and such selection has been or may be rejected * * * for the stated reason that since the date of such selection the base land has been excluded from such national forest, it shall be the duty of the surveyor general," etc.

So-called lieu locations are initiated under section 2275 of the Revised Statutes of the United States, as amended February 28, 1891 (chapter 384, 26 Stat. at L. 796; volume 6, Fed. Stat. Ann., p. 462 [U. S. Comp. St. 1916, § 4860]), which, so far as here pertinent, reads as follows:

"Sec. 2275. Where settlements * * * have been made, before the survey of the lands in the field, which are found to have been made on sections 16 or 36, these sections shall be subject to the claims of such settlers; * * * and * * * other lands of equal acreage are hereby appropriated and granted, and may be selected * * * in lieu of such as may be thus taken by pre-emption for homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said state or territory where sections 16 or 36 are mineral land, or are included within any Indian, Military, or other reservation, or are otherwise disposed of by the United States."

It is the latter part of the section with which we are here concerned, and particularly as to the scope and meaning of the language, "or other reservation, or are otherwise disposed of by the United States." Does this provision authorize the use of sections 16 and 36 (school lands) as base, when withdrawn as the land in question was and attached to a forest reserve, and which, when the selection was made, had not been as yet incorporated in a forest reserve permanently? This question was decided in Alberger v. Kingsbury, 6 Cal. App. 93, 91 Pac. 674, and the decision had the approval of the Supreme Court by denying a petition for hearing in that court. The land in that case was withdrawn for the same purpose and in like manner and was to form part of the same forest reserve as was the land in the present case. The action was to compel defendant to receive and file the plaintiff's application to purchase certain land in lieu of section 16, concededly within the township withdrawn. It was in accordance with the decision in that case, made in July, 1907, that defendant, in 1908, when the Pardee application was made, approved the location. In the Alberger Case the question was very fully and carefully discussed and was well sustained by decisions of the United States Supreme Court. We quote briefly:

> "The words 'other reservations' are evidently used in a broad sense in the statute. The word 'reservation' is defined in the Standard Dictionary as 'that which is reserved, kept back, withheld.' The said sixteenth section, to which the state would be otherwise entitled, has been by the proper authorities of the United States—the Land Department—kept back, withheld, and reserved. It has been reserved with a view to including it in a permanent forest reserve. The state is not now entitled to it because the United States has seen fit to reserve it for its own uses. It is no answer to this to say that the reservation may not be made permanent, and that the state may yet be entitled to the land. That might be said as to any other kind of reservation, for military purposes, for Indians, or any other purpose. A reservation is a reservation, no matter what may be the purpose, nor for how long a time the reservation may continue. The statute does not fix a time during which it shall continue, and we are not at liberty to do so. In our opinion, the question as to time refers only to the time when the state desires to take the land. Can the state take the section in place now? Evidently not, because it has been reserved and withheld from sale. * * * When the reservation exists, no matter how long it may continue, and the state is deprived of the lands in place, it immediately has the right to select and take other lands in lieu of the lands withheld from it. This right continues as long as the withdrawal or reservation continues. We know of no decision or rule of law that requires the state to try the question as to the time the United States may desire to keep the land in reserve." "The term 'reservation,' as used with relation to the public lands, means a withdrawal of a specified portion of the public domain from the administration of the land office and from disposal under the land laws, and the appropriation thereof, for the time being, to some particular use or purpose of the general government." 32 Cyc. 858.

It will be observed that the decision of the interior department was made after the land in question was restored to entry. It was restored in December, 1911, to settlement, and in January, 1912, to entry. It was in November, 1912, that the Commissioner of the General Land Office, in passing upon the Pardee location, wrote to the register and receiver of the Susanville land office, calling their attention to the fact that the land was included within the boundaries of a temporary forest withdrawal, and stating that:

> "Lands were included in departmental withdrawal, of January 5, 1907, for a proposed addition to the Modoc National Forest, but were restored to settlement December 26, 1911, and to entry January 25, 1912. These lands having now been eliminated from the forest reserve, there appears no reason which requires or justifies any exchange of lands with the state."

It was on appeal from this decision that the Secretary of the Interior in 1915 confirmed the ruling of the Land Department. How far the fact that the land was restored to the state before the Interior Department was called upon to decide the Pardee location, we do not know. However, it is fair to assume that the location was, in part at least, canceled because it was the opinion of the Land Department of the government, expressed in the letter of the Secretary of the Interior, that "land temporarily withdrawn and not included in any forest reserve is not proper base for indemnity school selection."

[1, 2] We may well ask what was meant by the Interior Department in its decision when it said, "These lands having now been eliminated from the forest reserve, there appears no reason," etc. How could the lands have been "eliminated from the forest reserve" if they did not form a part of the reserve before being eliminated? Here was a question of law, and not of fact; for no question of fact was involved. The only question before the Land Department was one of construction of the act of Congress on an admitted state of facts. As a question of law, we think the decision in the Alberger Case unassailable and should have been followed in disposing of the Pardee selection; for on a pure question of law the courts are not controlled by departmental rulings.

> "It is urged that this question of title has been determined in the Land Department adversely to the claim of the plaintiff. This is doubtless true, but it was so determined, not upon any question of fact, but upon a construction of the law; and such matter, as we have repeatedly held, is not concluded by the decision of the Land Department. Johnson v. Towsley, 80 U. S. (13 Wall.) 72, 20 L. Ed. 485; Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424; Quinby v. Conlan, 104 U. S. 420, 26 L. Ed. 800; Doolan v. Carr, 125 U. S. 618, 624, 8 Sup. Ct. 1228, 31 L. Ed. 844; Lake Superior Ship Canal, R. & I. Co. v. Cunningham, 155 U. S. 354, 15 Sup. Ct. 103, 39 L. Ed. 183." Wisconsin Central v. Forsythe, 159 U. S. 46, 61, 15 Sup. Ct. 1020, 1025, 40 L. Ed. 76.

[3] The question now before us must be dealt with not only in view of the admitted facts, but also in view of the law and the rights of parties under the law. We are to determine the true intent of the remedial statute of 1917 under which petitioners are seeking relief. It may be proper to state that, when these reservations were first authorized in 1891, they were called "forest reserves." Later, in 1907, by act of Congress they were called "national forests," and the latter appellation is the one used in the act of 1917 supra, but both designations refer to the same thing. The Legislature has said by the act of 1917 that, where the state has made a selection of other land in lieu of a sixteenth or thirty-sixth section "within a national forest," and such selection has been rejected "for the stated reason that since the date of such selection the base land has been excluded from such national forest," it shall be the duty of the surveyor general to reselect the land, etc. The Pardee selection was in lieu of part of a sixteenth section; it was finally rejected for the stated reason that since the date of the selection the base land had been excluded from the forest reservation, and it was for that reason the state was not entitled to indemnity. If, therefore, the base land used for the selection was within a national forest, petitioners' right to the reselection sought would seem to be

clear. It was held in the Alberger Case that this base land was a part of the reservation, although made so temporarily, and until restored to entry, its legal status was the same as any other land included in the reserve. Bearing in mind that the terms "forest reserve" and "national forest" mean the same thing, what did the Legislature intend when it enacted this law? Did it intend to confine the relief to cases only where school land had been permanently incorporated in a forest reservation and afterwards restored to entry, or did it intend to give relief not only to such cases, but also to cases where the school land had been temporarily attached to and for the time made a part of a reservation or national forest.

Respondent's position is thus stated in his brief:

> "We respectfully contend that the issue really presented is one of fact, viz. was said section 16, T. 46 N., R. 3 E., M. D. B. & M., ever included within or excluded from a national forest? It is to be borne in mind that the right granted by the provisions of chapter 674 of the California Statutes of 1917 is by carefully guarded language restricted to cases wherein 'the base land has been excluded from such national forests.' The act says nothing about 'other reservations,' or 'temporary forest reserves.' It is distinctly and definitely limited in its application to national forests."

It seems to us we are authorized to presume that the Legislature used the terms "national forest" in the sense the court in the Alberger Case regarded them; that the indemnity provided by section 2275 of the Revised Statutes U. S., included such a reservation as is here involved.

We do not think we are compelled to put an interpretation on the terms "national forest" which would restrict their meaning to lands embraced in what respondent is pleased to designate as a permanent reservation, as distinguished from lands embraced in a temporary reservation, which latter, for the time being, are part of such permanent reservation. We have seen that in applying existing statutes the courts make no such distinction. The withdrawal of land for forest purposes is a reservation of such land, and operates as effectively for all purposes of disposition when temporarily withdrawn as when set apart with no present intention to restore it to entry. In point of fact, government reservations of land cannot be said to be permanent in the sense that the land may not at some time be restored to entry. Land set apart as Indian or military reservations has been in various instances restored to public entry. Respondent's construction of the statute assumes that school land in what he speaks of as a permanent national forest may be restored. Otherwise the statute would have no application. No satisfactory reason can be suggested for assuming that the Legislature intended to restrict the right of indemnity to cases where the land restored had been withdrawn from a permanent reservation. No such cases had arisen when the act of 1917 was passed, nor was there any reason for anticipating that they would arise in the near future. But cases had arisen, and presumably were by the Legislature known to exist, where the restored land had been incorporated in a reservation with a view of becoming part of a permanent national forest, and for sufficient reason had been restored to entry. Such land bore the same legal relation to the national forest as did land included in the permanent boundaries, and was equally entitled to the remedial provisions of the act of 1917. There was no reason, therefore, for making any distinction between the two classes of land selected and subsequently restored. We think that when the state made the Pardee selection it used school land as a base which had become for the time, part of and was "within a national forest"; that, when the Legislature used the language "within a national forest," it intended to refer to all school land which had been used as base for lieu selection, which had been withdrawn by the Land Department for forest reservation purposes, and where such selection, as in this case, has been rejected by the General Land Office for the stated reason that since the date of such selection the base land has been excluded from forest reservation uses.

[4] Respondent advances the point that the writ should be denied because, if issued, it would be an idle act, and this for the reason that, should the writ be granted, and should the respondent comply therewith, the reselection would be rejected when it reached the Land Department at Washington If petitioners have the clear right to the reselection, as we think they have, under the act of 1917 we may not assume that the Secretary of the Interior will arbitrarily interfere with its consummation. The Land Department has held both ways, as we understand, during different administrations, on the very question here involved. That Department may not, should the question again be presented, hold to its more recent ruling. At any rate, our duty is to announce the law of the case and leave the consequences to take care of themselves. We cannot deny the relief sought on the assumption that it would be an idle act.

Our conclusion is that the writ should be granted; and it is so ordered.

We concur: HART, J.; BURNETT, J.

(36 Cal. App. 608)

BATT v. STEDMAN. (Civ. 1793.)

(District Court of Appeal, Third District, California. March 29, 1918. Rehearing Denied by Supreme Court May 27, 1918.)

1. MINES AND MINERALS 🔑19(1)—LOCATION NOTICE—STATUTE.

Civ. Code, § 1426, providing that one may locate a lode claim by posting a notice of location at the "point of discovery," must be complied with.

2. MINES AND MINERALS 🔑38(15) — LOCATION NOTICE—PLACE OF POSTING.

Although plaintiff testified that he posted notice of location within 75 feet of the "point of discovery," where immediately following such testimony he stated that he put the notice on the lode, where the quartz showed, a finding that the notice was posted at the "point of discovery," as required by Civ. Code, § 1426, was warranted.

3. MINES AND MINERALS 🔑38(24)—ACTION TO QUIET TITLE — TITLE OF PLAINTIFF — FINDING.

In action to quiet title to lode claim, where plaintiff's right of possession and ownership was not dependent upon a prescriptive title, it was sufficient to find that at the commencement of the action plaintiff was the owner and entitled to possession, so that the portion of the finding as to possession and ownership "for more than five years prior" to commencement of action could be regarded as surplusage.

4. MINES AND MINERALS 🔑38(19) — LODE LOCATION—SUFFICIENCY.

In action to quiet title to a lode claim, *held*, under the evidence, that, though markings on the ground were not exactly where they should be, they were sufficient, when taken with the amended location, to identify the land claimed with reasonable certainty.

5. MINES AND MINERALS 🔑19(1)—LOCATION NOTICES—CONSTRUCTION.

Location notices should be liberally construed, and in determining the sufficiency of a location notice the most important guide is the purpose of the notice, which is to identify the land claimed with reasonable certainty.

6. MINES AND MINERALS 🔑38(19) — LOCATION CERTIFICATES—SUFFICIENCY.

Testimony as to finding stone monuments on boundaries of lode claim and reference to such monuments in amended location certificate, *held* to satisfy Civ. Code, § 1426, requiring a description of the claim by reference to some natural object.

7. EVIDENCE 🔑379—SURVEYOR'S MAP—CORRECTNESS.

In suit to quiet title to mining claims, correctness of surveyor's map purporting to show area in conflict between the locations of plaintiff and defendant, *held* sufficiently established by the evidence.

8. MINES AND MINERALS 🔑17(1)—PLACE OF LOCATION—VALIDITY.

Where plaintiff when he located placer claim made a discovery of gold therein, and since has mined the claim and done the assessment work every year, it must be held that the land was valuable for placer mining.

Appeal from Superior Court, Butte County; K. S. Mahon, Judge.

Action by August J. Batt against Francis M. Stedman. Judgment for plaintiff, and defendant appeals. Affirmed.

S. W. Molkenbuhr, of San Francisco, for appellant. W. H. Carlin, of Marysville, for respondent.

HART, J. As respondent states that appellant, in his brief, has substantially stated the case, we adopt appellant's statement, as follows:

"This is an action to quiet title, pursuant to section 2326, Revised Statutes of the United States [U. S. Comp. St. 1916, § 4623], brought upon adverse claims of respondent on the Samson lode and Annex placer locations to appellant's application for United States patent on the Mammoth lode claim. After trial, without a jury, the court rendered judgment in favor of respondent, awarding to him certain areas in conflict with appellant's claim. Appellant, nevertheless, was awarded (upon his cross-complaint) the possession of a small fraction of the Mammoth location. Appellant moved for a new trial, which motion was denied. An appeal was thereafter taken from the judgment.

"Respondent's initial and sole location of the Annex placer claim was made January 1, 1909. Respondent's first attempted location of the Samson lode claim was made January 1, 1911; an alleged amended location followed on August 26, 1911. A third location was made, but it was contended during the trial that it was made pursuant to advice and instructions of respondent's counsel; the latter testifying that had he known of the existence of the second location of August 26, 1911, he would not have advised respondent to relocate; that his advice was given because a certificate of the searcher failed to report the second location.

"Appellant located the Mammoth lode claim on July 15, 1912; an amended location, preparatory to application for patent and subsequent to a survey, was made August 27, 1914. Respondent's Samson location was claimed to have been made upon a vein running easterly and westerly; appellant's location was upon a vein having a northerly and southerly course.

"Upon motion for a new trial, appellant urged, and upon this appeal urges, that the judgment be reversed because certain indispensable findings in favor of respondent are not supported by the evidence."

1. Appellant contends that finding No. 1 is not supported by the evidence. Said finding is:

"At the date of the commencement of this action plaintiff was, and for more than five years prior and up to said date had been, ever since has been, and now is, the owner in fee, in the actual possession and entitled to the possession of" two parcels of land, described by metes and bounds.

[1, 2] Appellant makes the point that the location notice of the Samson lode claim was not posted at the point of discovery, as required by section 1426, Civil Code. The claim is that the evidence shows it to have been posted at a point 75 feet from the discovery.

There can be no question that the requirement of the Code must be complied with. Said section 1426 is almost identical in language with section 3610 of the Political Code of Montana, under which latter section it has been held that the posting of a notice of location 60 feet from the point of discovery did not comply with the provisions of the section. Butte Northern Copper Co. v. Radmilovich, 101 Pac. 1078.

Appellant calls attention to the following testimony of the plaintiff:

"Mr. Carlin: Q. You made a discovery of gold on the lode? A. Yes, sir. After I made that discovery I filed on the claim. I posted the notice. Q. Where? A. On the lode.

"The Court: Where, with relation to the point of discovery? A. Within probably 75 feet of the point of discovery."

Immediately following said testimony is this question and answer:

"Mr. Carlin: Tell the court how you posted that notice, and what you did in posting it. A. In the first place, I dumped out some rock and found there was gold on it, and I went on and made out the papers and put up a post; nailed a box on it; put the notice in it and put it on the lode and surrounded it by a monument of rock right where the quartz shows—where the lode shows."

It is quite evident that the trial court must have considered the witness' statement that he posted the notice "within probably 75 feet of the point of discovery" as a slip of the tongue or, perhaps, made through a misapprehension of the question asked him, and that the finding was based on the last answer above quoted, which showed there had been a compliance with the requirements of the section as to posting. Therefore the rule that the legal right to possession of mining claims can only come from a valid location (Horswell v. Ruiz et al., 67 Cal. 111, 7 Pac. 197) is satisfied in this case.

[3] That portion of said finding No. 1 which declares that plaintiff, "for more than five years prior" to the commencement of the action, had been the owner in fee and entitled to the possession of the Samson lode claim, is criticized as being erroneous for the reason that respondent's first location was made on January 1, 1911, and the complaint was filed December 23, 1914, a period of less than four years. As seen, the finding described two parcels of land by metes and bounds. It is conceded that the description of one of these parcels covered the Samson claim and the other the Annex. The Annex claim having been located January 1, 1909, the finding, so far as that parcel was concerned, was true, more than five years having elapsed between the date of the location and the filing of the complaint, while it would seem that it was not true as to the Samson claim. As stated by appellant, the action is brought upon adverse claims by respondent to appellant's application for patent. Plaintiff's right of ownership and possession is in no way dependent upon a prescriptive title, and the words, "for more than five years prior" in the finding, so far as referring to the Samson claim, may be disregarded as surplusage. Doherty v. Cal. Nav., etc., Co., 6 Cal. App. 131, 91 Pac. 419; Risdon v. Steyner, 9 Cal. App. 344, 99 Pac. 377. It was sufficient to find that, at the commencement of the action, plaintiff was the owner and entitled to the possession of said mining claims.

[4] It is next contended that the Samson lode location was not distinctly marked on the ground. The plaintiff testified as follows:

"I stepped from the point where I put the [location] notice 300 feet in a southerly direction, crosswise from the lode. * * * Q. What did you place when you went over the 300 feet? A. Put a monument there of 4x4, about 3 feet high, between 3 and 4 feet, and placed it there and surrounded it by rocks. From this monument I went in an easterly direction 750 feet, and also put there a 4x4, and placed a rock around it—a similar monument. Then I went 300 feet in a northerly direction, and placed another monument there. That brought me about in the center line of the claim on the lode. Then I went 300 feet in a northerly direction and placed another similar monument there, just the same. Then I went 750 feet *easterly*, and I placed a similar monument there. Then I went on 750 feet more, and I placed another similar monument. The monuments were all similar, except as to markings. Then I went in a southerly direction 300 feet, and placed a similar monument there. That took me to about the center of the lode. Then I went 300 feet more, southerly, and placed another monument. Then I went 750 feet in an eastern direction to the point of beginning, you might call it, on the side line. There were markings on the monuments or stakes, which said the 'Samson Mining Claim,' and gave the description of the corners. For instance, the northeast corner was marked 'NE' and so on. I don't think I marked the stake in the center on the south side line. Q. When you got through there, state how your claim was marked on the ground. A. So any one could see it; plain."

The above description is meaningless, considered as the description of a lode mining claim. The first stake south of the discovery and the last one named would be 3,000 feet apart, and the lines would not entirely inclose any land. But it will be observed that if the word "easterly," which we have underscored in the above description, were to be read "westerly," a parallelogram would be described having the prescribed dimensions of a lode mining claim, to wit, 1,500 in length and 600 feet in width. That the claim was in fact so marked would appear from the testimony of R. A. Grass, who signed as a witness the notice of location of the Samson claim made on January 1, 1911. He testified:

"I was there when Batt put up the stakes. We put up the notice and then Mr. Batt put up the corners and the side stakes. The notice was put up about the center of the claim, east and west. I ascertained the existence of the lode that was there; it ran east and west. It may vary a few degrees; it may be a little north of west. There was an outcrop in the ground which you could follow. The claim was located on that lode and 300 feet on each side thereof. The claim was 1,500 feet in length. The corners and sides were marked with stakes. Mr. Batt and his son put the stakes up and I went to see. He told me to see whether those stakes were up—they were all up, the corners or end and side line stakes; they might not have been in a straight line because we did not have any surveying instruments. There were stone monuments around all of the stakes. After we got through marking the claim, there was nothing to prevent any person going on there and seeing the boundaries of the claim. It was in plain sight; any one could see the monuments."

In the amended location certificate, dated August 26, 1911, the boundaries of the Samson claim are described as follows:

> "Beginning at a monument of stones placed on center of said ledge or lode, thence 300 feet southerly to monument of stones placed on south boundary line, thence westerly 750 feet to a monument of stones placed on southwest corner, thence northerly 600 feet to a monument of stones placed on the northwest corner, thence easterly 1,500 feet and parallel with said vein to a monument of stones placed on the northeast corner, thence southerly 600 feet to a monument of stones placed on the southeasterly corner, thence westerly 750 feet to monument of stones and place of beginning."

J. C. Reaves, a deputy United States mineral surveyor, testified that he surveyed the Samson and Annex claims in November, 1914; that he had with him a copy of the amended location certificate of the Samson lode; and that Mr. Batt pointed out to him location stakes and monuments. At the northwest corner he found a 4x4 pine post in a mound of stone; the post was marked "Samson NWcor." At the southwest corner he found a 4x4 post in a mound of stones. At a point on the south side line he found a mound of stone, but no stake, and he also found a stake in a mound of stone at the east end of the lode line. A post was standing with the remains of a box "in which the location notice was said to have been posted; that post and the box on it faced an outcrop of quartz near a tunnel." The witness said he found no evidence on the southeast corner, on the southwest corner, or on the corner on the north side line, and he stated that "the southeast corner fell in the burned portion of Forbestown, that had burned probably since the posts were set." The witness described the courses and distances he ran, which differed in more or less degree from the calls in the amended location certificate and from the claim as delineated by the remaining monuments. We are not inclined to detail his testimony at length.

[5] "Location notices should be liberally construed, having reference to the circumstances under which, and the character of the parties by which, they are generally made; and in determining the sufficiency of a location notice, the most important guide is the purpose of the notice, which is to identify the land claimed with reasonable certainty." Green v. Gavin, 10 Cal. App. 330, 101 Pac. 931. In Talmadge v. St. John, 129 Cal. 430, 62 Pac. 79, it is held that "the proceedings of miners in the location of mining claims are to be regarded with indulgence, and their notices of location are to be liberally construed." It is true that the surveyor drew in some of the lines as they were marked on the ground in order to bring the boundaries of the claim within the limits prescribed by law. In Lindley on Mines, § 396, citing Doe v. Sanger, 83 Cal. 203, 23 Pac. 365, it is said, "For the purpose of obtaining parallelism, or casting off excess, the lines may be drawn in." We hold that, while the markings on the ground were not exactly where they should be, they were sufficient, taken with the amended location certificate, "to identify the land claimed with reasonable certainty."

[6] Section 1426 of the Civil Code requires "a description of the claim by reference to some natural object, or permanent monument, as will identify the claim located." It is the contention of appellant that the Samson location certificates do not show a compliance with that requirement. It is held in Talmadge v. St. John, supra, that "a reference to permanent posts or stone monuments erected on the exterior boundaries is sufficient." The testimony of the witness, Reaves, as to his finding stone monuments on the exterior boundaries of the claim, and the reference in the amended location certificate thereto, satisfy the requirement of the Code section in this respect.

[7] Appellant contends that a map made by the surveyor and appearing in the transcript, which purports to show the area in conflict between the locations of plaintiff and defendant, is without support in the evidence. As we have seen, the surveyor testified that he found four fixed monuments, on certain corners and one side line of the claim, and with one boundary line fixed the remaining three could easily be established. The witness testified:

> "I established no point; I simply extended the original, the mound pointed out to me by Mr. Batt, being the locator, and pointed out to me that he located to be the original location monument. In surveying, I considered both the data on the ground, as well as that given in the notice of location."

We think the correctness of the map is sufficiently established by the evidence.

As to the contention of appellant that the location as established by the surveyor is excessive, it appears from the map that the claim does not form a perfect parallelogram. From the northwest and the southwest corners the respective lines run to the north and south center side stakes on a course S. 42° 08′ E., and from the latter points to the northeast and southeast corners on a course S. 68° 28′ E. As a consequence of the angles thus shown, the west end line is 627 feet and the east end line is 608 feet in length. But the surveyor testified that the distance "would be 600 feet at right angles." So as to the distance from the point of location to the original mound in the center of the south side line, which appellant asserts exceeds 370 feet. We have the testimony of the surveyor that he surveyed a claim 600 by 1,500 feet.

[8] We cannot hold with appellant in his claim that the Annex placer location is void because respondent failed to show that the land was valuable for placer mining. In Garibaldi v. Grillo, 17 Cal. App. 540, 120 Pac. 425, we held:

"Where minerals have been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, the requirements of the statute have been met."

Plaintiff testified that when he located the placer claim on January 1, 1909, he made a discovery of gold therein; that he panned and found there was some gold on the claim; that he has mined the claim more or less every year—"placer mining, washing the earth." He stated that he had kept no record of how much gold he had taken out; that he mined with water, using sluice boxes and ground sluices. He has done the assessment work each year since locating the claim. Under these circumstances, it must be held that the land was valuable for placer mining.

Other points made by appellant we do not consider necessary particularly to notice. This seems to be a case where a miner, in good faith, located mining claims on unoccupied public domain of the United States. At the time of the commencement of the action he had been in possession of one claim for almost six years, and of the other for nearly four years. The annual assessment work had been done by him on both claims. Gold had been found in both, and a tunnel 212 feet in length had been run on the lode claim.

We think the judgment should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

(36 Cal. App. 739)

PEOPLE v. CLARK. (Cr. 423.)

(District Court of Appeal, Third District, California. April 9, 1918.)

Criminal Law 🔑1130(4)—Appeal—Failure to File Briefs or Appear.

Where transcripts were filed November 13, 1917, but no briefs were filed within the time extended for their filing, and the case was placed upon the April calendar, at which time there was no appearance by accused, the case may be submitted on the record on motion of the Attorney General.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

J. H. Clark was convicted of grand larceny, and he appeals. Affirmed.

Martin I. Welsh and Ralph H. Lewis, both of Sacramento, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. Defendant appealed to this court from the judgment of the superior court of the county of Sacramento, under which he was sentenced to serve a term in state's prison, having previously been convicted by a jury of the crime of grand larceny.

The clerk's transcript and the reporter's transcript were filed in this court on the 13th day of November, 1917. No briefs have been filed and the time for the filing thereof has not been extended. The case was placed upon the April calendar of this court, at which time there was no appearance on behalf of appellant, and the Attorney General moved that it be submitted on the record. On the authority of People v. Wagner, 171 Pac. 699, and the cases therein cited, the judgment is affirmed.

(36 Cal. App. 602)

McNEELY v. SUPERIOR COURT OF LOS ANGELES COUNTY. (Civ. 2539.)

(District Court of Appeal, Second District, California. March 28, 1918.)

1. Judgment 🔑98, 241 — Joint Tort-Feasors.

Under Code Civ. Proc. § 579, providing that in an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper, where two joint tort-feasors are sued and one of them suffers default, a judgment may be taken against him and the action proceeded with against the other and a separate judgment rendered against him.

2. Mandamus 🔑31—Compelling Trial of Case—Discretion.

Under Code Civ. Proc. § 579, where in an action against two joint tort-feasors one suffered a default and judgment was entered against him, the court had no discretion, although default had been set aside and appeal from order setting aside was pending, to determine whether the trial should proceed as to the other defendant, and writ of mandate will lie to compel judge to try action.

Original application for a writ of mandate by Robert McNeely against the Superior Court of Los Angeles County, Charles Wellborn, Judge thereof. Peremptory writ issued.

W. A. Alderson, of Los Angeles, for petitioner. G. F. McCulloch, of Los Angeles, for respondent.

WORKS, Judge pro tem. This proceeding concerns a certain action in which the petitioner, as plaintiff, sued one Connell and one Hill for damages as joint tort-feasors. Hill appeared in the action and made answer to the complaint, but the default of Connell was taken, whereupon the petitioner elected to proceed against the latter under the default, and judgment in the sum of $1,500 was entered against him. Connell then came forward, and presented a motion to set aside the default, and the motion was granted. The petitioner appealed from the order thus made, and the appeal is now pending. The action was set down for trial against Hill, but, at the time set, the respondent refused to proceed with the hearing. The petitioner then filed in this court his application for a writ of mandate, requiring the respondent to try the action as to Hill, and an alternative writ was issued.

[1] It is contended that the petitioner is entitled to the writ under the terms of section 579 of the Code of Civil Procedure, which reads:

> "In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper."

The respondent contends, however, that, in an action against several joint tort-feasors, a several judgment is not proper, and cites McCool v. Mahoney, 54 Cal. 491, and Marriott v. Williams, 152 Cal. 705, 711, 93 Pac. 875. These cases decide that where an action is tried against joint tort-feasors, only one judgment may be pronounced against them all; but a later case has announced the rule that where, as in the action now in question, two joint tort-feasors are sued and one of them suffers default, then a judgment may be taken against him and the action be proceeded with against the other and a separate judgment be rendered against him. Cole v. Roebling Construction Co., 156 Cal. 443, 105 Pac. 255.

[2] It is insisted that, after judgment had been rendered against Connell, it was left to the discretion of the respondent to determine whether a trial should proceed as to Hill, and the well-known rule is invoked that the writ of mandate will not run to control judicial discretion. Under section 579 the court did have a discretion to determine whether a judgment should be rendered against Connell in advance of a trial against Hill. Further than that there was no discretion reposed in the court. Under the latter part of the section the petitioner has the right to press the action for trial, and it is the duty of the respondent to try it.

A peremptory writ of mandate will issue as prayed for.

We concur: CONREY, P. J.; JAMES, J.

(36 Cal. App. 653)

MARCONI WIRELESS TELEGRAPH CO. OF AMERICA v. NORTH PACIFIC S. S. CO. (Civ. 2305.)

(District Court of Appeal, First District, California. April 2, 1918.)

1. DAMAGES 🔑189—BREACH OF CONTRACT—PRIMA FACIE CASE — DAMAGES TO UNPAID PRICE.

In an action for breach of contract whereby plaintiff was to install wireless equipment on defendant's steamer, keep it in repair, and furnish and pay a competent operator, it being obvious that plaintiff would be put to expense in performing, its mere introduction of the contract and showing of breach did not make a prima facie case of damages to the extent of the unpaid contract price; the burden being upon plaintiff to prove the profits it would have made had defendant complied with its contract and paid for the services.

2. TELEGRAPHS AND TELEPHONES 🔑33(1) — FILING OF RATES — FURNISHING WIRELESS SERVICE.

Public Utilities Act (St. 1911 [Ex. Sess.] p. 18) § 18, requiring, under penalty imposed by section 76, every telegraph corporation to print and file with the Railroad Commission a schedule showing the charges for the transmission of messages, does not include the kind of service performed by a wireless company in installing apparatus on a steamship and furnishing an operator therefor.

3. TELEGRAPHS AND TELEPHONES 🔑33(1) — FAILURE TO FILE CHARGES—ILLEGALITY OF CONTRACT—STATUTE.

Even if Public Utilities Act, § 18, requiring every telegraph corporation to print and file with the Railroad Commission a schedule of charges for the transmission of messages, includes the service furnished by a wireless company in installing apparatus on a steamship and supplying an operator, it does not render a contract for such service unlawful or void, where the wireless company has not complied with the statute.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Marconi Wireless Telegraph Company of America, a corporation, against the North Pacific Steamship Company, a corporation. From the judgment for plaintiff, both parties appeal. Affirmed on each appeal.

Samuel Knight and F. E. Boland, both of San Francisco, for plaintiff. Marcel E. Cerf and Charles H. Sooy, both of San Francisco, for defendant.

KERRIGAN, J. This is an action wherein plaintiff seeks to recover from the defendant certain sums of money claimed to be due it for the installation and operation of certain wireless equipment on vessels in the possession of the defendant, under two written contracts. The complaint is in two counts. The first count is based on a contract dated January 15, 1914, and the second upon a contract dated July 1, 1913. Judgment went for the plaintiff on the first count for the sum of $1, and on the second count for the sum of $1,620. Both parties being dissatisfied with the judgment have appealed therefrom, plaintiff from that part thereof which awards to it only nominal damages, and defendant from the portion thereof by which plaintiff recovers the sum of $1,620.

Considering plaintiff's appeal first, it is disclosed by the record that in the month of January, 1914, the parties entered into the first of the above-mentioned contracts, whereby it was agreed that the plaintiff would install wireless equipment in a certain steamship in the possession of the defendant under a charter, and would provide and pay a competent operator, for which services defendant agreed to pay to plaintiff $100 per month, and the contract was to continue for one year. Under this contract the plaintiff installed wireless equipment on said vessel and furnished a competent operator, and defendant paid to plaintiff the sum of $100 per month up to March 31, 1914, when it discontinued such payments. On the 7th day of April, 1914, the charter under which the defendant held the vessel was canceled and the ship was taken over by the owner, whereupon the defendant sought to cancel the contract, but plaintiff refused to permit it to do so, and after the period covered by the contract had elapsed brought this action.

There is no dispute between the parties as to the measure of damages applicable to the case if the plaintiff is entitled to any damages at all. If we understand the contentions of the parties the damages recoverable by the plaintiff consist of the profit which would have resulted to it if it had been permitted to carry out its contract, plus any costs and expenses incurred as a consequence of the breach. McConnell v. Corona, 149 Cal. 60, 65, 85 Pac. 929, 8 L. R. A. (N. S.) 1171; Civ. Code, § 1512; Ahlers v. Smiley, 163 Cal. 200, 205, 124 Pac. 827; 13 Cyc. 156. The question upon which counsel disagree is as to where lies the burden of proof, plaintiff's contention in that behalf being that the payments required by the contract furnish prima facie the measure of damages, and that the burden of proof was on the defendant to show, if it could, that such were not the actual damages. Applying this principle, it is pointed out by plaintiff that upon the submission of the case, it having shown the facts as above narrated, and the defendant having shown nothing in mitigation of damages, the plaintiff was entitled to judgment for $900.

There is a class of cases in which if the obligor to the contract repudiates it before the obligee has had an opportunity to perform, the contract price is prima facie the measure of damages, and matters of mitigation and reduction must be shown by the obligor. Such are cases of contracts for personal services (Milage v. Woodward, 186 N. Y. 252, 78 N. E. 873, Howard v. Daly, 61 N. Y. 362, 371, 19 Am. Rep. 285), contracts to pay an attorney's fee (Reynolds v. Clark County, 162 Mo. 680, 63 S. W. 382), or an architect's commission (Walker v. Lundstrom, 132 Mo. App. 367, 112 S. W. 1), and the commissions of a real estate broker (Alderson v. Houston, 154 Cal. 1, 96 Pac. 884; Norman v. Vandenberg, 157 Mo. App. 488, 138 S. W. 47), or contracts for the publication of advertisements (Star Publishing Co. v. Knosher & Co., 62 Wash. 215, 113 Pac. 569, 34 L. R. A. [N. S.] 404, Ann. Cas. 1912D, 281; McDermott v. De Meridor Co., 80 N. J. Law, 67, 76 Atl. 331; Ware Bros. Co. v. Cortland Cart & C. Co., 192 N. Y. 439, 85 N. E. 666, 22 L. R. A. [N. S.] 272, 127 Am. St. Rep. 914).

In the last-mentioned case an advertiser desired to cancel its contract with a publisher under which the latter was to publish an advertisement once a month for 12 months for a certain sum to be paid when the contract was fully performed. The publisher refused to consent to the cancellation and continued the publication for the entire period, and upon the advertiser declining to pay therefor brought an action for the contract price. Upon the trial the plaintiff proved the contract and its performance, and rested. Thereupon the defendant produced evidence to the effect that it had canceled the contract, and rested. It was held that the contract was prima facie the measure of damages, and the rule applied that where a contract for future employment had been entered into and afterwards revoked by the employer, in an action for breach of contract the damages are prima facie the amount of wages for the full term, and the burden of proof is upon the defendant to show facts in mitigation of damages. Commenting upon the conclusion arrived at in that case the court said:

> "In reaching the result above indicated, we wish it understood that it is not our purpose to extend the rule beyond the facts found in this case. Nor is it our purpose to limit or impair the rule that, in the breach of an ordinary contract for the manufacture of an article or the supplying of goods or merchandise, including that which is known as ordinary job printing, the damage is the difference between the contract price and the cost of the goods, merchandise, or manufactured article, in which the burden of showing the damages rests on the plaintiff. The distinguishing feature in this case, as we regard it, is that the publishing of an advertisement in a periodical is the same as the publishing in a daily or weekly newspaper, which involves the investment of no additional capital or the use of any material other than the ink used and the paper upon which it is printed, and these articles are of such trivial value as not in our judgment to change the character of the contract from one for services to be rendered."

[1] While the present case in some of its features is similar to the cases cited, it is more like an action for breach of contract for board or lodging (13 Cyc. 163), or for goods sold and delivered (Hellings v. Heydenfeldt, 107 Cal. 577, 585, 40 Pac. 1026; Winans v. S. L. Co., 66 Cal. 61, 4 Pac. 952), or to construct a tunnel (McConnell v. Corona City W. Co., 149 Cal. 60, 85 Pac. 929, 8 L. R. A. [N. S.] 1171), or a contract to furnish freight (Utter et al. v. Chapman, 43 Cal. 279), in which cases actual damages only are recoverable; and the burden of showing such damages rests on the plaintiff. Here the plaintiff was to install wireless equipment and keep it in repair, and to furnish and pay a competent operator. It is obvious that plaintiff would be put to more than trivial expense in performing its part of the contract, and that its profit would be substantially less than the contract price. Hence, we think it cannot be held that the mere introduction of the contract, and showing the breach thereof, made out a prima facie case of damages for the unpaid contract price. It may not be amiss to add that

the fact that the proof of the profit which plaintiff would have made if the defendant had complied with its contract was chiefly, if not entirely, within the control of the former, furnishes a strong reason for placing that burden upon it. We think it follows that the trial court correctly concluded upon the showing made that the plaintiff was entitled to no more than nominal damages.

We will now consider defendant's appeal. In its answer it alleged, as it now contends, that the contracts here sued upon are void because the plaintiff failed to file with the Railroad Commission of this state a schedule of rates for the transmission of messages between points within and without the state under the provisions of section 18 of the Public Utilities Act. The trial court rejected this contention and rendered judgment for plaintiff to $1,620 under the second count, as before stated. From a stipulation of facts entered into by the parties it appears that the plaintiff is engaged in the business of fabricating, leasing, renting, and selling wireless equipment and also in the business of transmitting messages thereby; that it rents such equipment to shipowners under contracts similar to those here involved; that it has shore stations so equipped; that it transmits messages from and to ships equipped with its apparatus for hire for any one other than the shipowners; that such messages are transmitted without charge to the shipowner; and that no messages are transmitted from one station to another in California. It also appears from the stipulation of facts that the contract which is now being discussed, made July 1, 1913, like the first contract considered, provided that the plaintiff was to install on certain steamships in the possession of the defendant wireless equipment, and to furnish and pay competent operators, for which service it was to receive a specified sum per month for a certain length of time, and that there became due to plaintiff under such contract the sum of $1,620.

The Legislature of this state declared (Stats. 1911, p. 18 et seq., § 18, p. 30) that upon the Public Utilities Act becoming effective every telegraph, including wireless, corporation (section 2) should print and file with the Railroad Commission a schedule showing the charges for the transmission of messages between all points within this state and all points without the state upon its route, and between all points within the state and all points without the state upon every route operated or controlled by it (section 18); and the Legislature further declared that every telegraph, including wireless, corporation which should violate or fail to comply with any provision of the act should be subject to a penalty for each offense (section 76), and that every officer of such corporation who should violate or fail to comply with any provision of the act should be guilty of a misdemeanor (section 77).

Assuming, without deciding, that the plaintiff is within the category of section 18 of this act, and that the company would be subject to the penalties therein provided, and its officers guilty of misdemeanors, for noncompliance with the provisions of the act, still we think this contract is not void, as contended by the defendant, so as to prevent recovery upon it. Section 18 of the act does not undertake to make unlawful the transaction of business if the required schedule of rates shall not have been filed. Nor is this a case where a member of the public desiring to send a message is without the benefit that the filing of the company's rates would give him. It is a case of a contract for a special service at an agreed price, arrived at by negotiation between the parties. The contract provides, among other things, that the plaintiff will send from and receive on board the defendant's ships through its coast stations in the United States, or between any ships equipped with plaintiff's system, messages unlimited in number relating to the defendant's business, for which the defendant pays a fixed sum, and furnishes certain accommodation for the operators and the equipment, nor would the fact that the plaintiff exacts the same price from other shipowners for similar service bring this contract within the purview of the act in question. We think this case comes within the principle applied in Luchini v. Roux et al., 29 Cal. App. 755, 157 Pac. 554, in which the plaintiff sought to recover from the defendants the agreed price of a quantity of milk sold and delivered to them. The defense set up was that the contract was void because the plaintiff, a dairyman, had failed to comply with sections 6 and 16 of the so-called Dairy Act, requiring those engaged in the dairy business to register as provided by the act. This court held that while the act imposed a penalty upon a dairyman who neglected to comply with its provisions as to registration, such failure did not render unlawful a contract made for the sale of milk produced in his dairy.

[2, 3] So here, even if section 18 of the Public Utilities Act in its requirement for the filing of schedules of rates included the kind of service involved in this case—and we do not think it does—it does not render unlawful or void a contract for such service. The penalty imposed by section 76 of said act is aimed directly at the failure to file the schedule of rates, and not at the act of transmitting business without having filed such schedule; nor is there anywhere in the act any inhibition against transacting business before compliance with such requirement. The situation here is entirely dissimilar from that where a license is required for the conducting of business and its prohibition in the absence of such license. There

the sanction of the statute is directed to the act of doing business, while in the case a bar the penalty relates to a matter that is merely incidental and collateral to the business operations of the plaintiff corporation.

It results from what we have said that as to each appeal the judgment must be affirmed, and it is so ordered.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

(36 Cal. App. 699)

HOPKINS v. FRESNO COUNTY ABSTRACT CO. (Civ. 2291.)

(District Court of Appeal, First District, California. April 6, 1918. Rehearing Denied by Supreme Court June 3, 1918.)

1. ABSTRACTS OF TITLE 🔑3—LIABILITY FOR IMPROPER DELIVERY OF CHECK.

Where a person willing to make a loan on certain property gives an abstract company a check for amount of loan to be given to payee in return for a mortgage and note "when title vested in" payee, abstract company agreed to hold check until title vested absolutely in payee, and not merely until he became owner of record.

2. PLEADING 🔑120(1)—ANSWER—DENIALS.

An abstract company sued for wrongful delivery of check, deposited to be delivered to payee when title to certain property vested in payee, does not deny plaintiff's allegation that title never vested in payee by alleging that it did not deliver check until title was "vested of record" in payee, and that payee had "apparent record title."

3. ABSTRACTS OF TITLE 🔑3—WRONGFUL DELIVERY OF CHECK.

Where a check was deposited with an abstract company for delivery to payee, in return for a note and mortgage, when title to the property vested in payee, the company, by delivering the check before title vested in payee, is liable to maker of check for amount thereof, although prior to delivery company had filed, without ascertaining if genuine, two forged deeds given it by payee, and naming him as grantee, the filing of which made him apparent owner of record.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by E. L. Hopkins against the Fresno County Abstract Company. Judgment for plaintiff, and defendant appeals. Affirmed.

L. L. Cory, of Fresno, for appellant. Geo. Cosgrave and L. B. Hayhurst, both of Fresno, for respondent.

BEASLY, Judge pro tem. This is an action in which plaintiff recovered a judgment against the defendant for $1,980 as damages for the breach of a contract. The defendant, as its name indicates, is engaged in the business of abstracting and certifying the titles of real property. On the 18th of November, 1915, the plaintiff with one Gustav Weber visited the defendant's office in Fresno, and Weber delivered to the defendant a certificate of title covering the north half of lots 16 and 17 of the Riverside Colony theretofore issued by defendant, showing one John Bartsch to be the owner of the property. Weber also delivered to the defendant two deeds which, if they were genuine, would have made title in Weber himself, and also a note for $2,000 and a mortgage on the property to secure the payment of the same, and the plaintiff at this time delivered to defendant a check in favor of Weber drawn by plaintiff for the sum of $1,980. Thereupon the plaintiff told the defendant's agent with whom he was dealing that he wished to make a loan on the property for $2,000, and either Weber or the plaintiff indicated that they wished the defendant to attend to seeing that the title of Weber was good and to the closing of the deal. Thereupon defendant's said agent, Mr. Acuff, had the plaintiff sign an agreement the material portion of which is as follows:

> "I hand you herewith $1,980 in check which you are to pay for a note and mortgage of $2,000 in favor of E. L. Hopkins to the following described property and to lots 16 and 17 of Riverside Colony when title is vested in Gustav Weber."

And then followed certain exceptions not material here.

The plaintiff's complaint stripped of matters not necessary to be considered here alleged that the respondent had agreed to loan Weber the sum of $2,000 upon the real property described in the complaint, and to take as security therefor a first mortgage upon the land when title to said real property was vested in said Weber. It then alleged the making of the agreement, and that the defendant delivered the check to Weber, and further that the title to the property never vested in Weber, and that he never had any interest in or to the property, that the check had been cashed, and that the plaintiff had been damaged in the sum of $1,980 thereby.

The defendant filed an answer to this complaint in two counts. In the first count it denied that it had failed or neglected to perform the contract, and denied that "it ever delivered to said Gustav Weber the check of the plaintiff before the title to the real property therein described was vested of record in said Gustav Weber, but alleged in that behalf that before said check was delivered to said Gustav Weber the apparent record title to the property therein described was vested in said Weber.

As a second defense the defendant averred that the two deeds delivered by Weber to it on the occasion of the making of the contract were forgeries, but that they were properly acknowledged and certified before one Percy Wills, who it is alleged purported to be a notary public of Fresno county; that his notarial seal was affixed, and in effect that they had depended upon these deeds as genuine, had recorded them, and in reliance upon them as passing title to Weber had delivered the check to him.

The course taken by the trial of this case was interesting. The defendant in the second count of its answer, as has been seen, alleged that the deeds delivered to it by Weber were forgeries. On the trial the plaintiff relying evidently upon this allegation as an admission of the fact, proved the making of the contract, the circumstances surrounding the same, and the delivery of the check to Weber, and rested. The defendant moved for a nonsuit on the ground that the plaintiff had failed to establish the allegations of the complaint, suggesting that the court could take the motion under advisement, as he had further evidence to offer on the defendant's side of the case. Thereupon he called Mr. Acuff and placed in evidence certain papers not material to be described in the view we take of this case, and the deeds and other papers delivered by Weber and Hopkins at the time the contract was made; showed that these deeds had been recorded, and rested its case.

This is all the evidence in the case necessary to understand the points made on this appeal.

The defendant's counsel at the trial, after plaintiff had rested, stated that he did not stand upon the second count of its answer, namely, the count alleging that the deeds were forgeries; and now contends that on the face of the record as made the title to the lots appeared to have vested in Weber, and that the deeds must be taken at their face value, there being no evidence in the record that they were forgeries.

[1, 2] In the view we take of the case it was not necessary for the plaintiff to prove that these deeds were forgeries. Even if it be conceded that the direct allegations that they were forgeries in the second count of the defendant's answer are to be disregarded, the first count of the defendant's answer on which it rested its case fails to deny the allegation of the complaint that the title to this property never vested in Weber. The defendant's contract, which its agent prepared, provided that it should not deliver this check to Weber until the title to this property vested in him. If it intended—as it now contends—to contract only that it would be responsible for the record title it should have made its contract so read. It contracted absolutely to hold this check until the title vested in Weber. The reply to the allegation of the complaint that the title never did so vest is that the defendant did not deliver the check until the title to this real property was vested of record in Gustav Weber. If this were a slip of the tongue or pen it might be considered a denial of the allegation referred to; but the denial was couched in these terms deliberately, as is apparent from the clause of the answer immediately following this denial, which reads that before the check was delivered to Weber the "apparent record title" to the property was vested in Weber. Taken together, these statements of the answer constitute no denial of the point blank allegation of the complaint that the title never vested in Weber.

There is little excuse for the failure of the defendant in this case to discover that these deeds were forgeries. The notarial certificate purported to be that of Percy Wills, who was described as a notary public in and for the county of Fresno; and had the abstract company taken the trouble to examine the records of the county clerk's office of Fresno county, it would have ascertained that Wills was not a notary, and this would have led to the disclosure that the instruments recorded were not authentic.

[3] The purpose of Hopkins in delivering these papers to the abstract company was to be assured that the title of Weber, who was to mortgage the property to him, was good. The abstract company contracted to see that it was a valid title. It failed to do this, and was therefore liable to the plaintiff for its breach of the contract.

The judgment is affirmed.

We concur: KERRIGAN, J.; ZOOK, Acting Presiding Judge pro tem.

(36 Cal. App. 744)

PEOPLE v. LYONS. (Cr. 422.)

(District Court of Appeal, Third District, California. April 9, 1918.)

CRIMINAL LAW ⚷1130(4)—APPEAL—FAILURE TO APPEAR OR FILE BRIEF—DISPOSAL.

Where the transcripts were filed November 13th, and briefs have not been filed, nor time for filing extended, and the case was placed on the April calendar, at which time there was no appearance for accused, the Attorney General may have the case submitted on the record.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Adolph Lyons was convicted of grand larceny, and he appeals. Affirmed.

Martin I. Welsh and Ralph H. Lewis, both of Sacramento, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. Defendant appealed to this court from the judgment of the superior court of the county of Sacramento under which he was sentenced to serve a term in state's prison, having previously been convicted by a jury of the crime of grand larceny.

The clerk's transcript and the reporter's transcript were filed in this court on the 13th day of November, 1917. No briefs have been filed, and the time for the filing thereof has not been extended. The case was placed upon the April calendar of this court, at which time there was no appearance on behalf of appellant, and the Attorney General moved that it be submitted on the record. On the authority of People v. Wagner, 171 Pac. 699, and the cases therein cited, the judgment is affirmed.

(36 Cal. App. 669)

A. B. FIELD & CO., Inc., et al. v. HAVEN. (Civ. 2331.)

(District Court of Appeal, First District, California. April 4, 1918.)

1. CONTRACTS ⟹303(1)—EXISTENCE OF SUBJECT-MATTER—IMPLIED CONDITION.

When performance of a contract depends on the continued existence of a person or thing, a condition is implied that the impossibility arising from the perishing of the person or thing excuses performance.

2. CONTRACTS ⟹215(2)—CONTRACT TO PACK FRUIT—DESTRUCTION OF PLANT—EFFECT.

Where plaintiffs employed defendant to buy and pack prunes for them, the contract was essentially one for the performance of personal services by defendant, which might be performed as effectively in one place as another, so that destruction of his packing plant by fire did not terminate the contract, though the plant was specially mentioned in the contract.

3. APPEAL AND ERROR ⟹1001(1)—REVIEW—FINDING.

The finding of the lower court on ample evidence cannot be disturbed by the appellate court.

4. APPEAL AND ERROR ⟹1078(1)—RESERVATION OF QUESTION.

A point neither raised in the court below nor mentioned in the briefs, but presented for the first time on oral argument, the appellate court is not required to discuss or decide.

5. DAMAGES ⟹78(6) — PROVISIONS OF CONTRACT—MINIMUM COMPENSATION—LIQUIDATED DAMAGES.

Where plaintiffs guaranteed to defendant the packing of 1,000 tons of prunes, and agreed to pay defendant $2.50 a ton for any shortage in the prune pack, the clause provided, not for liquidated damages, but for a minimum compensation to defendant for the services to be rendered by him in packing prunes during the year, for which he was employed.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by A. B. Field & Co., Incorporated, a corporation, and the American Trading Company, a corporation, against Edward Haven, doing business as Haven & Co. From a judgment for defendant, plaintiffs appeal. Affirmed.

Samuel Knight and F. E. Boland, both of San Francisco, and C. C. Coolidge, of San Jose, for appellants. R. R. Syer and Owen D. Richardson, both of San Jose, for respondent.

ZOOK, Acting Presiding Judge pro tem. This case arises out of a contract by the terms of which plaintiffs employed defendant to buy for them and on their instructions dried fruits and to pack them in his packing house on Cinnobar street in San Jose, at specified charges for the different varieties of fruit. Plaintiffs guaranteed to defendant the packing of 1,000 tons of prunes, and agreed to pay defendant $2.50 a ton for any shortage in the prune pack. Defendant was to devote his packing house exclusively to the work provided for in the contract, and to pack the goods "as well as the regular packing of said party in the past." The term of the contract was from May 29, 1913, to April 30, 1914. There were other provisions in the contract not necessary to be considered on this appeal. The parties commenced operations under the contract and continued until the 19th day of October, 1913, when defendant's packing house was destroyed by fire. Within a few days after the fire defendant tendered to plaintiffs another plant, but objection was made thereto on the ground that the defendant could not have exclusive possession. Thereupon the defendant arranged for the exclusive use of a second plant, known as the "A & C Ham" packing house, and tendered it to plaintiffs, who again objected, but upon what ground the record is silent. Plaintiffs declined to order any more fruit bought, and no further work was done under the contract, except the packing of some two or three tons of fruit which had been purchased, but not delivered, prior to the fire. Insurance moneys were collected by defendant, and various disputes arose between the parties, culminating in the bringing of this action by plaintiffs to recover a balance claimed to be due them. Defendant in his answer set up, among other things, a counterclaim for $1,903.12, which he claimed to be due him under the contract as packing charges at the agreed rate of $2.50 per ton for 761.25 tons of the 1,000 tons guaranteed; only 238.75 tons having been purchased prior to the fire. The allowance of this counterclaim by the trial court is the only issue on this appeal.

[1, 2] Appellant's main contention is that the contract was terminated by the destruction by fire of respondent's packing plant. It is an undoubtedly sound principle of the law of contracts that, when the performance thereof depends on the continued existence of a given person or thing, a condition is implied that the impossibility arising from the perishing of the person or thing excuses performance, but we must confess that we are unable to follow counsel in their endeavor to apply the rule to this case. Neither in the evidence nor in the briefs is there anything to show that the place of packing fruit has any peculiar bearing upon the quality of the fruit packed, and in the absence of such showing we must take the common sense view of the contract adopted by the trial court, namely, that the contract is essentially one for the performance of personal service by the defendant, which might be performed as effectively in one place as in an-

other, and that if defendant, after the fire, could pack fruit according to the standard set in the contract, he was entitled to tender another plant for the completion of the work contemplated therein. The fact that the packing house was specially mentioned in the contract was of no more moment than the mentioning of the residence of the parties, and the provision for the exclusive use of the plant was obviously inserted to secure the undivided attention of the respondent to the work contemplated. We are therefore of the opinion that the respondent was within his rights in tendering another plant for the performance of his contract.

[3] Appellants' second point is that the tender of the "A & C Ham" plant was not good for the reason that the "processor" for treating prunes in that plant was different from that in the one destroyed. The lower court found, however, on ample evidence from prominent experts familiar with both houses, that the "A & C Ham" plant was in every way as suited to the doing of the work contemplated by the contract as was the original plant, and this finding we cannot disturb on appeal.

[4, 5] The last contention made by appellants in that the guaranty clause in the contract was void as providing for liquidated damages. As this point was neither raised in the court below nor mentioned in the briefs, but was presented for the first time upon the oral argument, we are not required to discuss or decide it. We may state, however, that in our opinion the clause referred to provides not for liquidated damages, but for a minimum compensation to defendant for the services to be rendered by him during the year for which he was employed.

The judgment is affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

(36 Cal. App. 714)

CHRISTIN et al. v. CLARK et al. (Civ. 2371.)

(District Court of Appeal, First District, California. April 8, 1918.)

1. SPECIFIC PERFORMANCE 🔑49(2)—AGREEMENT TO WILL PROPERTY—INADEQUACY OF CONSIDERATION.

An agreement to will an estate worth $100,000 to a girl, in return for her companionship in Europe for six months, will not be specifically enforced; the value of the service being inadequate.

2. SPECIFIC PERFORMANCE 🔑86—AGREEMENT TO WILL PROPERTY—ADEQUATE REMEDY AT LAW.

An agreement to will "jewelry and personal effects" will not be specifically enforced, where it does not appear that they were of such a rare nature that they could not be duplicated, or had a sentimental value.

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by Estelle Porter Christin and husband against Edward H. Clark, individually and as executor of the last will and testament of Estelle Electa Caswell, deceased, and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

H. F. Chadbourne and Alan C. Van Fleet, both of San Francisco (C. A. Christin, of San Francisco, of counsel), for appellants. Charles S. Wheeler and John F. Bowie, both of San Francisco (Nathan Moran, of San Francisco, of counsel), for respondents.

ZOOK, Acting Judge pro tem. This is an appeal from a judgment for defendants on demurrer to a complaint for specific performance of a contract to leave property by will, which contract is alleged to have been made in 1906 between plaintiff, Estelle P. Christin, then Estelle Porter, and one Estelle Caswell, whose executor and legatees are the defendants in the case.

The facts of the case are as follows: When the contract was made, Estelle Porter, then 18 years old, was living with her family in San Fernando, Cal.; her family relations were affectionate, and her social circle pleasant and agreeable; she had finished her high school course and was about to enter Stanford University; Mrs. Caswell invited her to spend six months with her in Paris, and promised plaintiff and her mother that in the event that plaintiff accepted the offer she (Mrs. Caswell) would leave to her by will "all of her jewelry, personal effects, and a large part of her personal property," or "all of her jewelry and personal effects." (The promise is stated in the complaint in both ways.) Plaintiff accepted the offer, and spent "large sums," not stated in the complaint, in traveling to and from France and on trips with Mrs. Caswell in Europe; while with Mrs. Caswell plaintiff rendered services to her as a traveling companion and "personal services," the nature of which does not appear. Plaintiff returned home at the end of the six months. Mrs. Caswell died in 1914, leaving a will which omitted to make any provision whatsoever for plaintiff. Her estate consisted of a number of items of jewelry and furniture and railroad and industrial stocks of a total value of upwards of $100,000. The prayer of the complaint asks that the whole estate be decreed to be held in trust for plaintiff.

[1] The complaint wholly fails to state a case for equitable relief. While equity will in a proper case enforce a contract to leave property by will, it will only do so when the contract is fair, its terms definite and certain, the consideration substantial, and the plaintiff without an adequate remedy at law. Conceding the promise to be certain in the case at bar, the consideration therefor is hopelessly inadequate. In every California case where such a contract has been en-

forced, there was a complete change in the course of the plaintiff's life resulting from his performance of the contract. Here we have a temporary interruption only of plaintiff's relations with her family and friends and a short postponement of her college course, and while the complaint is eloquent, not to say verbose, in its recital of the detriment suffered by plaintiff, it is apparent that the only real loss suffered by her was the death of her father in her absence, an occurrence which certainly was not within the contemplation of the parties when the contract was made. The advantages plaintiff received in being afforded an opportunity to travel in Europe would, in the mind of any normal young woman, be more than sufficient compensation for her temporary absence from home and friends, and there could be no more fitting preliminary to a college course than a trip to Europe. The services rendered by plaintiff as a traveling companion for such a short period were slight, and absolutely disproportionate to the value of the estate claimed.

[2] Upon the oral argument counsel, evidently recognizing the weakness of their claim to the whole estate, urged that the contract should be enforced as to the "jewelry and personal effects" set forth in the schedule, but in the absence of any allegation that these articles were of such a rare nature that they could not be duplicated, or were possessed of a peculiar sentimental value, or pretium affectionis, the complaint is insufficient in equity. An award in an action at law of damages to the amount of the intrinsic value of the jewelry and personal effects would have adequately compensated plaintiff for the breach of the contract.

Judgment affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

(36 Cal. App. 703)

SCATTERGOOD v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY. (Civ. 2472.)

(District Court of Appeal, Second District, California. April 8, 1918. Rehearing Denied by Supreme Court June 6, 1918.)

1. INJUNCTION 🔑223(1)—VIOLATION—ACTS CONSTITUTING—MAINTENANCE OF ELECTRIC WIRES.

That defendant maintains an electric wire within 8½ inches of the primary wires maintained by plaintiff does not constitute contempt in violating an order enjoining defendants from conveying electric power through city lines until such time as such wires are removed from the wires of plaintiff to the distance prescribed by the Railroad Commission; the only inhibition of the order being against transmitting power.

2. INJUNCTION 🔑230(2)—VIOLATION—PROCEEDINGS FOR CONTEMPT.

A charge that defendant was maintaining electric wires within a stated distance from plaintiff's wires, in violation of an order enjoining defendant from trespassing upon poles or wires of plaintiff, and from constructing lines within such distance therefrom, does not constitute a charge of contempt, since the wires may have been so placed prior to the promulgation of the order.

3. CONTEMPT 🔑54(4) — CHARGE — SUFFICIENCY.

An affidavit charging a contempt out of the presence of the court must show on its face a case of contempt.

Original application by E. F. Scattergood against Superior Court of State of California in and for Los Angeles County for a writ of review of an order adjudging petitioner guilty of contempt of court. Order annulled.

Albert Lee Stephens, City Atty., W. B. Mathews, Wm. B. Himrod, and Lewis E. Whitehead, all of Los Angeles, for petitioner. H. C. Beach, of San Francisco, for respondent.

WORKS, Judge pro tem. The petitioner is chief electrical engineer of the bureau of power and light of the city of Los Angeles. He and certain other officers of the city, and the city itself, were defendants in an action commenced by the Los Angeles Gas & Electric Corporation for the purpose of procuring an injunction. The action was tried and a judgment was entered granting the injunction. Its terms may be stated, both briefly and comprehensively, as follows:

(1) The defendants were enjoined from trespassing upon, interfering with, moving, or displacing poles or wires owned and controlled by the plaintiff.

(2) The defendants were enjoined from erecting or placing any pole, cross-arm or other electrical appliance or equipment or attaching any wire or cable to or upon any pole, cross-arm, wire, or other electrical appliance or equipment in a fixed position within the distance from any pole, cross-arm, wire, or other electrical appliance or equipment owned or controlled by the plaintiff, as prescribed by law and by the rules and regulations of the Railroad Commission.

(3) The defendants were enjoined from conveying, running, or transmitting electric power or energy through the lines and wires of the city, located on York boulevard, until such time as those lines and wires are removed from the wires, poles, and equipment of the plaintiff to such distance as is prescribed by law and by the rules and regulations of the Railroad Commission.

Upon affidavits charging the petitioner with a violation of the terms of the injunction and after a hearing upon the charges, the respondent adjudged the petitioner guilty of a contempt of court and imposed a fine of $200 upon him as a penalty for the offense. This proceeding was instituted for the purpose of annulling the order declaring the petitioner guilty and imposing the fine.

The petitioner contends that the affidavits upon which the charge against him was based do not state facts sufficient to constitute a charge of contempt. In the affidavits there are several specifications of particulars in which it was claimed that the petitioner had been guilty of an infringement of the terms of the injunction. All but one of these were eliminated at the hearing in the contempt proceeding, and the petitioner was found guilty of contempt in the matter of that one alone. That alleged offense was stated in the affidavits in the following manner:

> "That at or about the intersection of Avenue 53 and York boulevard on pole No. 18601G, which is a pole jointly owned, operated and maintained by plaintiff and Southern California Edison Company and Los Angeles Railway Company, the primary arc wires of the city of Los Angeles are within 8½ inches of the primary wires owned and operated and maintained by plaintiff."

It was admitted at the hearing that the distance specified was less than was required in such a case by the rules and regulations of the Railroad Commission.

The only charge made in the single specification upon which the judgment of contempt was predicated is that certain wires of the city "are within" a certain stated distance from wires of the plaintiff in the action. It is to be noted, however, that the wires mentioned in the specification are apparently in York boulevard. If they are in fact in that thoroughfare, the question whether the charge in it amounts to a charge of contempt must be measured by the terms of that part of the judgment stated in the paragraph numbered 3 in the earlier portion of this opinion, as that part of the judgment refers to wires in York boulevard. It may be remarked, in passing, that the portions of the judgment set forth in the paragraphs of this opinion numbered 1 and 2 do not relate to any locality whatever. As to them, the judgment itself is as general and far-flung, as to locality, as are the statements of the two paragraphs.

[1] Judged, then, by the standard set down in paragraph 3, the charge does not constitute a charge of contempt; for there is nothing in that paragraph forbidding a maintenance of the city's wires at any distance whatever from the wires of the plaintiff in the action. The only inhibition of the language of that part of the judgment repeated in the paragraph is against "conveying, running or transmitting" power or energy through the city's wires until they are removed to a certain distance from the wires of the plaintiff, which removal is not required by the judgment.

[2] If we attempt to measure the terms of the charge by paragraphs 1 and 2, and concede that the fact that the city's wires "are within" the stated distance from the plaintiff's wires amounts to "trespassing upon or interfering with" the wires or poles of the plaintiff, as the quoted terms are used in paragraph 1, then we are met by this condition: The charge does not show that the city's wires were placed at the prescribed distance from the plaintiff's wires after the rendition of the judgment. They may have been so placed before its rendition. In fact, some of the remarks of counsel for the petitioner, made at the hearing of the contempt proceeding, indicate that the city's wires were actually in place before judgment and affidavits used at the hearing show the same thing. If they were in place that early—and, under the authorities cited below, the possibility of such a condition must have been negatived by the affidavit charging the contempt—they were entitled so to remain, for there is nothing in the judgment to require their removal.

[3] It is manifest to us that the charge is not sufficient to constitute a charge of contempt of court, and the contempt proceeding must fail, for it is settled, upon abundant authority, that an affidavit charging a contempt out of the presence of a court must show upon its face a case of contempt. Hutton v. Superior Court, 147 Cal. 156, 159, 81 Pac. 409; In re McCarty, 154 Cal. 534, 539, 98 Pac. 540.

The point of which most is made in the briefs has been omitted from discussion purposely by us. That point is that the affidavits charging a contempt fail to show that the petitioner personally committed or participated in the alleged contempt, and that they are insufficient for that reason. A consideration of the question is rendered unnecessary by what we have said above.

The order is annulled.

We concur: CONREY, P. J.; JAMES, J.

(36 Cal. App. 687)

HACKETT et al. v. LEWIS et al.

(Civ. 1982.)

(District Court of Appeal, First District, California. April 5, 1918. Rehearing Denied by Supreme Court June 4, 1918.)

1. APPEAL AND ERROR ⚷1010(1)—REVIEW—FINDINGS.

Where there is substantial evidence to support findings of trial court, they will not be disturbed on appeal.

2. SALES ⚷262—WARRANTIES.

Repeated assertions by seller that a motor truck would carry three tons were warranties, where buyer, although familiar with automobiles, had no opportunity of testing its carrying capacity and believed and relied upon seller's statements, and would not have purchased truck except for such representations.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by E. M. Hackett and others against M. E. Lewis and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Chas. R. Holton, of Whittier, for appellants. F. J. Castelhun, of San Francisco, for respondents.

KERRIGAN, J. The plaintiffs brought suit to foreclose a chattel mortgage given by the defendants to the plaintiffs to secure the payment of 13 promissory notes of $100 each, the purchase price of a motor truck sold by the plaintiffs to the defendants. The defendants in their answer set up a breach of a warranty of the truck made by the plaintiffs, and in a cross-complaint demanded cancellation of the notes and mortgage, and damages alleged to have been sustained by them by reason of the breach.

[1] The decision of the case in the trial court turned on the point as to whether or not the plaintiffs had expressly warranted the carrying capacity of the motor truck, and that court found in favor of the defendants upon this question. While there is much force in the argument made by the plaintiffs, still, as there is substantial evidence in the record supporting the findings attacked, it follows, under the familiar rule in the decision of appeals, that the judgment will not be disturbed because a contrary conclusion could have been drawn from the evidence.

It appears by the testimony introduced by the defendants that defendant R. E. Lewis, in the month of August, 1915, desiring to engage in the motor truck business, called at the salesroom of the plaintiffs in San Francisco, and informed their representative that he was in the market for a three-ton truck; that the plaintiffs represented to him expressly and repeatedly that the truck for which the notes in suit were given in payment would carry that weight, and that a trailer might be attached thereto upon which another load of a couple of tons could be carried; that the truck was or would be put in good condition before delivery; that upon these assurances, and these assurances alone, the defendant R. E. Lewis on September 2, 1915, purchased the truck, giving in payment therefor his notes secured by chattel mortgage; the notes and the mortgage being executed by him and his codefendant, M. E. Lewis. There is an abundance of evidence in the record that the truck would not carry three tons; that it was almost continuously out of repair, and was practically useless to the purchaser. On October 19, 1915, Lewis, after many complaints to the plaintiffs, and after giving them many opportunities to effectually repair the truck, and being finally satisfied that the truck could not carry three tons, offered to return it, and demanded the surrender of the notes and the cancellation of the mortgage. This was refused; whereupon the present action followed.

[2] Any distinct assertion or affirmation as to the quality or character of the thing sold, made by the seller during the negotiations for the sale, which it may be reasonably supposed was intended to induce the purchase and was relied upon, will be treated as a warranty. In Luitweiler Pump Co. v. Ukiah Water Co., 16 Cal. App. 198, the court, at page 206, 116 Pac. 707, at page 710, said:

> "The rule, indeed, seems to be well settled that 'any distinct assertion or affirmation as to the quality or character of the thing to be sold, made by the seller during the negotiations for the sale, which it may reasonably be supposed was intended to induce the purchase, and was relied on by the purchaser, will be regarded as a warranty unless accompanied by an express statement that it is not intended as such' (30 Am. & Eng. Ency. of Law, p. 136), and it seems that the general tendency of the later authorities is to construe liberally in favor of the buyer language used by the seller in making affirmations respecting the quality of his goods, and to treat such affirmations as warranties when such an inference is at all reasonable."

In Pepper v. Vedova, 26 Cal. App. 406, 147 Pac. 105, the court held that, if the false representations as to the quality of the property go to the essence of its value and render it useless, and hence valueless, to its purchaser, it necessarily follows that the warranty was an essential condition of the sale, and, upon discovery of the breach, the purchaser has the right to rescind, and in such a case whether the defendant knew or did not know the representations to be false, or did not intend to commit a fraud in making them, is immaterial.

It is true that the purchaser in the case at bar was more or less familiar with automobiles, having driven such vehicles for three or four years; that before purchasing this truck he inspected it and helped to make some of the repairs thereto; that he was present at a 13-minute demonstration of the car, when it was operated without a load, but he was afforded no opportunity to learn the carrying capacity of the truck, as to which phase of the transaction he relied on the explicit representation of the plaintiffs, without which, he testified, he would not have purchased the truck.

The judgment is affirmed.

We concur: BEASLY, Judge pro tem.; ZOOK, Judge pro tem.

(178 Cal. 286)

SHERMAN v. AMERICAN SURETY CO. OF NEW YORK. (L. A. 4167.)

(Supreme Court of California. May 15, 1918. Rehearing Denied June 14, 1918.)

1. Municipal Corporations 🔑347(1)—Contractors' Bonds — "Materials" or "Supplies."

Tubing at the end of which was attached a knife, used solely as an appliance in perforating the casing of a well, which the contractor retained unimpaired save for wear and tear, was not, but rental and transportation of tools used were, "materials" or "supplies" within St. 1897, p. 201, relating to contractors' bonds on public improvements, and requiring a bond to pay for material and supplies furnished "for the performance of the work."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Material; Supply.]

2. Principal and Surety 🔑89 — Contractor's Bond—Discharge of Surety.

Where materialman on a city contract, before filing any claim against the city for labor or material, gave the city written notice that it released the city from all claims and authorized payment to the contractor, such notice was of no effect, there being no enforceable claims to release until claims were filed; and hence the notice did not affect the liability to the materialman of the surety on the contractor's bond.

Department 2. Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by W. H. A. Sherman against the American Surety Company of New York, a corporation. From a judgment for plaintiff both parties appeal. That part of the judgment in favor of plaintiff modified and affirmed, and that in favor of defendant reversed and rendered.

Stutsman & Stutsman, of Los Angeles, for appellant. Bicksler & Smith, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. Plaintiff, as assignee of certain materialmen and laborers, brought this action against the defendant as surety upon a bond given by S. F. Loftus, a contractor, to the city of Long Beach, to recover payment of certain amounts alleged to be due to such materialmen and laborers from the contractor for work performed and material furnished in the construction of two wells for said city. At the time of entering into the contract, on July 22, 1912, Loftus, pursuant to the provisions of an act of the Legislature, designated as chapter 140, Stats. 1897, gave a bond in the penal sum of $4,000, duly executed by defendant, as surety, the condition of which was that in case Loftus failed "to pay for any materials furnished for the work of improvement described in said contract, or for any work or labor done thereon," the surety would, to the amount of $4,000, pay the same. Upon completion of the work Loftus, as alleged, was indebted in the sum of several thousand dollars for materials furnished and labor done in the performance of the work and for which the claimants, as required by the act, duly filed with the board of public works their verified claims, with a notice requiring said board to withhold payment of any sums due to Loftus and apply the same in liquidation of said claim. Upon trial the court made its findings, upon which judgment was entered in favor of plaintiff for claims, the total amount of which was $897, and gave judgment in favor of the defendant upon two claims, that of Los Angeles Manufacturing Company for materials furnished, and Long Bros. for labor furnished, the aggregate of which was $5,873. From the judgment so entered both parties appeal upon the same record.

Of the $897 for which judgment was rendered in favor of plaintiff, the court, in effect, found that $99 thereof was for materials furnished by Mills Ironworks; that $214 was for materials furnished by Fairbanks, Morse & Co., and that the remainder thereof, viz. $584, was for rental of tools and freight paid by the claimants for the transportation of the same.

[1] Defendant, as appellant, contends that the finding that Fairbanks, Morse & Co. furnished materials in the sum of $214 is without support, for the reason that it conclusively appears from the evidence that said amount includes the sum of $160, conceded to be the value of 1,000 feet of two-inch tubing purchased from said company by Loftus and used solely as an appliance on the end of which a knife was attached for use in perforating the casing of the well, which operation was necessary in completing the wells so that water would flow into the same. After such use of the tubing, the contractor, as purchaser thereof, retained the same unimpaired save and except the wear and tear incidental to such use. The condition of the bond, as required by the act, is that the surety will pay for materials or supplies furnished "for the performance of the work." This provision cannot be construed to cover and include the tools or plant purchased by the contractor, the use of which is required in doing the work, and which, barring wear and tear incident to such use, survive for such repeated and other use. The vendor of a boiler and engine sold to the contractor for use in providing the necessary power in drilling the well, or the seller of a kit of tools to a carpenter, might with equal propriety insist that the value thereof or price agreed to be paid therefor was secured by the bond. Indebtedness incurred by a contractor in the purchase of his plant or any part thereof, the use of which is required in doing the work, is not within the provisions of the act, nor included in the terms of the bond. Hence the finding that Fairbanks, Morse & Co. furnished materials of the value of $214, in so far as it relates to the $160

found to be the value of the pipe so purchased by the contractor for use as stated, is not supported by the evidence.

Defendant likewise insists that the court erred in including in the judgment so rendered for plaintiff the sum of $584, found by the court to be due from the contractor for the rental of tools used in drilling the wells and cost for transporting them to the place where used. This contention is based upon the claim that the words "materials or supplies," as used in the statute, should be construed as referring only to those things which enter into and become component parts of the completed structure. In support of the proposition defendant cites a number of authorities construing mechanics' lien statutes which, if applicable, lend force to its claims. See Wood v. El Dorado Library Co., 153 Cal. 231, 94 Pac. 877, 16 L. R. A. (N. S.) 585, 126 Am. St. Rep. 80; Hall v. Cowen, 51 Wash. 295, 98 Pac. 670; Troy Public Works Co. v. City of Yonkers, 207 N. Y. 81, 100 N. E. 700, 44 L. R. A. (N. S.) 311. While such statutes in principle bear some analogy to the act under which the bond in question was given, they are distinguishable therefrom. French v. Powell, 135 Cal. 636, 68 Pac. 92; Associated Oil Co. v. Commary-Peterson Co., 32 Cal. App. 582, 163 Pac. 702. It would be inequitable to subject an owner of property to a lien for that which did not enter into and become a part of such property. Hence, in construing mechanics' lien statutes, they are generally held to cover only what has been incorporated into the substance of and added to the value of the property against which the lien is asserted. Section 6923 of the Compiled Statutes of the United States 1916, provides that contractors doing public work for the government shall execute a bond conditioned that they will promptly pay all persons supplying such contractor with labor and materials "in the prosecution of the work provided in such contract." In American Surety Co. v. Lawrenceville Cement Co. (C. C.) 110 Fed. 717, the court, in construing a bond given pursuant to the provisions of the section, said:

> "The underlying equity of the lien statutes relates to a direct addition to the substance of the subject-matter, * * * building, or other thing to which the lien attaches, while the statute in question concerns every approximate relation of the contractor to that which he has contracted to do. Plainly, the act of Congress and the bond in the case at bar are susceptible of a more liberal construction than the lien statutes referred to, and they should receive it."

The learned judge, in discussing the subject, laid stress upon the words "in the prosecution of the work," contained in section 6923, as differentiating the act requiring the giving of such bonds from statutes providing for mechanics' liens. What is said is equally pertinent to our statute requiring a bond for materials or supplies used "in the performance of the work." Indeed, it may be said that in this respect there is no difference in the phraseology of the two acts. As to the bond required under section 6923, United States Compiled Statutes 1916 the Supreme Court of the United States has repeatedly refused to restrict its application in the manner contended for by defendant. As illustrative of these views a few cases may be cited. Thus, in Title Guaranty & Trust Co. v. Crane Co., 219 U. S. 24, 31 Sup. Ct. 140, 55 L. Ed. 72, recovery was allowed under the bond for cartage and towage of materials. In U. S. Fidelity Co. v. Bartlett, 231 U. S. 237, 34 Sup. Ct. 88, 58 L. Ed. 200, where the work contracted for was completing a breakwater, recovery was allowed for all the labor at a quarry opened 50 miles away, including that of carpenters and blacksmiths who repaired the cars in which the stone was carried to the quarry dock for shipment, and wages of stablemen who fed and drove the horses which moved the cars. In Illinois Surety Co. v. John Davis Co., 244 U. S. 376, 37 Sup. Ct. 614, 61 L. Ed. 1206, recovery was allowed, not only for the rental of cars and other equipment used by the contractor in doing the work, but the expenses of loading the equipment and freight charges paid in transporting the same to the place where it was used. Indeed, upon the theory that the act and the bonds given under it must be construed liberally in order to effect the purpose intended, the Supreme Court, in a very recent case, that of Brogan v. National Surety Co., 38 Sup. Ct. 250, 246 U. S. 257, 62 L. Ed. ——, sustained the right to recover upon such bond for provisions used by a contractor in feeding his employés where the location of the work rendered the furnishing of such board necessary. The principle to be deduced from these and other like decisions is that in so construing the bond no hardship is imposed upon the surety since in entering into the contract it is deemed chargeable with notice, not only of the financial ability and integrity of the contractor, but with notice as to whether he possesses the plant, equipment, and tools required in doing the particular work, or will be compelled to rent and hire the same or some part thereof, all of which matters are factors to be considered in determining the risk and upon which the surety fixes the premium exacted for executing the bond.

[2] With regard to the appeal prosecuted by plaintiff from the judgment rendered in favor of defendant upon the claim of Los Angeles Manufacturing Company, and that of Long Bros., the court found that the Los Angeles Manufacturing Company furnished to the contractor in the performance of the work materials of the value of $2,476.55, and that Long Bros. supplied labor thereon of the value of $2,855 claims for which were, in accordance with the act, filed in the proper office on July 23, 1913. The court further found that prior to the filing of said claims,

to wit, on December 10, 1912, and July 6, 1913, Long Bros. caused to be delivered to the board of public works of the city of Long Beach documents as follows:

> "Long Beach, 12/10/12.
>
> "To Board of Public Works, Long Beach—Dear Sir: We, the undersigned, authorize and give permission to Stanly F. Loftus to collect amount due for labor on well just completed.
>
> "Respt. yours, [Signed] Long Bros."
>
> "Long Beach, 7/6/13.
>
> "To Board of Public Works: We, the undersigned, authorize Mr. Stanley F. Loftus to collect for labor on well just finished.
>
> "[Signed] Long Bros."

It also appears that the Los Angeles Manufacturing Company, under dates of December 12, 1912, and July 7, 1913, caused to be addressed and delivered to the board of public works of Long Beach two documents in words as follows:

> "Gentlemen: We hereby release you from any claim we may have against you for materials furnished to Mr. S. F. Loftus used in sinking your wells"

—following which the court found that on December 20, 1912, the city of Long Beach, out of the funds appropriated for the payment of the sum due to Loftus under his contract, paid him the sum of $3,036.80, and on July 8, 1913, it paid to him the further sum of $2,836.88, both of which sums were paid in accordance with the terms and provisions of its said written contract as provided therein after the wells had been completed and accepted by said city, but that said Loftus after receiving payment of said sums, failed to pay the same, or any part thereof, to Long Bros. or the Los Angeles Manufacturing Company, and that in receiving said moneys Loftus was the agent of said Long Bros. and Los Angeles Manufacturing Company. The latter part of said finding, to wit, that Loftus was the agent of the manufacturing company and Long Bros. must be deemed a conclusion of law rather than a finding of fact, and in reaching this conclusion the court, in our opinion, erred.

As found by the court the money was due Loftus upon his contract, he having completed the wells. At the time of the making of the payments neither Long Bros. nor the manufacturing company had in pursuance of law filed any claims, the effect of which would be to impound the money due to Loftus and which it was the duty of the city of Long Beach to pay to him in accordance with its contract. Neither the manufacturing company nor Long Bros. had any claims upon these funds which could be the subject of the so-called releases. The service thereof, in the absence of any claim at the time having been filed by such parties the effect of which would be to impound the moneys due to Loftus, was, since unnecessary in enabling him to collect that which was due to him, ineffectual and inoperative for any purpose; hence, the case as presented to our minds is exactly the same as though these so-called releases had never been executed. It may be, as contended by the surety company, that if they had been executed after the filing of the claims for material and labor they would constitute a release thereof, advantage of which could be taken by the surety company. Such question, however, is not before us. Upon completion of the wells and in the absence of the filing of any claims it was the duty of the city to pay Loftus in accordance with the terms of the contract. Long Bros. and the Los Angeles Manufacturing Company were strangers to this contract, and, having filed no claims for labor and materials furnished in performing the contract, had no interest in or claim upon the fund to be released or in regard to which an agency could be created. The fact that the city prior to the filing of the claims of Long Bros. and Los Angeles Manufacturing Company paid Loftus nearly $6,000 on account of the work done which was in accordance with the terms of the contract could not impair their right under the statute and the bond given in pursuance therewith to file their claims within the 90 days and look to the surety on the bond for payment, limited, of course, by the amount specified in the bond for which the surety was liable. What is said sufficiently disposes of all points made which merit discussion.

It is ordered that the judgment rendered in favor of the plaintiff for $897.05 be modified by deducting therefrom the sum of $160, and, as thus modified, it is affirmed; and that the judgment in favor of the defendant appellant as to the claims of Los Angeles Manufacturing Company and Long Bros. be reversed, and that judgment in favor of plaintiff for the amount of said claims as filed be entered upon the findings, recovery thereof to be restricted to the penal amount of the bond and interest thereon.

It is further ordered that plaintiff recover its costs on this appeal.

We concur: MELVIN, J.; WILBUR, J.

(178 Cal. 270)

THAXTER v. FINN, Sheriff. (S. F. 8223.)

(Supreme Court of California. May 11, 1918. Rehearing Denied June 10, 1918.)

1. MASTER AND SERVANT 🔑417(4½)—WORKMEN'S COMPENSATION ACT — WRONGFUL AWARD—RELIEF.

Notwithstanding award of compensation would have been annulled on proper review proceeding, the employer can have relief only where a proceeding for judicial review is instituted in the proper time and court, failing which, the award is not open to other attack in view of Workmen's Compensation Act, § 27,[1] limiting review to courts specified in sections 84, 85, and section 84, providing for review, in 30

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[1] St. 1913, p. 279.

days, in Supreme or District Court of Appeal, and stating that no court of the state (except the Supreme Court and the District Courts of Appeal to the extent therein specified) shall have jurisdiction to review, reverse, correct, or annul any order, decision, or award of the commission, or to suspend or delay the operation or execution thereof, and section 73, making award conclusive in the absence of proper review proceeding.

2. Master and Servant 🔑367—Workmen's Compensation Acts — Right to Award — Subcontractors.

Under Workmen's Compensation Act, § 30, the Industrial Accident Commission cannot enforce claims of an employé of a subcontractor against the principal contractor.

3. Master and Servant 🔑347—Workmen's Compensation Acts—Powers of Legislature.

In view of Const. art. 20, § 21, empowering Legislature to provide for settlement of workmen's compensation disputes, anything in this Constitution to the contrary notwithstanding, the Legislature has power to limit review of awards of compensation, and to make them conclusive, as provided in Workmen's Compensation Act, §§ 27, 73, 84, 85.

4. Master and Servant 🔑416—Workmen's Compensation Act — Wrongful Award — Relief.

In view of Workmen's Compensation Act, §§ 27, 73, 84, 85, making commission's award conclusive in the absence of proper review proceeding, conceding that its acting without its jurisdiction, as, for instance in action for damages by libel, would be subject to collateral attack, its acts in any compensation proceeding, though beyond its jurisdiction in rendering an award against one not the employer, are not so without jurisdiction of the subject-matter as to be subject to collateral attack.

5. Master and Servant 🔑416—Workmen's Compensation Act — Wrongful Award — Relief.

Conceding an award of compensation against one not the employer was beyond the power of the commission, it became conclusive when such person and his insurer failed to ask rehearing before the commission, or review in Supreme Court or District Court of Appeal, under Workmen's Compensation Act, § 84.

Shaw, Sloss, and Melvin, JJ., dissenting.

In Bank. Original proceeding in mandamus by William H. Thaxter against Thomas F. Finn, as sheriff. Writ granted.

P. L. Benjamin and Chris. M. Bradley, both of San Francisco, for petitioner. John T. Williams, John D. Harloe, and Redman & Alexander, all of San Francisco, for defendant.

ANGELLOTTI, C. J. This is a proceeding instituted in this court to obtain a writ of mandate directed to defendant, requiring him to enforce against property of A. A. Janssen and the Ætna Life Insurance Company an execution issued by the clerk of the superior court of the city and county of San Francisco upon a judgment entered in said court upon an award of the Industrial Accident Commission in favor of petitioner. The award of the commission was made in a proceeding regularly instituted and prosecuted by petitioner against one F. W. Thaxter, and also said Janssen and said insurance company, for compensation for injuries arising out of and happening in the course of his employment by F. W. Thaxter. All of these parties appeared in the proceeding before the commission. The work on which petitioner was engaged at the time of the accident was the erection of a building; said Janssen being the general contractor for such erection, the insurance company being the insurance carrier for Janssen, and F. W. Thaxter, for whom petitioner was working, being a subcontractor of said general contractor. Said F. W. Thaxter had not taken out any compensation insurance. The award was made by the commission on June 30, 1914, against all three of the defendants F. W. Thaxter, A. A. Janssen, and the insurance company, being based in so far as Janssen and the insurance company are concerned on the provisions of section 30 of the Workmen's Compensation, Insurance, and Safety Act, which purported to authorize exactly what was done. No complaint was made by any of said defendants as to this award, either by petition for rehearing to the commission, or by application for a writ of review to any court. The award was for the sum of $270.53 to be paid at once, and for an additional sum weekly thereafter during plaintiff's disability. The sum of $270.53 was paid, as well as the weekly stipends to June 20, 1916. Further payment was refused, whereupon a certified copy of the findings and award were filed with the clerk of the superior court as provided by section 26 of said act, and the judgment was entered by the clerk as required thereby. The execution issued to the sheriff was based on this judgment. The facts as we have stated are set forth in the findings of the commission, the certified copy of which and of the award, together with a copy of the judgment, constitute the judgment roll (section 26 [b] Workmen's Compensation, Insurance, and Safety Act).

The refusal of Janssen and the insurance carrier, in June, 1916, to further comply with the terms of the award was doubtless due to the fact that on May 22, 1916, this court decided in Sturdivant v. Pillsbury et al., 172 Cal. 581, 158 Pac. 222, and Carstens v. Pillsbury et al., 172 Cal. 572, 158 Pac. 218 (both being proceedings in certiorari to review awards of the commission, instituted within the time allowed by the provisions of the Workmen's Compensation, Insurance, and Safety Act for the inauguration of such proceedings), that under the Constitution the Legislature was not empowered to confer judicial authority upon the commission to inquire into, determine, and enforce liabilities under section 30 of the act, in favor of the employé against persons other than his immediate employer.

[1, 2] In passing, it may be said that this view has been adhered to in later review pro-

ceedings instituted within the specified time. Donlon v. Ind. Acc. Com., 173 Cal. 252, 159 Pac. 715; Connolly v. Ind. Acc. Com., 173 Cal. 407, 160 Pac. 239; First Christian Church v. Ind. Acc. Com., 173 Cal. 552, 160 Pac. 675. In view of these decisions it is true, of course, that if an application for a writ of review had been made by Janssen and the insurance company to a District Court of appeal or to this court within the time allowed by said act, the award would have been annulled as to them. But, as we have said, no such proceeding was ever instituted. And it is now thoroughly settled that the sole judicial review contemplated by the act can be had only where a proceeding therefor is instituted in the proper court within the time specified in the act. On this ground we have denied applications for writs where it was claimed that the award was in excess of the jurisdiction of the commission, and in at least one case have refused a rehearing in this court when the District Court of Appeal denied a writ on this ground. See North Pacific S. S. Co. v. Ind. Acc. Com. (no opinion) S. F. No. 8571, Dec. 15, 1917. In North Pacific S. S. Co. v. Industrial Accident Com., 168 Pac. 30, this point was discussed and decided by the District Court of Appeal of the First Appellate District.

Notwithstanding this impossibility of review in any judicial proceeding, it is urged that upon the face of the record the award and the judgment based thereon as to Janssen and the insurance carrier are absolutely void and open to collateral attack, for want of jurisdiction of the subject-matter in the commission to make such an award, with the result that the writ of execution issued on the judgment is a mere nullity, affording no justification to the sheriff to make a levy. This claim is based upon authorities relative to collateral attacks upon judgments, and declaring certain well-settled principles as to which we are in entire accord. But in our judgment those authorities are not in point here.

It seems to us that there can be no question as to the clear intent of the Legislature to render awards by the commission of compensation to employés on account of injuries alleged to have been received in the course of their employment free from review or attack of any kind except as prescribed in the Workmen's Compensation, Insurance, and Safety Act. We do not see how this intent could have been made clearer. As said by learned counsel for the commission:

> "It is as plain and clear as anything can be made that the statutory specifications for attack upon the awards of the commission were intended to provide the only method of attack, and to preclude any collateral attack which would, or could, be directed to defeating the award itself, so far as the rights of the immediate parties to the controversy are concerned. The prime purpose of the provisions by their very terms, and by reference to the policy of all compensation statutes, is to effectuate simplicity, facility, and expedition in reaching an end to the controversy and finally settling the rights of the parties to it."

It is provided in section 27 of the act that:

> "The orders, findings, decisions or awards of the commission made and entered under sections twelve to thirty-five, inclusive, of this act may be reviewed by the courts specified in sections eighty-four and eighty-five hereof and within the time and in the manner therein specified and not otherwise."

Section 84 provides for the only review in the courts of such an award, a proceeding in the Supreme Court or a District Court of Appeal, inaugurated within 30 days after the proceeding is terminated before the commission "for the purpose of having the lawfulness of the original order, decision or award or the order, decision or award on rehearing inquired into and determined," and in which the question whether "the commission acted without or in excess of its powers" is one of the questions to be determined, as well as the question whether or not the findings of fact "support the order, decision or award under review." In this section is to be found this provision:

> "No court of this state (except the Supreme Court and the District Courts of Appeal to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order, decision or award of the commission or to suspend or delay the operation or execution thereof."

In section 73 it is provided that all orders, rules, and regulations, findings, decisions, and awards "shall be conclusively presumed to be reasonable and lawful, until and unless they are modified or set aside by the commission or upon a review by the courts in this act specified and within the time and in the manner herein specified." This necessarily means that whenever or wherever an award of the commission is shown it is to be conclusively presumed as against any kind of attack, collateral or otherwise (except, of course, the review proceeding authorized by the act itself), to be lawful and binding, in the absence of a showing that it has been modified or set aside by the commission or by the Supreme Court or a District Court of Appeal in the review proceeding provided by the act.

[3] Manifestly, the provisions quoted were intended to preclude any attack, direct or collateral, upon an award by the commission of compensation to an employé on account of injuries alleged to have been received in the course of his employment, other than the review provided by the act. It cannot be seriously questioned, in view of the constitutional provision relative thereto (section 21, art. 20), that the Legislature has full authority to thus limit the review of such awards and to make them conclusive except on a review by the courts specified by the act and within the time and in the manner specified therein. Its power "to provide for the settlement of any disputes arising under the legislation contemplated by this section,

* * * anything in this Constitution to the contrary notwithstanding," sufficiently implies this authority. The provisions, moreover, appear to be an entirely reasonable exercise of authority on the part of the Legislature in this behalf, with a view to making the final settlement in such cases as expeditious as possible. Ample opportunity is given to any aggrieved party to obtain the authorized review by the proper court, and it is entirely reasonable to provide that in no other way can he resist the award.

[4] As we have stated, the claim here is that the award in this matter is void on its face for want of jurisdiction by the commission of the subject-matter (we say jurisdiction of the subject-matter, for, of course, in view of the record, there can be no question as to jurisdiction of the person), and that therefore, in accord with the well-settled rule ordinarily applicable to judgments that a judgment pronounced by a tribunal having no jurisdiction of the subject-matter is necessarily and incurably void, and may be shown to be so in any collateral or other proceeding in which it is drawn in question, it must be treated as a nullity. We may concede that in accord with the principles applicable to collateral attacks on ordinary judgments, notwithstanding the provisions of the act that we have set forth, absolute lack of jurisdiction of the subject-matter, when apparent on the face of the judgment roll, may be urged on a collateral attack on an award of the commission, in the highly inconceivable event of the commission assuming jurisdiction of an action for damages for libel or slander, or one for money due for goods sold and delivered, or one for damages for negligence, or indeed any proceeding other than one under the Workmen's Compensation, Insurance, and Safety Act looking to the fixing and enforcement of compensation to an employé or to his dependents in the event of his death on account of injuries received by him in the course of his employment. All of this may freely be conceded, but it cannot affect the determination of this proceeding. We have no such case here. There was in this case no such lack of jurisdiction of the subject-matter on the part of the commission. The proceeding here was one by an employé to obtain an award by the commission of the compensation provided by the terms of the Workmen's Compensation, Insurance, and Safety Act for injuries accidentally received by him in the course of his employment. In character it was certainly of the class of proceedings confided by our law to the exclusive jurisdiction of the Industrial Accident Commission. It was a proceeding strictly within the purview of the act and of the constitutional provision upon which the act is based, and one as to which it was clearly intended that any award of compensation made was to be "conclusively presumed to be reasonable and lawful" whenever and wherever attacked, unless modified or set aside in the manner provided by the act. It seems to us that in no proceeding by an employé before the commission to obtain an award for the compensation provided by the act can there be, in view of the provisions of the act, a lack of jurisdiction in the sense in which the term is used in the authorities relative to collateral attacks on judgments, either of the subject-matter, or of the person of any party against whom the relief is sought, and who is given such notice of the proceeding against him as the law requires.

It is true that upon the facts disclosed by the findings the commission in this case did in one sense of the word exceed its jurisdiction; acted "without or in excess of its powers" in making the award, not only against the immediate employer, but also against Janssen and his insurance carrier. There was here an acting in excess of jurisdiction in the same way only that we hold on the review allowed by the act there is an acting in excess of jurisdiction in making an award when there is no evidence to support a conclusion that the person against whom the award was made was the employer of the injured party, or that the accident happened in the course of the employment, or that it arose out of the employment, or that the injury was not due to the willful misconduct of the employer. But clearly it was the manifest intent of the act that no such acting in excess of jurisdiction or "without or in excess of its powers" by the commission shall be available to any party to the proceeding as a ground of attack, collateral or otherwise, upon the award, except in the proceedings authorized by the act. In passing it may properly be said that under the general rule as to lack of jurisdiction of the subject-matter it is thoroughly settled in this state that neither the failure of the complaint to sufficiently state a cause of action, nor the insufficiency of the findings to support a judgment, subjects the judgment to collateral attack as being void on its face. In substance all we have here is a lack of any sufficient evidence on which to sustain an award against Janssen and the insurance company—a lack confessed by the very findings on which the award is based—with the result that the findings do not sufficiently support the judgment or award against them.

As we have already said, we see no good reason to doubt the authority of the Legislature to preclude to the extent stated, in so far as the courts of this state are concerned, any attack, direct or collateral, upon an award by the commission of compensation in any proceeding instituted by a person claiming compensation under the Workmen's Compensation, Insurance, and Safety Act, provided, always, of course, that jurisdiction of the person of the party against whom the award runs is not wanting. The language used in our constitutional provision sufficiently implies the authority to make any reasonable regulation as to the time within and manner in which any award for compensation made in a proceeding before the commission may be attacked in any way, directly or collaterally; to enact, as it were, a statute of limitations creating an absolute bar to any such attack made after the prescribed time. It is an incident of their acknowledged power to, "by appropriate legislation, create and enforce a liability on the part of all employers to compensate their employés," etc., and to "provide for the settlement of any disputes arising under the legislation contemplated" by the constitutional provision, and reasonably appropriate to that end. We have already discussed this matter and the question of the purpose and reasonableness of the provisions precluding any attack on an award other than such attacks as are provided in the act.

[5] The situation here presented does not render the award and judgment attackable collaterally. It could be considered by a court in a review proceeding instituted in the manner and within the time specified in the act (section 84), and, we are satisfied, not otherwise. The award became absolutely final and conclusive against Janssen and his insurance carrier when they failed to ask for any rehearing before the commission, and failed to ask for any review by this court or a District Court of Appeal within the time allowed by the act.

It follows that petitioner is entitled to the relief sought. Let a peremptory writ of mandate issue as prayed.

We concur: WILBUR, J.; RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

SHAW, J. I dissent.

In my opinion none of the propositions on which the majority opinion is based is logically tenable. It is an elemental principle of law that a judgment of any tribunal upon a subject-matter of which it has no jurisdiction is absolutely void; not merely voidable at the election of the losing party thereto if he chooses to avail himself of some procedure authorized by law, for the purpose of annulling or vacating it, but totally void whether he submits to it or not, and wholly and always incapable of enforcement against his will. The reason is simple. The power of any tribunal to adjudge a matter is given to it by the people. It can come from no other source. The judgment, when made, is, in effect, the judgment of the people. The power is always limited by the terms of the gift. Beyond that the power does not exist. A decision upon a matter to which the power does not extend is not a decision of the people, and hence is of no force.

The Industrial Accident Commission is authorized to decide disputes of one kind only; that is to say, disputes between an employer and an employé in regard to a claim by the employé against the employer for the compensation allowed to him by the Workmen's Compensation Act for an injury arising out of and happening in the course of his employment. It has no power to decide upon a claim by such employé for such compensation against a person who is the general contractor upon a building upon which his employer is a subcontractor, or against the owner of the building, or against one who is not his employer. A decision purporting to allow such compensation against either or all of such persons, and which shows that fact upon the face of the record thereof, is a decision which the commission has no power to make. By the principle above stated it is of necessity void in the extreme sense, or as Mr. Freeman expresses it:

> "It is to be regarded as mere waste paper—a mere brutum fulmen;" "necessarily and incurably void, and may be shown to be so in any collateral or other proceeding in which it is drawn in question." Freeman on Judgments, §§ 116, 120.

See, also, Pioneer Land Co. v. Maddux, 109 Cal. 642, 42 Pac. 295, 50 Am. St. Rep. 67; Winrod v. Wolters, 141 Cal. 403, 74 Pac. 1037; Kreiss v. Hotaling, 96 Cal. 617, 31 Pac. 740; Sullivan v. Gage, 145 Cal. 771, 79 Pac. 537.

The decision which the plaintiff in this proceeding seeks to have enforced in his favor against Janssen and the Ætna Life Insurance Company, his insurance carrier, is a decision that Janssen, who is not the employer, nor claimed to be the employer, of the plaintiff, and who had no connection with him whatever, except that he contracted to erect a building and let a subcontract for a part of the work thereon to another person by whom plaintiff was employed and for whom he was at work when injured, shall pay the compensation for which the employer solely is liable. It was a decision upon a matter upon which the commission had no jurisdiction to act at all, as this court has repeatedly decided. Sturdivant v. Pillsbury, 172 Cal. 581, 158 Pac. 222; Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218; Donlon v. Ind. Acc. Com., 173 Cal. 252, 159 Pac. 715; Connolly v. Ind. Acc. Com., 173 Cal. 407, 160 Pac. 239; First Christian Church v. Ind. Acc. Com., 173 Cal. 552, 160 Pac. 675.

All this is admitted in the majority opinion. The decisions in the cases last cited, although they were all cases in which the awards of the commission were attacked by a direct proceeding in this court, as provided in the Workmen's Compensation Act, were necessarily based upon the proposition that such an award was upon a subject-matter that was beyond the jurisdiction of the commission, and they fully establish that proposition. This, also, is admitted, or, at all events, not disputed, in the majority opinion.

The principle I have stated applies to all courts, the highest as well as the lowest. There is no exception, not even in the case of the Supreme Court itself. This court has no jurisdiction to entertain an appeal from a money judgment of a justice of the peace; that is a subject-matter to which its powers do not extend. If it should, nevertheless, go through the form of entertaining such an appeal, and should thereupon enter its judgment reversing the judgment of the justice of the peace, the latter judgment would not be thereby reversed, but would remain in full force notwithstanding the purported reversal by this court. The justice of the peace could lawfully proceed to issue an execution thereon, and the execution could be enforced, paying no attention to the reversal.

The majority meet this condition by the assertion that the Industrial Accident Commission is an exception. The exception exists, they say, because of the peculiar provisions of the Workmen's Compensation Act. They point to the provision of section 84 that "no court of this state (except the Supreme Court and the District Courts of Appeal to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order, decision or award of the commission, or to suspend or delay the operation or execution thereof," and to provisions of section 27 of similar import and of section 73, declaring that awards of the commission made "in conformity with law" shall be conclusively presumed to be reasonable and lawful until set aside upon a review as provided in section 84. And these provisions, they say, forbid all question, in any other court, concerning the validity of any award of the commission, no matter how obviously and palpably void it may be on the face of the record thereof. The claim is that the invalidity, though patent, cannot be taken advantage of in any collateral proceeding in any court, or at all.

The phrase "collateral attack" is relied on to justify this proposition. The act says that such award shall not be "reviewed, reversed, corrected or annulled" in any other than the prescribed manner. This, it is claimed, precludes all other "attacks." The words bear no such significance. They each have a well-known and somewhat limited meaning, and they all refer to some sort of direct proceeding in which the rulings and the award may be examined with a view to determining whether or not they were regular or sanctioned by law and with the object of vacating the award if on such examination sufficient cause therefor is found. A judgment is "reviewed" when the proceedings leading up to it are examined by some other tribunal with power to vacate, reverse, annul, or correct it after such examination. It is "reversed" or "annulled" when the higher tribunal on such review, upon finding it erroneous or void, so adjudges. It is "corrected" when on such review it is found erroneous or void in part only, and the offensive part is eliminated.

These provisions of the act limiting the power of review of awards of the Industrial Accident Commission and forbidding such review by any court other than those specified introduce no new feature into our law. A judgment of the superior court cannot be "reviewed, reversed, corrected or annulled," except by the courts specially empowered to do so and in the manner specially provided for that purpose. There may be more methods of procedure for review provided, but the principle is the same, and, of course, the greater variety of methods has no bearing on the question at issue. The same is true of judgments of justices of the peace. A judgment or order of a superior court may be reversed or corrected on appeal by the Supreme Court or by a District Court of Appeal. It may be annulled on certiorari, for want of jurisdiction, by the same courts. And it may be annulled or set aside for fraud or mistake by an action in equity for that purpose by the superior court itself. These are all expressly provided by law and are all of the class known as direct attacks. And none other is provided or permitted. The provisions of the act aforesaid, therefore, do no more than to place the Industrial Accident Commission, which is a tribunal of special and limited jurisdiction, upon the same plane, with respect to presumptions in its favor, and in respect that its awards can be directly attacked only by the specified courts, as that on which the law had already placed courts of general jurisdiction. The reasonable and obvious conclusion and interpretation of the act would be that this was all that was intended by the language used, since that is all that its natural and ordinary meaning imports. Yet, notwithstanding these limitations upon the power and manner of reviewing judgments of the superior courts, fully as drastic as those applying to the commission, it has never been supposed or contended that such judgments, if shown by the record thereof to be upon a subject-matter not within its jurisdiction, were not ineffectual and void, subject to collateral attack, so called, at any time or place, or that they could not be safely ignored and disregarded by the parties thereto as well as by others. It is universally conceded that such is the case.

Why should there be a discrimination between these tribunals whereby such limitations, when applied to superior courts, should leave their judgments open to impeachment or question collaterally for obvious want of jurisdiction, but when applied to the Industrial Accident Commission places its award beyond reach or question collaterally, although obviously and openly upon a matter over which the commission is given no power or jurisdiction whatever? The majority do not attempt to answer this question, or to give any reason for the discrimination. It does not appear that they have even perceived that there is such discrimination. In my opinion no answer is possible and no reason for the discrimination exists.

Nor can I perceive any reason in justice for enlarging the accepted meaning of the words of the act, as, in my opinion, the majority has done. The view advanced by me could not materially affect the proceedings of the commission. The invalidity of its awards can be taken advantage of, under the principles above stated, only when the excess of jurisdiction appears on the face of the record. This means that it can be done only when the record itself shows that the commission has committed, or attempted to commit, an injustice; when it has awarded compensation from a person whom the law does not make liable therefor, or has assumed to adjudge a matter wholly foreign to its functions, such, for example, as to give judgment for the recovery of money due on contract, or for damages for conversion of property. It must be admitted that if an award purports to impose a liability upon some one upon whom the law does not cast the burden, reason, fair dealing, and justice alike would require that such award should have the stamp of invalidity so impressed upon it that it could be made available at any time and under any circumstances. Surely, the commission itself can have no wish to have its mistakes of that character cause such hardship and injustice; it being itself powerless to correct the mistake after the lapse of 30 days from the making thereof. Such straining of the ordinary meaning of words would seem to have no possible result other than to perpetuate injustice and wrong in cases where from any cause, such as inadvertence, ignorance, sickness, or other disability, the party so mulcted has failed to take the direct proceeding authorized by the act. To allow such collateral objection to prevail does not tend to destroy or hamper the facility with which employés may obtain the compensation to which they are entitled from the person whom the law makes liable, as the majority seem to fear; for it is only when he has obtained an award to which he is not entitled and from a person who is not liable and could not be made liable, and when this appears by the record of the award itself, that the principle can be invoked against him, and in such case it cannot be said to hamper him in the pursuit of any just claim.

The majority admit that "in the highly inconceivable event of the commission assuming jurisdiction of an action for damages for libel or slander, or one for money due for goods sold and delivered, or one for damages for negligence, or indeed, any proceeding other than one under the Workmen's Compensation, Insurance, and Safety Act, looking to the fixing and enforcement of compensation to an employé or to his dependents in the event of his death on account of injuries received by him in the course of his employment," the objection of lack of jurisdiction of the subject-matter may be urged collaterally. They also admit, as before stated, that a proceeding against the original contractor by an employé of a subcontractor, to obtain compensation for an injury received in the course of that employment, is not a lawful proceeding under said act, nor a proceeding authorized thereby. They therefore admit the error of their conclusion. The argument is comparable to the defense of the wet nurse in Marryatt's story of Mr. Midshipman Easy, who, when taxed by the austere and highly moral father of little Jack with being the mother of an illegitimate child and therefore unfit to suckle the child of such a father, answered by way of confession and avoidance, "But it was such a little one." Here, the award being for compensation to plaintiff for injuries received in the course of his employment, and the only departure from the authority of the commission being that it has avowedly charged such compensation to one who was not legally liable and could not lawfully or justly be made liable therefor, it is too small to be taken advantage of collaterally, although wholly unauthorized, as completely without authority of law as would have been an award of damages for libel.

As if perceiving that the above-mentioned admission is a little awkward in its logical results, the majority opinion proceeds to endeavor to show that there was some semblance of jurisdiction in the commission when it made the award here in question. There was jurisdiction, they say, because the proceeding was "by an employé to obtain an award by the commission of the compensation provided" by the act for injuries accidentally received by the employé in the course of his employment. From this small premise it is argued that the commission is thereby given jurisdiction to make an award against any person from whom the employé sees fit to ask it, whether such person is the employer or not. Of course if this argument were good, this court could never, in any direct proceeding to review such award, have power to annul it; for, jurisdiction of the person being admitted, there would be jurisdiction of the subject-matter also, and, no other cause being set up, it would be only for lack of such jurisdiction that this court could, under the act, set aside an award. But the argument states only half the case. It is as if one of our superior courts should give judgment foreclosing a mortgage on land lying wholly outside of the state, and when the objection of want of jurisdiction of the subject-matter is made the plaintiff should answer that the superior court has jurisdiction of actions to foreclose mortgages on land. The obvious reply would be that the fact that land shall lie in this state is essential to the jurisdiction and that it is necessary to be included in any complete description of such jurisdiction. The application of the illustration is obvious.

There is no question here of the failure of the complaint before the commission to state a valid claim under the act. It is not disputed that the claim was made against Janssen solely on the ground that he was the original contractor, and upon the theory, now known to be erroneous, that the act cast upon him in that character a liability to compensate the employé of a subcontractor under him. The record plainly shows on its face that this is the fact of the matter. Nor was it a mere lack of evidence to show that Janssen was the employer of the plaintiff. There never was a claim that he was such employer.

Running through the majority opinion there is apparent an erroneous idea as to the nature of what is denominated a "collateral attack"—the idea that it is some sort of proceeding to review the decision so attacked or objected to in the collateral suit. This is not in any sense true. When a judgment appears on its face to have been made by a tribunal having no power to act at all on the subject-matter thereof, it is, as Mr. Freeman says, "in legal effect, no judgment." "It neither binds nor bars any one." Freeman on Judgments, § 117. The objection may be raised at any time or place, in court or out of court. And when raised and sustained, no direct action upon the void judgment ensues in the sense that it is vacated, annulled, or reversed. It is merely excluded from consideration if the objection is made in court in a collateral action, or disregarded entirely if the objection is made by a party interested in the course of a business transaction out of court. In a trial in a justice's court an objection of this character can be made to a judgment of the superior court, over whose judgments a justice's court can have no reviewing power whatever. The justice, nevertheless, has power to sustain the objection and exclude proof of the void judgment. And his ruling can itself be reviewed only on appeal to the superior court.

Finally, it is said that section 21, article 20, of the Constitution, gives the Legislature power to provide this immunity of awards of the commission from question collaterally, even when they are upon matters not committed to the commission either by the Legislature or by the Constitution itself. The statement in that section that "the Legislature may provide for the settlement of any disputes arising under the legislation contemplated by this section," refers only to the preceding sentence wherein power is given to the Legislature to "create and enforce a liability on the part of employers to compensate their employés" for injuries arising out of and happening in the course of their employment. This section, therefore, does not contemplate any legislation allowing a liability for compensation to be created against persons not employers, nor legislation providing that compensation awarded against persons not employers shall be immune from collateral attack, and that, though invalid for want of power if directly attacked, they immediately become valid and enforceable if such direct attack, for any reason, is not made within the short time allowed. Hence, whatever power the Legislature may have over such matters, it does not derive that power from this section, but obtains it from the general grant of legislative power found in article 4. But in my opinion it is entirely clear that the Legislature has made no attempt to exercise such power by any provision of the act under consideration.

For these reasons I am of the opinion that the writ of mandate applied for should have been refused.

We concur: SLOSS, J.; MELVIN, J.

(178 Cal. 293)

In re BAILARD. (Sac. 2568.)

(Supreme Court of California. May 21, 1918.)

1. HUSBAND AND WIFE ⚷247—STATUTE—CONVEYANCE—RIGHTS OF WIFE.

Where land was conveyed to a married woman by a deed of grant, bargain, and sale, executed before the amendment of 1889 to Civil Code, § 164, providing that a conveyance in writing to a married woman raises presumption that title is vested as her separate property, the land so conveyed became community property.

2. HOMESTEAD ⚷86—COMMUNITY PROPERTY—SELECTION BY WIFE.

Where an undivided one half of property is community property, and the other half wife's separate property, a wife's homestead declaration impressing her separate property as homestead has effect of impressing homestead characteristics on other half as a homestead selected by wife from community property, in the absence of selection by husband.

3. HOMESTEAD ⚷140—RIGHTS OF SURVIVING HUSBAND—STATUTORY PROVISIONS.

Where an undivided one half of property selected by wife as homestead was community property, and the other half was wife's separate property, the property vested in husband upon wife's death under Code Civ. Proc. § 1474, providing that community property selected by wife for homestead vests absolutely in husband upon wife's death, and further providing that her separate property selected as homestead likewise vests absolutely in husband upon her death.

Department 2. Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

In the matter of the termination of the homestead interest of Sarah S. Bailard, sometimes also known as Sarah Baylard, deceased. From an order setting apart homestead to Frank Bailard, Gilbert Bailard and others appeal. Affirmed.

Paul C. Harlan, of Fairfield, for appellants. Raines & Devlin, of Fairfield, for respondent.

WILBUR, J. This is a proceeding brought under the provisions of section 1723 of the Code of Civil Procedure, by the surviving husband, to be declared the owner of a homestead vesting in him by reason of his wife's death, by virtue of the provisions of section 1474 of the Code of Civil Procedure. The property was ordered set apart to petitioner by the lower court, and the children of petitioner and his deceased wife appeal to this court from that order.

[1] After the marriage of the petitioner and decedent an undivided one-half interest in the property in question was conveyed to him, and thereafter the same grantor conveyed the other undivided one-half interest to the decedent. It is correctly claimed by appellants that, inasmuch as the deed to the wife was made before the amendment of 1889 to section 164 of the Civil Code, and was in form a deed of grant, bargain, and sale, the title to the half so conveyed to her became community property. Thereafter certain conveyances were made between the husband and wife of undivided half interests therein, by which the appellants claim the wife at the time the homestead declaration was filed by her thereon, was vested with an undivided one-half interest as her separate estate and the husband a one-half interest as community property; while the respondent claims that the entire title was thereby vested in the wife as her separate estate, and that, for that reason, upon her death the property vested in him as surviving husband, under the provisions of section 1474, Code of Civil Procedure. It is unnecessary to determine which of these two contentions is correct.

[2] If we take appellants' view, namely, that the wife owned an undivided one half of the property as her separate property, and that the other half was vested in the community, the homestead declaration by her impressed the undivided half interest in the property held by her as her separate property with the characteristics of a homestead selected by the wife from her separate property, and also impressed the other half of the property owned by the community with the characteristics of a homestead selected by the wife from the community property, in the absence of any selection by her husband. Swan v. Walden, 156 Cal. 195, 103 Pac. 931, 134 Am. St. Rep. 118, 20 Ann. Cas. 194; Estate of Davidson, 159 Cal. 98, 115 Pac. 49.

[3] The undivided half of the property which was community property, therefore, vested in the petitioner upon his wife's death, under the following clause of section 1474, Code of Civil Procedure:

> "If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both are living, was selected from the community property, * * * it vests, on the death of the * * * wife, absolutely in the survivor."

The undivided half which was the separate property of the wife vested in the husband upon her death under the following clause of the same section:

> "If the homestead selected by the * * * wife * * * was selected * * * from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the * * * wife, absolutely in the survivor."

The same result follows from the same provision if the property was all her separate property, as contended by respondent.

There is no merit in the contention that the description in the homestead is insufficient.

The order is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

(36 Cal. App. 707)

SHERWOOD & SHERWOOD v. GILL & LUTZ et al. (Civ. 2091.)

(District Court of Appeal, Second District, California. April 8, 1918.)

1. LIMITATION OF ACTIONS 🔑46(12)—AGREEMENT TO PAY DEBT OF ANOTHER.

The agreement of defendant with F., on buying F.'s business, to assume and pay all indebtedness of F. contracted in and about the business, rather than the original debt of F. to plaintiff and his assignor, contracted in said business, constitutes the gist of plaintiff's cause of action, as regards limitation of action.

2. CONTRACTS 🔑187(3) — PARTIES — "CONTRACT MADE EXPRESSLY FOR BENEFIT OF THIRD PERSON."

Within Civ. Code, § 1559, providing a contract made expressly for the benefit of a third person may be enforced by him, contract of defendant with F., on buying F.'s business, to assume and pay all indebtedness of F. in and about said business is for the benefit of creditors of F. in such business, though they are not named and the indebtedness to them is not at the time known to defendant.

3. CONTRACTS 🔑346(2) — BENEFIT OF THIRD PERSON—PLEADING AND EVIDENCE.

Though the complaint in action on agreement of defendant, in purchase of business of F., to pay all indebtedness of F. contracted in the business, alleges that at the time of the purchase F. was indebted to plaintiff on an open book account, proof of an open book account is unnecessary; this being but an allegation of an evidentiary fact, and it being enough that there was an unpaid indebtedness of F. coming within the description of defendant's contract with him.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Sherwood & Sherwood, a corporation, against Gill & Lutz, a copartnership, and others. From an adverse judgment, plaintiff appeals. Reversed.

T. F. Allen, of Bakersfield, for appellant.
T. N. Harvey, of Bakersfield, for respondents.

CONREY, P. J. On the 23d day of August, 1910, J. C. Fuller sold and transferred to defendants the personal property and improvements and good will of a saloon business theretofore conducted by him on certain premises in San Luis Obispo county. The written contract of sale provided that the purchasers "hereby agree to assume and pay all indebtedness of the said J. C. Fuller contracted in or about the said business." In this action the plaintiff seeks to recover on that contract as one made for its benefit and for the benefit of its assignor as creditors of Fuller on account of indebtedness contracted by him in and about the business described in said contract. The original complaint by which this action was commenced was filed on February 4, 1913; the case went to trial upon the second amended complaint and the answer thereto. Our further references to the complaint should be understood as meaning the second amended complaint. The first count alleged that on August 23, 1910, Fuller was indebted to plaintiff in the sum of $258.59 upon an open book account for goods, wares, and merchandise sold and delivered by plaintiff to Fuller in the months of May and June, 1910. The second count alleged that on the 23d day of August, 1910, Fuller was indebted to H. Jevne Company in the sum of $292.20 upon an open book account for merchandise sold by that company to him in the months of April and June, 1910, which said account was on December 30, 1912, assigned by H. Jevne Company to plaintiff. Judgment was entered in favor of defendant Lutz; defendant Gill having suffered default. Plaintiff appeals from the judgment entered in favor of Lutz.

1. It was found by the court to be true, as alleged by defendant Lutz, that as to each of the causes of action in plaintiff's complaint it was barred by subdivision 1 of section 339 of the Code of Civil Procedure. If, as contended by respondent, this is an action to recover a sum due upon an open book account, or if, as contended by appellant, the action rests upon a contract liability founded upon an instrument in writing executed by the defendants within this state the period of limitation is four years, as provided by section 337, Code of Civil Procedure. The action is not, upon either theory, governed by the two-year limitation described by section 339, Code of Civil Procedure.

[1] Appellant relies upon the written contract made by defendants with Fuller, and upon section 1559, Civil Code, which reads as follows:

> "A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it."

Appellant contends that the gist of his action is the enforcement of a contract agreeing to pay a debt to a third person; that he is suing upon that contract, and not directly upon the obligation of indebtedness which had been incurred by Fuller. Appellant's theory is that the agreement of defendants to pay the debts of Fuller is a new contract for which the property transferred by Fuller to defendants constituted the consideration. Respondent, on the other hand, contends that the only causes of action stated by the complaint are founded upon the alleged indebtedness of Fuller to the plaintiff "upon an open book account," and upon a similar indebtedness of Fuller to plaintiff's assignor, also "upon an open book account"; that the only indebtedness proved to have been incurred by Fuller was not proved as upon any open book account, but was only an ordinary indebtedness upon oral agreement for goods sold; that the action was therefore barred by the statute of limitations (subdivision 1, § 339, Code Civ. Proc.) because it was not commenced within two years after the indebtedness incurred by Fuller became due.

In support of his claim that the action is in substance founded only upon the original "open book account" indebtedness said to have been created by Fuller, respondent refers to the case of Roberts v. Fitzallen, 120 Cal. 482, 52 Pac. 818. That action was instituted for the foreclosure of a mortgage which, at the time of the transfer of the mortgaged property to him, Fitzallen had assumed and agreed to pay. At that time the mortgage debt was not yet due. The action was commenced within less than four years after the note by its terms became due, but more than four years after the deed to Fitzallen. Fitzallen claimed that the four-year period of limitation began to run at the date of his deed, and that the action against him was upon the liability created by the terms of the deed as accepted by him. In response the court said:

> "The liability of the grantee in such a case is the indebtedness secured to be paid by the mortgage. But it must be enforced by foreclosure; and a deficiency judgment may be entered against him only upon the security, the mortgaged premises, becoming exhausted (citing cases). It necessarily results that the statute of limitations must run against the mortgage obligation, for that is the grantee's liability, and not against the promise to pay the mortgage as a new and independent agreement."

In Daniels v. Johnson, 129 Cal. 415, 61 Pac. 1107, 79 Am. St. Rep. 123, the Supreme Court defined the effect of an agreement assuming and agreeing to pay a mortgage. The court said:

> "The effect of the deed from Wilson to Howe, executed as it was while the note was a subsisting obligation, or, in other words, before it was barred by the statute of limitations, was to waive so much of the period of limitations as had run in favor of Wilson, the mortgagor, and establish a continuing contract and not a new contract. There was no merger of the old debt in the new, but merely a continuation of the original liability for a longer term. There was no renewal of the lien, and no occasion for its renewal; it was not extended, nor was it extinguished, but continued for the period during which the note, as continued, had to run" (citing Southern Pacific Co. v. Prosser, 122 Cal.

413, 52 Pac. 836, 55 Pac. 145; Roberts v. Fitzallen, 120 Cal. 482, 52 Pac. 818).

Discussing the foregoing decisions, appellant accounts for them, and in our opinion correctly accounts for them, by the fact that they involved promises to pay mortgage indebtedness, under a law which defines and limits the mortgagee's right of action, the promise to pay in those cases being, under the statute, not enforceable personally for anything more than the portion of the debt which may remain unpaid after a sale made under decree of foreclosure; the action not being, as in the case at bar, solely upon the promise to pay as a new and independent agreement. We think that the difference between an agreement thus affecting the rights of parties to a foreclosure suit and a contract enforceable only at law upon a personal agreement made for the benefit of a third person is very clear. In Washer v. Independent Mining & Development Co., 142 Cal. 702, 76 Pac. 654, which was an action at law to recover upon a promise made by the defendant to certain persons to pay money which they owed to the plaintiff, the plaintiff's right to recover was based directly upon the promise thus made. At page 708 of the decision last cited the court quoted from Brewer v. Dyer, 7 Cush. (Mass.) 337, as clearly stating the doctrine in the following terms:

> "Upon the principle of law, long recognized and clearly established, that where one person for a valuable consideration engages with another to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement; * * * that it does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases seem to indicate, but upon the broad and more satisfactory basis that the law, operating upon the acts of the parties, creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded."

In Malone v. Crescent City Mail & Transportation Co., 77 Cal. 38, 18 Pac. 858, it was said that where A. owes B., and B. owes C., and A. and B., without consulting C., agree that A. shall pay to C. the amount which A. owes B., an action may be maintained by C. against A. "Such a promise, although the party for whose benefit it was made was not cognizant of it when made, is, if adopted by him, deemed to have been made to him, and he may sue upon the promise thus made without a consideration passing from him to the promisor."

In the case at bar, it is true that each of the contracts, in its turn, must have been made, before the defendants can be held as bound to pay to the plaintiff. But primarily it is the contract made by the defendants which makes them liable at all. There being no mortgage, the remedy is not complicated by any rule which prevents a direct action at law for the collection of the debt. Our conclusion, therefore, is that if by their agreement with Fuller the defendants agreed to pay the indebtedness of Fuller then owing to the plaintiff and to the plaintiff's assignor for the merchandise which had been sold to Fuller as stated in the complaint, the cause of action of the plaintiff arises directly out of the agreement thus made by the defendants, and this agreement, rather than the original indebtedness, constitutes the gist of the plaintiff's cause of action. It follows that the action was not barred by the statute of limitations.

[2] 2. The trial court found that at the time the defendants entered into the agreement with Fuller for the purchase of his business they had no knowledge of any indebtedness existing between Fuller and the plaintiff, or between Fuller and the plaintiff's assignor, and that said agreement was not made expressly or at all for the benefit of either the plaintiff or its assignor. The latter part of this finding cannot be sustained unless it is justified by the fact that at the time of making such agreement the defendants had no knowledge of the existence of such indebtedness owing by Fuller. To show that the entire finding is thus justified respondent cites the case of Wilson v. Shea, 29 Cal. App. 788, 157 Pac. 543, quoted as follows:

> "The rule of the decisions is clear to the point that in order to sustain such an action there must have been an intent clearly manifested on the part of the contracting parties to make the obligations inure to the benefit of the third party."

But we do not think that decision sustains respondent's contention. The court held that the writing upon which the plaintiff in that case relied did not show an intent to assume responsibility to the plaintiff's assignor on account of a certain contract. That being so, of course the plaintiff, or his assignor, could not be the person for whose benefit the contract was made, and could not recover thereon. In the case at bar, although Sherwood & Sherwood and the Jevne Company were not named in the contract made by the defendants, yet if at that time Fuller was indebted to those corporations by reason of obligations contracted in and about the business which Fuller sold to the defendants, then those corporations belonged to a class of creditors of Fuller, which class was expressly designated in the contract. "It is not necessary that the parties for whose benefit the contract has been made should be named in the contract. It must appear, however, by the direct terms of the contract, that it was made for the benefit of such parties." Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. 100. It appears, therefore, that plaintiff is entitled to maintain this action if it can establish by sufficient proof that Fuller was indebted as alleged in the complaint.

[3] 3. The court found "that J. C. Fuller was not indebted either to H. Jevne Company or Sherwood & Sherwood in any sum upon an open book account for goods, wares, and

merchandise sold and delivered either by H. Jevne Company or by Sherwood & Sherwood to said Fuller." In view of our definition of the nature of the plaintiff's cause of action, it is not necessary that the indebtedness owing by Fuller should have been "upon an open book account," if even without such open book account the evidence proves that the indebtedness existed, contracted by Fuller in and about his saloon business, and that it was for goods, wares, and merchandise sold and delivered to Fuller as alleged in the complaint. Proceeding upon this theory of the case, we will now examine the evidence.

Counsel for the respective parties agree that the evidence shows the following facts: With reference to the Sherwood & Sherwood account, that in May, 1910, Fuller ordered a bill of goods consisting of liquor, and in the following July another stock of liquors, and made a partial payment on the first order. The plaintiff sent to Fuller itemized statements of account which he never denied, and the sum of $258.59 remained due upon the account from Fuller to the plaintiff. With reference to the other account, the evidence shows that H. Jevne Company sold a general bill of goods to Fuller in April and June, 1910, on open account for $292.20, when Fuller was opening the business described in the complaint, and that the merchandise was used in connection with the said business; that Fuller promised and agreed to pay the Jevne Company for the merchandise, including $9.02 freight, or a total of $292.20, and that the same has not been paid. A sheet of paper, being customer's ledger sheet, was introduced in evidence, and testified to be a true statement of the account of H. Jevne Company against Fuller, including all charges for merchandise sold and delivered to Fuller by H. Jevne Company, and the prepaid freight charges. And it was testified that the same was a true statement of the account and original records. A letter was introduced in evidence, dated August 12, 1910, signed by Fuller, addressed to H. Jevne Company, in which he acknowledged the indebtedness and promised to pay the bill on September 1st.

In his argument upon the facts shown, counsel for respondent contends that the plaintiff failed to show in either cause of action an open book account existing between the plaintiff or the plaintiff's assignor and Fuller. He does not contend that an indebtedness did not exist which was contracted in and about the business of Fuller, and does not contend that such indebtedness was not paid. The finding of fact made by the court is marked by the same limitations.

If we agreed with respondent that plaintiff's cause of action was upon the original indebtedness, we would also agree that the plaintiff could not prevail without establishing the open book account. This result would be compelled under the rule that a plaintiff must prove the facts material and essential to his cause of action. But since we have held herein that the plaintiff's cause of action is based upon the contract made by the defendants with Fuller, it is sufficient for the plaintiff that it is the owner of an unpaid indebtedness owing by Fuller and coming within the description stated in the contract. The fact that there was an open book account, although alleged in the complaint, was only an evidentiary fact, and was not the only means by which the principal facts might be proved.

The judgment is reversed.

We concur: JAMES, J.; WORKS, Judge pro tem.

(36 Cal. App. 740)

MAYER v. ANDERSON et al. (Civ. 2392.)

(District Court of Appeal, First District, California. April 9, 1918.)

1. Trial 🔑165 — Nonsuit — Evidence—Inferences.

In deciding a motion for a nonsuit, every favorable inference fairly deducible from the evidence produced must be considered in favor of plaintiff.

2. Municipal Corporations 🔑705(10)—Use of Streets — Collision — Contributory Negligence.

A pedestrian who crosses a crowded street at 5 o'clock in the afternoon when traffic is heavy, looking straight ahead without glancing to either side, and is struck by an automobile of which he is oblivious until the moment of the collision, is guilty of contributory negligence; it being his duty to be alert and watchful, and to look up and down the street to know whether approaching vehicles are likely to intercept his line of travel.

3. Municipal Corporations 🔑705(10)—Use of Streets—Crossing Accidents—"Last Clear Chance."

In pedestrian's action for injury while crossing a public street, due to collision with defendant's automobile, where there was evidence that the chauffeur did not discover plaintiff's peril in time to avoid the accident, and the chauffeur's negligence, if any, being not subsequent to and independent of the plaintiff's continuing negligence, but contemporaneous with it, the doctrine of last clear chance is not applicable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Last Clear Chance.]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Samuel D. Mayer against Sterling Anderson and another. From a judgment for defendants, plaintiff appeals. Affirmed.

McCutchen, Olney & Willard, of San Francisco, for appellant. Wm. M. Abbott and Wm. M. Cannon, both of San Francisco (Kingsley Cannon, of San Francisco, of counsel), for respondents.

KERRIGAN, J. This is an action for damages for personal injuries alleged to have been caused by the defendants' negligence. The court at the conclusion of the plaintiff's case denied a motion for nonsuit, but the motion being renewed when the defendants had concluded the introduction of their testimony, it was thereupon granted. The propriety of the court's action in this regard is the sole question presented for review.

[1] In considering this same question the court, in the case of Lassen v. Southern Pacific Company, 173 Cal. 71, 74, 159 Pac. 143, 144, stated the rule to be applied as follows:

> "In deciding a motion for a nonsuit, 'every favorable inference fairly deducible * * * from the evidence produced must be considered as facts proved' in favor of the plaintiff. If there is any substantial evidence tending to prove all the facts in issue constituting the plaintiff's case, he is entitled to have the case go to the jury for a verdict on the merits."

Reverting for a moment to the facts of the case, the evidence showed that the plaintiff at about 5 o'clock on the afternoon of June 26, 1914, was crossing on the northerly side of Market street in San Francisco, and was proceeding westward on the crossing between the northeast corner of the intersection of Market and Kearny streets to the northwest corner of the same intersection, which is also the easterly point of the gore formed by the intersection of Market and Geary streets. He passed Lotta's fountain, a monument standing on the line of crossing about half way between the corners above referred to, and had in his progress reached a point on the crossing about midway between the fountain and the northwest corner, when an automobile belonging to the defendants, proceeding southward on Kearny street towards Market street, and having crossed the line of Geary street in its progress, and being about to turn into Market street, collided with the plaintiff. As a result of this collision the plaintiff fell to the pavement, the fall resulting in very severe injury to him.

It is not claimed that the defendants were operating the car in violation of any speed law. The car was not moving rapidly, the testimony being that upon hitting the plaintiff it was stopped at once. According to the principal witness for the plaintiff, it was going no faster at the time of and just prior to the impact than the plaintiff was walking. But assuming that the evidence introduced by the plaintiff tends to support the claim that the defendants were guilty of negligence, still we think the court committed no error in granting the nonsuit, for the reason that the injuries to the plaintiff were, we think, proximately caused by his own negligence, and for the further reason that the evidence introduced by the plaintiff does not warrant the application of the doctrine of "last clear chance."

[2] According to the undisputed evidence of all his witnesses, the plaintiff, at 5 o'clock in the afternoon, when traffic upon the intersection above described was heavy, walked out upon the crossing looking straight ahead, without glancing to either side, and was absolutely oblivious to the proximity of the automobile right up to the moment of the impact, at which time he had traversed about three-quarters of the distance across the street. Plaintiff was bound to do more than to ascertain whether or not there was any obstruction in his immediate path. He was required to be alert and watchful, and to look up and down the street in order to know whether approaching vehicles were likely to intercept his line of travel. It has been repeatedly stated as the settled rule that the duty cast upon both pedestrian and driver of a vehicle in their use of the public streets is reciprocal and equal, and that neither of them has a right of way superior to the other; yet, in the present case, as stated by counsel for the defendants, we find the plaintiff urging that defendants' chauffeur was bound to maintain "a sharp lookout" at this busy intersection, when he himself personally, as shown by the testimony of his witnesses, neglected to do so. In Niosi v. Empire Steam Laundry Co., 117 Cal. 257, 49 Pac. 185, the court, after stating the rule just referred to, quoted with approval from a New York case as follows:

> "To enter upon a street crossing in a city where the moving vehicles are numerous, and a collision with them likely to produce serious injury, without looking in both directions along the street to ascertain whether any are approaching, and, if so, their rate of speed, and how far from the crossing, would not only be the omission of reasonable care for one's own safety, but an act of rashness. * * * Neither footmen nor teams have any right of way superior to the other. They each have the right in common and equally with the other, and in its exercise are bound to exercise reasonable care for their own safety, and to avoid doing injury to any others who may be in the exercise of the equal right of way with them."

As before indicated, the place where the accident occurred is at the time it happened one of the most heavily traveled points in San Francisco, yet the plaintiff, in attempting to cross the street, neglected to take the most ordinary precaution to avoid being injured. His hearing and eyesight were good, and it is clear that if he had looked he would have seen the approaching automobile and could have avoided the collision. It would appear that the accident occurred, as stated by one of the plaintiff's witnessses, by the plaintiff walking into the front left-hand end of the car. However that may be, it is plain that the negligence of the plaintiff directly contributed to and was the proximate cause of the injury. In Hamlin v. Pac. El. Ry. Co., 150 Cal. 776, 782, 89 Pac. 1109, 1111, the plaintiff rode along the street car track on his bicycle for a distance of a block and a half when a car of the defendant approached from the rear and struck him. The court said:

"All the evidence in the case, the plaintiff's as well as that introduced by the defendant, shows that plaintiff was not aware of the approaching car until it was practically upon him. His health and hearing were good. Under these circumstances it is perfectly plain that his failure to see or hear the car must have been the result of absolute inattention to his situation and surroundings, and that he exercised no care whatever. To this phase of the case the decision in Everett v. L. A. Ry. Co., 115 Cal. 105 [43 Pac. 207, 46 Pac. 889, 34 L. R. A. 350], is applicable, and it is as true here, as it was there, that as matter of law the appellant was guilty of contributory negligence."

[3] It follows that the plaintiff, having himself been guilty of contributory negligence which contributed proximately and directly to his injury, was not entitled to have the case go to the jury, even if negligence on the part of the defendants were present, unless it can be said that the plaintiff had established a prima facie case upon the doctrine of "last clear chance." We do not understand that he seriously makes any such claim. True, a discredited witness, who was hostile to the defendants, testified that the chauffeur in charge of the automobile was looking at the plaintiff as the latter traversed the crossing, but how far apart they were at the time, or to what precise moment his testimony refers does not appear. Even if the chauffeur was looking at the plaintiff and saw him just before the accident, there is nothing in the record to indicate that he was bound to know that the plaintiff would place himself in a position of danger. From the evidence it is clear that the chauffeur did not discover that the plaintiff was or would be in a perilous position in time to avoid the accident, and the negligence of the driver, if any, was not subsequent to and independent of the continuing negligence of the plaintiff, but was contemporaneous with it. The doctrine of "last clear chance" has no application to the facts of this case. Bennichsen v. Market St. Ry. Co., 149 Cal. 18, 20, 84 Pac. 420; Sauer v. Eagle Brewing Co., 3 Cal. App. 127, 133, 84 Pac. 425; Tucker v. United Railroads, 171 Cal. 702, 705, 154 Pac. 835; Thompson v. Los Angeles, etc., R. Co., 165 Cal. 748, 134 Pac. 709.

The judgment is affirmed.

We concur: ZOOK, Judge pro tem.; BEASLY, Judge pro tem.

(36 Cal. App. 745)

J. M. OVERELL FURNITURE CO. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY. (Civ. 2548.)

(District Court of Appeal, Second District, California. April 9, 1918.)

1. RECEIVERS ⚷67—PROPERTY VESTING—SEIZURE OF PROPERTY LEASED.

Appointment of receiver in an action by the vendor against purchaser to recover on ground of fraud the apartment house sold would not give receiver any rights to furniture therein leased to vendor, and that the lease was assigned to purchaser would not cut off any remedy of lessor to recover the furniture.

2. RECEIVERS ⚷67—PROPERTY VESTING—AGREEMENT TO PAY RENT FROM PARTICULAR FUNDS.

In such case, that receiver was to collect the house rentals and assignee had agreed to pay rental of furniture out of house rentals would not deprive lessor of his right to enforce payment of rentals due.

3. PROHIBITION ⚷15—NATURE AND SCOPE OF REMEDY.

Where receiver, appointed to take charge of apartment house in suit between vendor and purchaser, was in possession of personalty therein leased to vendor, lease being assigned to purchaser, merely because the same was in the house, lessor of such personalty would have no beneficial interest in proceedings to restrain the carrying out of the order appointing a receiver.

Original application for a writ of prohibition by the J. M. Overell Furniture Company against the Superior Court of the State of California in and for the County of Los Angeles and another to restrain respondents from carrying out an order appointing a receiver in a suit wherein Ethel K. Patterson was plaintiff and Clarence H. Patterson and another defendants. Alternative writ set aside, and peremptory writ denied.

Frank G. Tyrrell, Douglas L. Edmonds, Claude B. Morton, and A. L. Abrahams, all of Los Angeles, for petitioner. R. P. Jennings and Geo. L. Greer, both of Los Angeles, for respondents.

WORKS, Judge pro tem. Ethel K. Patterson commenced an action in the superior court against Clarence H. Patterson and Monnie Blackburn for the purpose of recovering certain real property which Patterson had conveyed to Mrs. Blackburn. The recovery was sought on the ground of fraud. The property consisted, in part, of an apartment house, the furniture and some other equipment of which were the property of the J. M. Overell Furniture Company, the petitioner in this proceeding. This personal property had been under lease from the petitioner to Patterson; the lease containing provision for a transfer of title by the petitioner upon the completion, by Patterson, of the payment of a certain total sum in rents. Patterson had assigned the lease to Mrs. Blackburn and the petitioner had consented to the assignment; Mrs. Blackburn agreeing to make the payments of rental called for by the lease. A receiver was appointed in the action commenced by Mrs. Patterson; the order of appointment requiring the officer to take possession of the real property which was the subject of the action, "to collect the rents thereof, * * * to pay out of said rents and income any and all expenses connected with the said real property or the improvements thereon, including interest or incumbrances, or liens, insurance, and other necessary expenses and to preserve any balance of said rents and income remaining in the hands of the receiver pending the further determination and decision of this court." The receiver qualified and took possession of the real property; the personal property of petitioner still remaining and yet being on the premises.

By its petition in this proceeding the petitioner seeks to restrain the respondents from enforcing or carrying out the order appointing the receiver on the ground that it is void, but the petitioner concedes in its brief that it is not entitled to the broad relief prayed for. The petitioner's theory is that the order requiring the collection and retention of rents, taken in connection with the fact that the receiver is in possession of the personal property, amounts to an infringement of its rights under the contract between it and Mrs. Blackburn. It is alleged in the petition that Mrs. Blackburn, upon taking the assignment of the lease, agreed with petitioner that she would thereafter pay the monthly rentals on the personal property out of the rents from the apartment house as they came in, and the allegation is not denied by the respondents. The petitioner also had the right, under the terms of the lease itself to take possession of its property at any time, without notice, upon default in the payment of rent. The petitioner insists that both of its remedies are cut off by the order appointing the receiver; that it cannot seize the property for the reason that it is in the custody of the court, and that payment of the amounts due it out of the rents collected from the apartment house cannot be made, because they are directed by the court's order to be devoted to other purposes.

[1] There are several answers to the petitioner's proposition that it cannot avail itself of the provision of the contract to the effect that it may seize its property upon default in the payment of rent. In the first place, the respondent court and the respondent receiver have filed separate answers to the petition, and it is alleged in each answer that the receiver is in possession of the personal property solely because it was on the premises when he took possession of the real property; that his possession of it is incidental to his possession of the realty; and that he neither claims nor has any right to the possession of the personalty as receiver. Further, the order appointing the receiver does not direct him to take possession of the personal property of the petitioner. It is manifest, then, that if the petitioner desires to take advantage of its right to seize the property it may do so at will and without trouble.

[2, 3] The petitioner's right to enforce payment of the rentals due under the lease appears to be equally untrammeled. The agreement of Mrs. Blackburn to pay the rental charges out of a particular fund does not relieve her of her general liability under the terms of the lease, and the petitioner may at any time enforce a collection from her of amounts due it; or it may pursue Patterson, if he yet remains liable under the lease, a point which we do not decide. It therefore appears that the petitioner has no beneficial interest in this proceeding.

The alternative writ of prohibition is set aside and the application for a peremptory writ is denied.

We concur: CONREY, P. J.; JAMES, J.

(36 Cal. App. 672)

HALLAWELL et al. v. UNION OIL CO. OF CALIFORNIA. (Civ. 1767.)

(District Court of Appeal, Third District, California. April 4, 1918. Rehearing Denied by Supreme Court June 3, 1918.)

1. MASTER AND SERVANT 🔑137(1) — DEATH OF SERVANT—NEGLIGENCE OF MASTER.

It was negligence on the part of the master mechanic of an oil company engaged in the distillation of asphalt in an attempt to repair a gas still to discharge its highly inflammable fluid in a way to come in contact with furnace fires and to spread to the immediate vicinity of an open trap, the surface of which carried more or less oil and inflammable material.

2. MASTER AND SERVANT 🔑276(2) — DEATH OF SERVANT—PROXIMATE CAUSE—NECESSITY OF PROOF.

In an action for death by fire of servants of an oil company engaged in the distillation of asphalt, plaintiffs were not required to show with absolute certainty that the fire which originated at asphalt stills through the oil company's negligence was communicated to the asphalt shed and was the proximate cause of the death of the deceased employé and another.

3. MASTER AND SERVANT 🔑278(3) — SAFE PLACE TO WORK — SUFFICIENCY OF EVIDENCE.

In such action, evidence *held* to show that the deceased servant was not furnished a safe place in which to work.

4. MASTER AND SERVANT 🔑281(9)—DEATH OF SERVANT—CONTRIBUTORY NEGLIGENCE.

Contributory negligence cannot be imputed to the deceased servant of an oil company burned to death in a sudden fire; that he was caught while fleeing from the danger being shown by the discovery of his remains some distance from where he was when first warned.

5. MASTER AND SERVANT 🔑276(2) — DEATH OF SERVANT — FIRE — SUFFICIENCY OF EVIDENCE.

In an action against an oil company engaged in the distillation of asphalt for death of its servant in a fire, evidence *held* sufficient to support finding that oil in a fire trap was ignited by the burning oil surrounding it, and thence ran down an 8-inch pipe to the asphalt shed.

6. EVIDENCE 🔑553(1) — EXPERT OPINION — HYPOTHETICAL QUESTION.

A hypothetical question to an expert witness must be based on evidence, but the basis may consist of any condition of facts the evidence of which tends to establish the facts assumed, or which the jury may reasonably find to be proven.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

7. EVIDENCE 🔑553(4)—HYPOTHETICAL QUESTIONS—DISCRETION OF COURT.
As to hypothetical questions to experts, the trial court is charged with much discretion, and may properly allow a question under counsel's claim that the facts stated have been proven, rather than take the risk of passing on a question of fact by denying the offer on the ground there is no evidence of facts or a particular fact embodied in the question.

8. TRIAL 🔑208—HYPOTHETICAL QUESTION—INSTRUCTION.
Counsel objecting to a hypothetical question on the ground it assumes facts not proved may have the instruction of the court to the jury to disregard the testimony of the expert unless satisfied that all the facts on which the question is based are true.

9. EVIDENCE 🔑553(4) — EXPERT OPINION — HYPOTHETICAL QUESTIONS.
In an action for death of its servant by fire against an oil company engaged in the distillation of asphalt, the trial court properly allowed an expert witness to testify, in answer to hypothetical questions, as to the effect of burning oil at the intake of a 6-inch pipe when only a small quantity of water was passing into the pipe, though there was testimony that when asphalt stills were in full operation, as at the time of the fire, a trench usually carried water from condensers sufficient to fill half the pipe at its intake.

10. APPEAL AND ERROR 🔑1050(1)—HARMLESS ERROR—EVIDENCE.
In such action, if the hypothetical questions to the witness were improperly allowed, the oil company was not seriously prejudiced, where the fire could be accounted for by disregarding all evidence as to the pipe's having conveyed it, and especially where, disregarding the origin of the fire, finding was justified that the employé lost his life because not given a safe place to work.

11. EVIDENCE 🔑150—EXPERIMENT.
A bystander to an experiment, though not assisting in any way to make it, may testify as to its result, if he had knowledge of all the conditions of the experiment, and it was one involving no special technical knowledge, or was such that its result could be seen and understood by a person of ordinary judgment.

12. EVIDENCE 🔑150—FACT NOT IN DISPUTE —EXPERIMENT.
The trial court's ruling denying defendant the right to show what the bystander of an experiment had observed was not error, where the tendency of the experiment was to prove a fact not disputed.

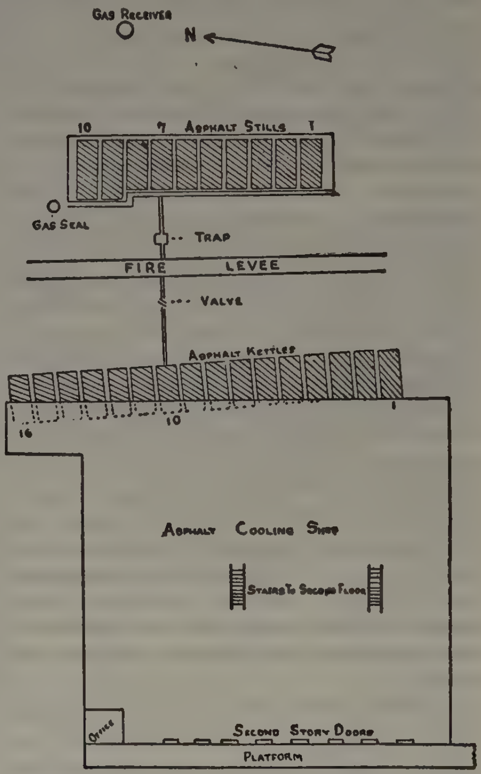
Appeal from Superior Court, Contra Costa County; R. H. Latimer and A. B. McKenzie, Judges.

Action by Addie Hallawell and others against the Union Oil Company of California, a corporation. From judgment for plaintiffs, and order denying its motion for new trial, defendant appeals. Affirmed.

Chickering & Gregory, Evan Williams, Frank H. Gould, and B. V. Sargent, all of San Francisco, and J. E. Rodgers, of Martinez, for appellant. Stetson & Koford and A. T. Shine, all of Oakland, Elmer E. Nichols, of Berkeley, and T. D. Johnston, of Richmond, for respondents.

CHIPMAN, P. J. Plaintiffs bring the action as heirs at law of Charles Hallawell, deceased, who, it is alleged, lost his life on December 9, 1913, at Oleum, Contra Costa county, through the alleged negligence of defendant. The cause was tried before a jury, and plaintiffs had the verdict. Judgment was entered thereon, from which, and from the order denying its motion for a new trial, defendant appeals.

We have prepared the following rough diagram taken from data furnished by two exhibits found in the record:



This seemed necessary to a fair comprehension of the evidence in the case. The main object of defendant's plant was to produce commercial asphaltum from crude petroleum, and incidentally to preserve such oils as might be condensed from gases in the process. The battery of asphaltum stills consisted of 10 separate stills, to each of which was attached a condenser. A furnace commencing at still No. 10 at the north end of the battery ran under all the stills to still No. 1. Still 10 was connected with still 9 and still 9 with still 8, and so on to still 1. East of the stills some distance was the gas receiver, noted on the diagram, into which gases that did not condense were carried from the condensers, and thence by a pipe these gases were conveyed to the gas seal situated near the northwest corner of the stills, and the inflammable gas was taken by a pipe from the gas seal to the furnace under the stills and burned. A ditch ran along on the west side of the stills into which the waste water from the condensers ran and was brought to a point near still No. 7, where this overflow was taken up by a 6-inch pipe and carried about 18 feet at a grade of .32 in that distance to the open trap noted on the diagram. At the lower or west side of this trap, which latter was flush with the surface of the ground and was about 18 inches square, was an 8-inch pipe so set in the trap as to carry away the contents of the trap, but leaving the discharge of the 6-inch pipe slightly below the surface of the water. About 4 or 5 feet west of the trap this 8-inch pipe made a right angle down about 6 feet, and resumed its course west for about 60 feet and at about the same grade as the 6-inch pipe, where it discharged in a wooden ditch in front, on the east side of the group of 16 asphalt kettles. Between the trap and the drop in the 8-inch pipe was a valve intended to shut off the flow through that pipe. Immediately west of this row of asphalt kettles and connected with them was a two-story wooden building of dimensions 130 feet by 150 feet. The asphalt, after cooling, was here drawn into barrels through long spouts leading from the kettles and stored on the first-story floor of this building, and was shipped from the platform on the west side of the building. This lower story was entirely open on all sides; the upper story, 10 feet above, being supported by the necessary timbers. The upper story consisted of a workshop of one large room, and was used for cooperage purposes and storing barrels and barrel materials. At the points indicated about 100 feet from the west side, two narrow stairways led to the lower story. The supporting timbers and the sides of the upper story and the roof were covered with corrugated iron. The east side of this upper floor was entirely occupied from floor to roof with barrels. There were no openings on the north or south side, but on the west side there was a number of windows with a 10-foot drop to the platform below. The upper floor was filled with barrels, work benches, and materials of various kinds, with narrow passageways at intervals leading to the west side which were at times more or less obstructed by loose materials. There was a fire levee, noted on the diagram, to check the contents of any of the stills, should one explode, from running down to the kettles.

When the plant was in operation, crude oil was placed in still 10, the heat increasing in intensity as the asphaltum residuum passed from still to still until at still 1 it was as high as 700 degrees Fahrenheit; the asphaltum residuum in the process of refinement becoming of greater viscosity as it passed through the stills until the condensation of the gases in the condensers had reached its maximum. The surplus or remaining noncondensable gases passed from the various condensers to the gas receiver and thence as shown to the gas seal, more or less impregnated with oil which had not been condensed. The finished product was drawn from still 1 to the asphaltum kettles to cool, preparatory to being drawn into barrels and stored or shipped. It was found necessary in the last operation to heat the cooled asphaltum in order to draw it off into the barrels, and this was done by using plates of iron on which was burning crude oil and asphaltum placed under the spouts leading from the kettles, and these portable heating appliances were wheeled on iron barrows from place to place and fuel dipped from containers to feed the fires, which latter flamed up at times several feet. The effect of these fires was to give off a dense smoke, which settled on all parts of the building more or less and particularly on the timbers supporting the upper story and upon the sides and parts of the building immediately exposed to the smoke arising from these fires. This soot was inflammable, and burned with rapidity when exposed to sufficient heat to start it burning. The floor of the shed was wooden, and was usually kept covered with sand. When the sand had become too much impregnated with asphalt in wheeling leaky barrels over the floor it would be removed and fresh sand put on the floor. It appeared also that in wheeling the containers of the oil used as fuel to heat the spouts oil was spilled on the ground around the asphalt stills. Prior to the burning of the cooling shed, defendant had commenced to install an improved method of heating the spouts of the asphaltum kettles by substituting steam pipes, thus avoiding the accumulation of soot on the building, but it had not progressed beyond about one-third or one-half of the building. On the day of the fire there had been no heating of these spouts; and there was no fire burning at or near these kettles. The ground in front of the stills was nearly level, but sloped slightly to the open trap from the gas seal, which latter contained a quantity of oil in the nature of gasoline condensed from the gases coming from the gas reservoir. This seal was of about 50 or 60 gallons' capacity.

We come now to inquire into the cause of the accident. The eyewitnesses who testified were in defendant's employment at the time and were so employed at the trial. Decedent Hallawell was burned to death on the second floor of the asphalt shed in the early afternoon of December 9, 1913, and at the time was working with one Graves, another carpenter, who also perished in the fire and with one Hanford, the carpenter foreman, who survived. It appeared that master mechanic Lightbody was called to repair a leak in the gas seal. Without knowing or inquiring into the contents of the seal, and assuming that it was water, he caused to be turned down a stand pipe parallel with the ground which came from the bottom of the seal upwards along its side, thus causing the entire contents to run over the ground around and near the trap and into the trench at the furnaces. He turned away, but soon discovered that the oil and gases coming from the seal had taken fire from the furnaces and the fire was communicated to the oil spread over the ground and was burning briskly over an area of 20 feet square, and within 3 or 4 feet of the trap. A strong wind was blowing from the southeast towards the asphalt shed and across the trap. The burning material was noticed close to the intake of the 6-inch pipe. Fire extinguishers were procured, and the fire burning in front of the stills and around the trap was put out. Witness Conley testified that to prevent the fire from passing through the 8-inch pipe to the asphaltum shed he went to the gauge and turned it off and while doing this he said the smoke was rising and fire blazing up at the asphaltum shed at about the point where the 8-inch pipe discharged at the shed. He testified:

> "I couldn't say how long after I first saw the fire at the asphalt stills before the whole building was ablaze or aflame, about three or four minutes or so."

An effort was made to extinguish this fire, but it spread so rapidly that in a very short time the entire building was enveloped in flames and a dense smoke from the burning soot which had accumulated on the building. The flames were seen to run rapidly up the timbers supporting the second story and spread along the sides of the building. Of the situation in the second story, witness Hanford, under whom decedent and Graves were working, testified:

> "We were bolting a barrel machine to a sort of frame while Mr. Hallawell was sawing some boards for the upper part of the crate when I noticed the smoke. I first thought it was the engine outside, lots of times the smoke will come up between the first and second floors. Shortly some one hollered 'Fire' and we started for the stairs, that is one of the stairs we came up. We all three of us started for the stairs. Mr. Hallawell, being nearest to the stairs, started out ahead and Mr. Graves, and I was on one side of the machine and he was on the other and he started right after Mr. Hallawell, and I had to run around the machine and was behind them, and I saw the smoke belching up through the stairs and I knew it was impossible for us to get down the stairs. I said, 'Run for your life, boys,' and I turned and ran in the opposite direction, and I supposed that they followed, but that is the last I ever saw of them. * * * I had some trouble with smoke as I was running to the front door, that is the west end of the building, the building was filling with smoke so fast that it was lowering, and I had to get down on my knees to get to the door, in order to see my way out. There were several coopers making barrels that were working on that floor at the time. They were working at those different benches. These other two men were working right with me. We were all three working on the same machinery. A minute or two, something like that, elapsed from the time I heard the cry of 'Fire' until I told the men to run for their lives. I just started for the stairs and I saw we couldn't get down. I must have gone I should judge 10 or 15 feet towards the stairway. * * * I do not know of my own knowledge where that fire came from. I know the direction it came from. The first I saw of it was the smoke coming up through the building, from the east side; that is the side away from the bay. That place is right on the edge of the bay. The bay is on the west side and also on the north side of it; that portion of the works of the Union Oil Company is on sloping land towards the bay."

The charred remains of Hallawell and Graves were later found in the ruins not far from the northwest corner of the building, in which direction they probably attempted to escape. Witness Lightbody testified:

> "When I saw the fire down below, when my attention was called to it as I was leaving there (near the fire at the stills), a great deal of smoke was breaking out, the building was not entirely enveloped, the rear end of it (at the kettles) was almost entirely so that you could not see it hardly. It was completely enveloped in flames so quickly that I could not hardly tell you. It was not more than two or three minutes and the flames had made some headway by that time."

Witness Curran testified that:

> After putting out the fire at the stills "we turned around and noticed that the shed was burning below us. * * * The flame traveled very fast. * * * It was just instantly after I succeeded in putting the fire out there (at the stills) that I observed the fire in front of kettle No. 7; it was just a moment. * * * I don't know if it was soot, it was some black substance on the posts; they were covered with sheet iron. * * * Q. Did you see the fire go up that? A. I saw it travel along it; yes, sir. Q. And how fast did it travel along there? A. I do not know; I am not sure; it traveled pretty fast. * * * I should judge it was four or five minutes, three minutes maybe, after I first saw the fire, the part in front of the kettles, before the whole building was in flames. It wasn't very long; it burned fast."

Witness Del Monte testified that after putting down his extinguisher with which he had been fighting the fire around the trap, he noticed that the shed was on fire; "after I saw the fire it was a minute or a couple of minutes, probably a minute and a half, before the whole building was in flames."

[1] There was no material conflict in the testimony as to the cause of the fire in front of the stills and around the open trap. To effect the repair of the gas seal it was not necessary, but was, we think, negligence, to discharge its highly inflammable fluid, as was done, in a way to come in contact with the intense furnace fires and in a way to spread, as it did quickly, to the immediate vicinity of the open trap, the surface of which carried more or less oil and inflammable material. From the evidence in the case the plaintiffs advanced the theory that the burning fluid was carried through the 6-inch pipe to the open trap and thence by the 8-inch pipe to the asphalt shed; or the oil on the surface of the water in the trap was ignited by the heat from the fluid burning on the ground near by, or by the flames being wafted or carried directly to the trap by the high wind and thence passed down the 8-inch pipe, before the valve was shut off, thus igniting the inflammable material

at the asphalt shed. The expert testimony was that fire would travel with great rapidity in passing over the surface of the water —like a train of powder. Defendant offered no explanation, but contented itself with combating the theory of plaintiffs. Expert testimony was admitted which showed that, notwithstanding the outlet of the 6-inch pipe in the trap was slightly below the surface of the water in the trap, the burning fluid passing through the pipe would cause an explosion which would force the fire to the surface at the trap, ignite the oil in the trap, and pass on down the 8-inch pipe. It was shown that ordinarily, when the stills were in operation, the overflow coming from the condensers and passing along the trench to this 6-inch pipe would fill the pipe about half full at the intake and, its grade considered, the pipe would be full for a distance of about 7 feet back from the outlet at the trap, and in the opinion of the witness, an explosion would not force the burning fluid through this obstruction. It was also shown that this ditch did not always carry the water freely, but at times was more or less clogged. In the confusion of the moment no witness was able to say just what the condition was at the time, nor did any one testify that he saw the fluid burning at the intake. It was seen, however, quite near to it. No one testified that he saw the fluid burning in the trap or enter the 8-inch pipe in a burning condition, or escape at the asphaltum shed in that condition. There was no fire at the shed and had not been on that day, and no cause is suggested for the fire which consumed the shed other than the fire which started at the gas seal. About the time the fire around the trap was extinguished, which was the work of but a short time, one of the men, as we have seen, went immediately to the valve and turned it off, but the fire had in some way already reached the shed, as described by the witnesses, and was flaming up.

[2] We do not think plaintiffs were required to show with absolute certainty that the fire which originated at the stills through what we regard as an act of negligence on defendant's part (The Santa Rita, 176 Fed. 890, 100 C. C. A. 360, 30 L. R. A. [N. S.] 1210) was communicated to the asphalt shed and was the proximate cause of the death of these two men. The evidence that this fire ran through the 6-inch pipe to the open trap may not be conclusive. The evidence, however, that the burning oil was in close proximity to the trap; that its smoke and flame noticeably rose two or three feet from the ground; that this smoke, as was shown, would naturally contain more or less inflammable gases which might readily be communicated to the gases rising from the trap or the oil on it by the eddying currents of the strong wind then blowing; that the fire burst forth almost simultaneously at the shed where there had been no fire from any other source and before the valve on the 8-inch pipe was turned off—these circumstances constituted a reasonable hypothesis for the explanation that the oil on the surface at the trap took fire and was carried down the 8-inch pipe at the foot of which it was first seen at the shed by witnesses in the shed and at the stills.

Respondents contend that having shown the circumstances surrounding the fire sufficient appears to justify the invocation of the res ipsa loquitur doctrine, and that in the absence of explanation by the defendant the circumstances afford reasonable evidence that the accident arose from want of care. Judson v. Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146; O'Connor v. Mennie, 169 Cal. 217, 146 Pac. 674; Van Horn v. Pac. Refining Co., 27 Cal. App. 105, 148 Pac. 951, and other cases cited. We think this doctrine may be urged with more than plausibility. Everything in the present case which in any way contributed to the accident was under the management of the defendant; the thing which caused the injury was shown to have been under the management of defendant, and that in the ordinary course of things the accident would not have happened if those having the management had used proper care. We do not, however, find it necessary to resort to this doctrine to find support of the verdict.

[3, 4] We are satisfied from the evidence that the deceased was not furnished a safe place in which to work. Whatever the cause of the fire at the shed, whether it originated at the gas seal or by some unknown cause at the shed itself, deceased lost his life through conditions which defendant allowed to exist and which by ordinary care could have been avoided. It is beyond dispute that the rapidity with which the fire spread over the building was caused by the oil-impregnated soot which had been allowed to accumulate on the timbers and sides of the building, which with ordinary care could have been kept free from this danger. Considering the purposes for which the upper story was used, and its crowded condition with barrels and materials of all kinds, and the meager means of escape afforded, deceased and his companion were in a veritable trap when the flames and smoke burst upon them almost at the first cry of fire. Contributory negligence cannot be imputed to deceased, for the instinct of self-preservation would have impelled him to seek safety with all possible promptness, and that he was caught while fleeing from the danger is shown by the discovery of his remains some distance from where he was when Hanford cried out, "Run, boys, for your life."

Error is assigned in permitting plaintiff's expert witness Cooper to answer certain hypothetical questions. Appellant assumes it to be conclusively shown that the only way the fire in front of the stills could have been communicated to the asphalt shed was through the trap; that the possibility of the fire having reached the trap along the surface of the ground was by the testimony eliminated. Hence, if the fire reached the trap at all, it was through the 6-inch pipe. Attention is then called to the testimony that when the stills were in full operation, as they were at the time of the fire, the trench usually carried water from the condensers sufficient to half fill the 6-inch pipe at its intake; that the grade of this pipe was .32 of a foot in 18 feet, and that the top of this pipe at the trap was 1¾ inches under the surface of the water in the trap; that expert Cooper had testified that under these conditions the pipe would be full for 6 or 7 feet back from the trap; and that it was improbable that the fire would penetrate this obstruction and set fire to the oil in the trap. As already noted, there was evidence that the trench in front of the stills was occasionally clogged by sticks and débris, thus obstructing the flow of water to the 6-inch pipe intake and diminishing or wholly shutting off the water for the moment. Expert Cooper was asked the following question:

> "Now, answer my question, what would be the condition that prevailed there if there was less water flowing into the intake pipe, of everything shown on that—that is, less than the usual flow of water?"

Having in mind that the oil which ran out of the seal into the ditch and over the ground around the trap was carried on top of the water in the ditch where it was quickly ignited by the fire from the furnaces and was seen in this condition passing still No. 8 and in the immediate vicinity of the intake of the 6-inch pipe, witness Cooper testified:

> "Suppose there is a small quantity in the ditch or enough water only to carry the oil down, the water would carry the oil down in front of the stills. That wasn't the question. The oil was spilled on the water and then became lit. In the first place the water would carry the oil down to the mouth of the 6-inch pipe, and then, of course, when it got to the mouth of the 6-inch pipe, it would run into the 6-inch pipe. Now, then, if the oil were ignited at any time between the mouth of the 6-inch pipe and where it was spilled, the flame would travel down the oil, as it does when inflamed oil is put on water, and it would also travel down this pipe, through this opening and through the trap and down the 8-inch pipe and down to the end, it would carry it like a shot out of a gun."

He then explained how an explosion would follow when a match is touched to a mixture of gasoline and air or inflammable gas and air, and why an explosion would follow if the oil was ignited after some of the oil had floated into the 6-inch pipe; "there would be a mixture of the vapor of oil and of air in the 6-inch pipe and if the oil was ignited, if the ignited oil flowed down to the mouth of the 6-inch pipe, it might possibly cause an explosion of the gases contained in this pipe; I would say, it will cause an explosion of the gases contained in the pipe," the effect of which he explained would be to force the flame to "shoot out into the trap," although at the outlet the water might be over the top of the pipe—how much over he could not say. He stated, however, that:

> "When the pipe is full of water up to this point (indicating on the diagram) the burning oil flowing on the ditch will just collect on top of the water above the pipe, and, as burning oil cannot sink under the surface of the water, will stay in the ditch and nothing would happen. The fire would be confined in the ditch in front of the stills, providing this pipe is full of water."

He explained further what would happen should the liquid in the ditch—

> "which has had the flame on it in the ditch run through the 6-inch pipe, but the flame is extinguished, the water will run through the trap as usual, but in addition to that the oil from which the flame came, but which has not been extinguished, will pass along through the water and will pass out under the top end of the 6-inch pipe and will follow from the trap. The material that floats on top is the oil which has been put out. Of course, it is inflammable when it is there. It would exhale inflammable gases for this reason, that when oil is burning on the top of water, especially a large quantity of oil, enough to make a flame, that if that flame has been on it, that flame will make water very, very hot, in some cases will make the surface of the water boil, therefore the water in this trap will be very much hotter if there has been extensive fire in this ditch than before, and if the water is hot in the trap it will tend to volatilize the oil in this trap, so this trap, in addition to the oil on it, should have some inflammable vapors over the surface of the oil also."

This condition of things would, he testified, cause inflammable vapors to come off the top of the water in the trap.

[5-8] Appellant is not justified in its assumption that the testimony eliminated the possibility of the oil in the fire trap having taken fire from the burning oil around it that came from the gas seal, and that if the fire at the kettles came from the fire in the trench it must have got there by passing through the 6-inch pipe. There was sufficient evidence to support a finding by the jury that the oil in the fire trap was ignited by the burning oil surrounding it and thence ran down the 8-inch pipe. This fire trap was open at the top and was flush with the surface of the surrounding ground. The oil on its surface and the vapor arising from it were thus exposed to the fire. Witness Conley testified that when the fire started he blew the whistle and immediately turned off the water from the condensers, which, of course, stopped the flow into the trench and would diminish the quantity running into the 6-inch pipe. The rule undoubtedly is that a hypothetical question must be based upon evidence, but the basis may consist of any condition of facts the evidence of which tends to establish the facts assumed, or which the jury may reasonably find to be proven. In practice the trial court is charged with much discretion, and the court may properly allow

the question under the claim of counsel that the facts stated have been proven, rather than taking the risk of passing upon a question of fact by denying the offer on the ground that there is no evidence of the facts or a particular fact embodied in the question. Counsel objecting may have the instruction of the court to the jury to disregard the testimony of the expert, unless satisfied that all the facts upon which the question is based are true. Estate of Dolbeer, 149 Cal. 227, 252, 86 Pac. 695, 9 Ann. Cas. 795.

[9, 10] We think, however, that under all the facts and circumstances the court properly allowed the witness to testify as to the effect of the burning oil at the intake of the 6-inch pipe when only a small quantity of water was passing into the pipe. But if we are mistaken in this view we cannot see that defendant was seriously prejudiced thereby when we consider that the fire at the kettle shed can be accounted for by disregarding all evidence as to the 6-inch pipe conveying the fire, and especially where, disregarding the origin of the fire, the jury were justified in finding that Hallawell lost his life because not given a safe place in which to work.

[11, 12] It appeared that Mr. Nichols, one of plaintiff's attorneys, made an experiment by passing a bag over the intake of the 6-inch pipe, but he did not testify in the case. Witness Conley was called by defendant to prove that he was present and saw what Mr. Nichols did.

> "Q. Did you or did you not see anybody day before yesterday do anything to that portion of the 6-inch pipe, shown upon the map No. 2, which connects with the ditch in front of the stills?"

Objection by plaintiffs was made to the question. Some argument ensued as to the admissibility of the question, in the course of which the court said:

> "He can testify of his own knowledge what was done there himself; he needn't refer to Mr. Nichols at all; he can testify as to the water he saw in the pipe, that the water was stopped, and that he knew it was stopped, and that he knew all the conditions, if he is prepared to testify to the facts, let him testify himself."

The question above shown was then asked.

> "The Court: This witness can testify as to any fact within his own knowledge as to conditions that existed there."

The question was not objectionable, but an answer to it would have proved nothing more than that he saw somebody do something to the 6-inch pipe. Defendant did not follow it up by endeavoring to elicit from the witness what he himself observed. We think a bystander to an experiment being made, though he is not assisting in any way to make the experiment, may testify as to the result if he had knowledge of all the conditions entering into the experiment, and it was such a one as involved no special technical knowledge, and was such an experiment as that the result could be seen and understood by a person of ordinary judgment. Defendant, however, seems not to have asked any question which fairly shows that the court refused defendant the privilege of proving the result of Mr. Nichols' experiment. Furthermore, as we understand defendant's purpose, it was to show that when no water was flowing into the 6-inch pipe the top of the pipe at its outlet was still under water. This fact, as we read the evidence, was not disputed. Hence no error was committed, even if the ruling of the court had the effect to deny defendant's right to show by Conley what he observed.

The judgment and the order appealed from are affirmed.

We concur: HART, J.; BURNETT, J.

(36 Cal. App. 692)

CITY OF WATTS et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 2670.)

(District Court of Appeal, Second District, California. April 6, 1918.)

1. PROHIBITION ⟹28 — SUFFICIENCY OF COUNTS—QUESTION FOR TRIAL COURT.

The appellate court, on petition for writ of prohibition, cannot review decision of the superior court as to whether the complaint is sufficient to state a cause of action.

2. INTOXICATING LIQUORS ⟹32(2) — LOCAL OPTION—PETITION—EXAMINATION BY CLERK —FINALITY OF DECISION.

As to all matters comprehended within the proper scope of the examination of a local option election petition committed to the city clerk by Deering's Gen. Laws 1915, Act 1696, providing for the regulation of the traffic in alcoholic liquors by establishing local option, section 4, the decision of the clerk is final.

3. INTOXICATING LIQUORS ⟹32(2) — LOCAL OPTION ELECTION—INJUNCTION SUIT—JURISDICTION.

If certain signatures to a local option petition, filed with the clerk of a city pursuant to Deering's Gen. Laws 1915, Act 1696, were not made by the persons who purported to have signed, or unauthorized forged additions have been made to the names as signed, or if addresses have been set opposite signatures which were not affixed thereto by the signers, and if the facts can be shown to have affected the number of signatures to the petition sufficiently to reduce it below the required number, such fraudulent acts constitute an appropriate subject-matter for the consideration of the superior court as a court of equity in suit to enjoin the election, not being matters which could become apparent to the clerk in the course of his inspection of the petition, or in examination of the great register of voters, and not being included in the matters passed on by him in the determination made by him concerning the sufficiency of the petition.

Petition for writ of prohibition by the City of Watts, a municipal corporation, and others, against the Superior Court of the State of California in and for the County of Los

Angeles, and Dana R. Weller, Judge thereof. Peremptory writ directed to issue.

S. W. Odell and Neighbours, Hoag & Burke, all of Los Angeles, for petitioners. Paul W. Schenck and Richard Kittrelle, both of Los Angeles, for respondents.

CONREY, P. J. This is a proceeding whereby the plaintiffs ask that the defendant superior court be prohibited from proceeding further in the trial of an action entitled Van Zandt v. City of Watts et al., and from entering any decree or order of injunction therein. An alternative writ of prohibition was issued by this court. The defendant has responded thereto by a motion to quash the alternative writ, by a demurrer to the petition, and by an answer. The defendants in the injunction case are the city of Watts and its board of trustees and the members thereof. The city of Watts is a municipal corporation of the sixth class.

On or about the 20th day of September, 1917, there was filed with Virgil R. Franklin, city clerk of the city of Watts, a petition which by its terms requested that the board of trustees of that city cause to be submitted in the manner provided by law to the voters of the city the proposition, "Shall the sale of intoxicating liquors be licensed in this city?" This petition purported to be signed by residents and qualified electors of the city of Watts. On October 9, 1917, the said city clerk filed with the board of trustees the said petition, with his certificate attached thereto, whereby he certified "that I have examined the foregoing petition and have compared the names thereon with the great register on file in the office of the registrar of voters of Los Angeles county, and find the said petition sufficient." Thereafter, on or about the 12th day of March, 1918, the board of trustees of the city of Watts adopted and passed an ordinance relating to the general election to be held in that city on the 8th day of April, 1918, and further providing that the question of licensing or not licensing the sale of alcoholic liquors in that city be submitted to the electors thereof on the ballots to be used at the election to be held on said 8th day of April.

The several proceedings whereby it is proposed to submit this question to be voted upon at the election of April 8, 1918, have been conducted under the claim that they are in accordance with the provisions of a certain act to provide for the regulation of the traffic in alcoholic liquors by establishing local option, which act was approved on the 4th day of April, 1911 (Stats. 1911, p. 599; Act No. 1696 in Deering's General Laws). Besides the facts above stated, the complaint in the injunction case alleges that the total number of purported signatures on said initiative petition with street and number address and date, purporting to have been affixed by said purported signers, was 553; that 59 names were rejected by the said city clerk for one reason or another; that the total number of purported signatures remaining was and is 494; that the total number of votes for all candidates for Governor in said city at the last general election was 960; that 25 per cent. of said number is the required number of names on said petition; that the number of names required thereon is 240. Paragraph 18 of the first count of the complaint in the injunction case reads as follows:

> "That the certificate of said Virgil R. Franklin, city clerk as aforesaid, is false, fraudulent, and untrue, and that said petition is false, fraudulent, fictitious, altered, changed, mutilated, and void; that plaintiff is informed and believes, and upon that ground alleges the fact to be, that the said certificate is false, fraudulent, and untrue, and said petition false, fraudulent, fictitious, altered, changed, mutilated, and void in the following particulars and for the following reasons, to wit: (1) That 8 names, together with the street and number address, appear twice on the said petition; (2) that 3 names appearing on said petition are not the names of registered voters in said defendant city; (3) that 3 names appearing thereon are the names of persons not registered in the precinct shown by the address affixed opposite their said names; (4) that 346 purported signers did not affix thereto opposite their purported signatures, or at all, the date of such signing, and that said 346 dates were affixed thereto by some person or persons other than the purported signers; (5) that 13 addresses set opposite 13 purported signatures were not affixed thereto by the purported signer thereof, but were affixed by some person or persons other than the said purported signer; (6) that 58 names thereon do not correspond or conform to 58 similar names appearing upon affidavits of registration, in the registrar's office, pertaining to said city; (7) that 5 names appearing thereon have additions made thereto by some person other than the purported signers of such names, and which before such addition do not correspond to or conform with similar names appearing on the affidavits of registration in the registrar's office pertaining to said defendant city; (8) that one purported signer thereto appears by the affidavit of registration pertaining to him to be a person unable to write; (9) that 3 purported signatures thereon were not made by the person purported to have signed the same; (10) that 15 names appearing thereon have no date affixed thereto; (11) that 3 names appearing thereon have no street number affixed thereto; (12) that 42 names appearing thereon have no intelligible indication of the date of the purported signature opposite thereto."

In Baines v. Zemansky, 168 Pac. 565, the Supreme Court of California had under consideration certain questions relating to the power of the superior court to restrain the registrar of voters of the city and county of San Francisco from further action upon certain recall petitions which were then in his hands. In its decision the court said:

> "Under well-established principles of law it cannot be denied that, if the superior court has jurisdiction, upon any possible state of facts, to prohibit or enjoin the registrar of voters from proceeding with such recall petitions in the manner prescribed in the charter, the sufficiency of the petition or complaint upon which that court acts, so far as the facts stated therein are concerned, cannot be in-

quired into by this court in this collateral proceeding, but that, on the contrary, its writs and orders must be upheld so far as this case is concerned, and can only be questioned when presented by way of appeal after the final judgment of said court in the cause. If that court has jurisdiction, it may decide the wrong as well as the right in the matter, and its decision is binding on all other persons, officers, and courts, save upon an appeal to the court having appellate jurisdiction of the cause. The sole question for our consideration, therefore, is whether or not the court has jurisdiction of the subject-matter of said proceeding in prohibition and of said action for an injunction. For the solution of this question we must look to the provisions of the city charter, the allegations upon which the writs and orders were issued, and the general principles of law applicable to the subject."

So here, the sole question for our consideration is whether or not the superior court is exceeding its jurisdiction in proceeding with the trial of said action for an injuncton. And for the solution of this question we must look to the provisions of the statute, the allegations of the complaint in that action, and the acts of the superior court with respect thereto.

[1] The matters really at issue in this proceeding are raised by allegations contained in paragraph 18, which we have quoted, of the first count of the Van Zandt complaint. The second and third counts of that complaint allege certain other facts, pleaded as furnishing a different basis of right to the demanded injunction. These counts 2 and 3 present questions, within the jurisdiction of the superior court, for its determination. It is for that court to say whether either of those counts is sufficient to state a cause of action, and we cannot in this proceeding review its decision.

Section 3 of the act in question (Act No. 1696), contains, among other things, the following:

"Each petitioner shall, in addition to signing his name to such petition, write opposite his name thereon his place of residence, giving street and number, if any, and such signing, to be valid, must have been done not more than sixty days before the filing of said petition."

Section 4 of the act defines the duties of the clerk as follows:

"Upon the filing of said petition the clerk of the body to which it is addressed shall forthwith examine it, and from the great register ascertain whether or not said petition is signed by the requisite number of qualified electors of the territory described therein, and, if necessary, he shall be allowed extra help for that purpose, and within ten days from the date of filing such petition he shall certify in writing the result of such examination and shall file his certificate with the petition. If the clerk finds the number of qualified signers to be insufficient he shall immediately send a written notice to the person who filed the petition, stating the number of qualified signers he has found thereon, and that they are not sufficient; and the petition may be amended within ten days from the date of such notice by the filing of a supplementary petition. The clerk shall within ten days after such amendment make like examination and certification of the amended petition. If it is still found insufficient he shall notify the person who filed the petition of that fact, without prejudice, however, to the filing of a new petition to the same effect. If the petition shall be certified as sufficient, the legislative or governing body having jurisdiction over the territory described therein shall, within the time prescribed herein, call an election to be held in such territory to vote upon the question whether the sale of alcoholic liquors shall be licensed therein."

[2] The superior court has not before it in the injunction case any charge of fraud or willful misconduct upon the part of the city clerk of the city of Watts. The statute imposed upon him the duty and vested in him the authority to examine the petition which was filed with him, "and from the great register ascertain whether or not such petition is signed by the requisite number of qualified electors of the territory described therein." As to all matters comprehended within the proper scope of the examination thus committed to the clerk, his decision thereon is final. This is illustrated by the matters set forth in subdivisions 1, 2, 3, 4, 6, 8, 10, 11, and 12 of paragraph 18 of the first count in the complaint which is above quoted. The matters referred to in those subdivisions are all ascertainable by examination of the petition and of the affidavits attached thereto, either alone or by comparison with the great register or records of registration containing the affidavits of registration as made by the voters.

[3] The remaining specifications of fraud in the said petition present themselves in a somewhat different light. These are contained in subdivisions 5, 7, and 9 of said paragraph 18 of the first count of the complaint. If it be true as therein alleged that certain signatures were not made by the persons who purported to have signed the same; or that additions have been made to the names as signed, such additions having been made by unauthorized persons and in a manner amounting to forgery; or if addresses have been set opposite certain signatures, which addresses were not affixed thereto by the purported signer thereof, but were affixed by some person other than the purported signer; and if these facts can be shown to have affected the number of signatures to the petition sufficiently to reduce the petition below the required number, we are of the opinion that such fraudulent acts constitute appropriate subject-matter for the consideration of the superior court as a court of equity. They are not matters which could become apparent to the clerk in the course of his inspection of the petition or his examination of the great register, and would not be included in the matters passed upon by him in the determination made by him concerning the sufficiency of the petition.

Let a peremptory writ issue, restraining the defendant superior court from proceeding further in the trial of said action entitled E. G. Van Zandt v. City of Watts et al., described in the petition filed herein, and from entering any decree or order of injunction therein, save and except that said respondent may proceed to determine the merits of said action with respect to so much thereof as relates to the subject-matter of the specifications of fraud mentioned in subdivisions 5, 7, and 9 of paragraph numbered 18 of the first cause of action set forth in the complaint in said action, and make its decision and judgment thereon; and provided, further, that said superior court may consider and determine the additional matters set forth in the second and third counts of said complaint, together with the subject-matter of said subdivisions 5, 7, and 9, and make its decision and judgment thereon.

We concur: JAMES, J.; WORKS, Judge pro tem.

(37 Cal. App. 655)

PEOPLE v. JACINTO. (Cr. 434.)

(District Court of Appeal, Third District, California. June 26, 1918.)

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Joe Jacinto was convicted of assault with a deadly weapon with intent to commit murder, and he appeals. Affirmed.

George E. Foote, of Sacramento, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. This case was submitted on the record by the Attorney General, no brief having been filed with or appearance otherwise made before this court to sustain the appeal from the judgment of conviction taken by the defendant.

We have, however, examined the record and have found no substantial ground for the appeal. The offense of which the defendant was convicted was that of an assault with a deadly weapon with intent to commit murder. The evidence discloses that the assault was committed on the wife of the accused at their home in the town of Hood, in Sacramento county, in the month of July, 1917, the motive for the crime being that the wife—the victim of the assault—had threatened and was about to leave the defendant because of his alleged ill treatment of her and refused to heed his repeated demands that she remain with him. The evidence clearly shows the guilt of the accused. We have found no errors in the rulings admitting and excluding evidence, while the charge of the court is in clear language, pertinent to the issues and otherwise unobjectionable.

The judgment is affirmed.

(37 Cal. App. 284)

SCHOLZ v. GARTLAND. (Civ. 2450.)

(District Court of Appeal, First District, California. May 17, 1918.)

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Arthur G. Scholz against P. J. Gartland. Judgment for plaintiff, and defendant appeals. Affirmed.

William A. Kelly, of San Francisco, for appellant. A. J. Treat, of San Francisco, for respondent.

PER CURIAM. In this action for services rendered by plaintiff as an architect to the owner of certain property, who contemplated erecting a building thereon, plaintiff had judgment, from which defendant appeals upon two grounds: First, that the evidence on behalf of plaintiff was so inherently improbable as to amount to no evidence at all; and, second, that there were certain errors in the instructions given by the court to the jury.

We do not consider it necessary to review the facts of the case. We have carefully examined the transcript, and conclude that the verdict of the jury was amply warranted by the evidence. We are also satisfied that the instructions given by the court correctly stated the law applicable to the case, and that there was no error in the refusal of certain instructions and the modification of others requested by the defendant.

Judgment affirmed.

(178 Cal. 296)

In re LAND'S ESTATE.

LAND v. EVANS et al.

(Sac. 2749.)

(Supreme Court of California. May 21, 1918. Rehearing Denied June 20, 1918.)

Wills 🔑743—Bequests—Assignment—Conditions.

Where a city, a legatee under a will, to avoid litigation and delay in distribution of the estate, assigns an interest in its bequest to testator's relative threatening to contest will, upon condition that no person contests will, an unsuccessful contest by a third person for which neither of the parties to the contract was responsible defeated the assignment.

Department 2. Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

In the matter of the estate of William Land, deceased. From the decree of distribution Francis E. Land appeals adversely to Nettie E. Evans, executrix, and Chauncey H. Dunn, executor, of said estate, and the City of Sacramento, a legatee. Affirmed.

Elliott Johnson, of San Francisco, for appellant. Clyde H. Brand and Archibald Yell, City Atty., both of Sacramento, for respondents.

WILBUR, J. This is an appeal from a decree of final distribution. Francis E. Land claims, as assignee of a $15,000 interest in the bequest to the city of Sacramento, which bequest amounted to the sum of $250,000, but which upon distribution was decreased to $231,165.66, said sum being distributed to the city of Sacramento in trust for the purchase of a public park in the city of Sacramento, to be known and called the "William Land Park."

Appellant's claim to the distribution of the said amount of $15,000 is made under the provisions of section 1678 of the Code of Civil Procedure, authorizing and requiring distribution to the assignee of a legatee upon petition of such assignee. If we assume in favor of the appellant that all the papers and documents set up in his petition for distribution were placed in evidence before the court at the time of distribution, and that the order of court denying a distribution of the amount of $15,000 to the appellant is, as appellant contends, based upon a construction of such documents and the legal effect to be given thereto, we may consider whether or not the court was justified in holding that the appellant was not entitled to distribution under the contract in question. All the facts need not be stated. Suffice it to say that the appellant, a relative of the deceased, threatened to begin a contest of the will of the deceased, thus jeopardizing two large legacies in favor of the city of Sacramento, one a legacy for $200,000, the other a legacy for $250,000. Under these circumstances an agreement of compromise was entered into between the city of Sacramento and the appellant, wherein it was agreed, in consideration of his waiving his right to contest the said will, he should be paid from the legacy to the city of Sacramento at the time of distribution the sum of $15,000, and that said sum should be distributed by the court in its decree of distribution to the appellant.

Without considering the question as to whether or not the provisions of section 1678 of the Code of Civil Procedure apply to the assignee of a portion only of a legacy, we pass to the question of whether or not, under the contracts, agreements, and order of compromise, the appellant was entitled to have distributed to him the sum of $15,000. The resolution of the city commission authorizing such settlement contained the following:

> "* * * The court having jurisdiction of said estate at the time distribution thereof is ordered to deduct said sum of $15,000 from the distributive share of the said city of Sacramento arising under said twenty-eighth paragraph, and direct the same to be paid to the said Francis E. Land; provided and upon condition, however, that the said Francis E. Land, in writing, irrevocably waive, relinquish and abandon all right whatever to contest the validity of said last will and testament, or of any part or item thereof, and all right to seek to have the order admitting the same to probate in any wise changed, modified, canceled, or annulled, and upon the further condition that no person other than the said Francis E.

Land shall, at any time pending the final distribution of said estate, file or attempt to file any contest of any kind of said will, or of any item or part thereof or seek in any way to have the order admitting the same to probate changed, modified, canceled or annulled, or object in any manner to the distribution to said city of the sums to it bequeathed by the said will. * * *"

Thereafter one Alexander Morrison filed a contest of the will of William Land, deceased. This contest was dismissed by the probate court, and the order of dismissal was affirmed by this court. Estate of Land, 166 Cal. 538, 137 Pac. 246. It is stipulated by the parties:

> "That the only contest, or attempt to contest, said will of William Land, deceased, was made by Alexander Morrison, and that this contest is reported in 166 Cal. at page 538 [137 Pac. 246]."

This contest was tried by the court without a jury, and was decided against the contestant on the ground that he had no interest in contesting the last will for the reason that he received the same legacy as under a prior will, and therefore is not a person interested in the question as to which of these two wills was probated. Appellant, therefore, claims that he cannot be held to have contracted with reference to the possibility of persons who had no interest in the matter filing a contest which would thus cause him to lose the very substantial amount agreed to be paid to him. In considering that question, however, we are bound to consider the purpose of the parties to the agreement as stated in their contract. The resolution in question recites that:

> Notwithstanding the fact that the amount bequeathed for park purposes is $250,000, "said will further providing that in the event the said bequest for park purposes, together with other bequests for charitable purposes made by said testator in said will, should exceed one-third of his estate, said bequest for park purposes should be cut down so that it, together with the remaining charitable bequests, should just equal one-third of his said estate; and further provided that in the event said bequest for park purposes, together with said other charitable bequests, should be less than one-third of his said estate, then the bequest for park purposes, is to be increased so that it, with said other charitable bequests, shall just equal one-third of the estate of said testator; and, whereas, it has become manifest since the death of said testator that said bequests for park purposes, together with said other charitable bequests, is less than one-third of the value of the estate of said decedent, and that said bequest for park purposes will be materially increased, to wit, in the probable sum of $20,000 and upwards, by reason of such fact; * * * whereas, in the judgment and opinion of the city commission such contest, if instituted, would, regardless of all questions of merit, be expensive and prolonged and disastrous to said estate and to all persons beneficially interested therein, and would result in a direct loss to the city of Sacramento in a sum greater than that hereinafter named as the amount to be abated by the city in order to effect such settlement, compromise and adjustment of such threatened and impending contest, and for the purpose of avoiding the same; and, whereas, for several years last past values of lands situate in the vicinity of the city of Sacramento suitable for park purposes have been and are now rapidly increasing, it is the judgment and opinion of the city commission that the indirect loss arising and occasioned to the city by reason of the delay in the distribution of said estate consequent upon such threatened litigation will equal or exceed the direct loss occasioned by the costs and expenses of such litigation: * * * Be it further resolved, that the president of the city commission and the city attorney be, and they are hereby directed to appear in behalf of the city of Sacramento upon the return day fixed in said citation, then and there to file in said court, in behalf of the city, its written consent to the making of said compromise, and the written relinquishment of said city of the said sum of $15,000," etc.

This resolution was passed during the pendency of a petition filed by the executors for leave to compromise with the appellant. In the petition for such leave to compromise it was alleged by the petitioners, the executors, respondents herein:

> "That your petitioners allege to this court that in their judgment there is no foundation whatever for a successful contest of the probate of the last will and testament of said deceased by the said F. E. Land, either upon the ground of the alleged undue influence, or upon the ground of the alleged insanity or upon any other ground, and that said contemplated contest is wholly without merit, and that if said contest is filed, in the judgment of your petitioners, the same can be wholly defeated, and the said probate of the last will and testament of said deceased be upheld and confirmed, but that such contest would, in all probability, delay the settlement of the said estate for at least one year, and possibly a second or third year, and would cost the estate a considerable amount of money, to wit, from $20,000 to $30,000, or thereabouts, for the actual cost of the contest, and that distribution of said estate would be delayed for a long time, thereby entailing a loss to the distributees of the use of their said bequests for the length of time that said contest would extend the administration of said estate; that under the last will and testament of said deceased, the city of Sacramento is given a bequest of $200,000 in trust, nevertheless, to be invested to the best advantage by said city, and the interest accruing thereon to be paid out from time to time to the destitute men, women, and children of Sacramento City, said trust fund to be known as the 'Ann Land Memorial Fund,' and that the city would lose the interest on said $200,000 during the pendency of said contest."

With reference to the payment of the $250,000 legacy for the purchase of a park, the executors call attention to the provision of the will by which such bequest may be either augumented or decreased, and state as follows:

> "That in all probability if no contest is filed within the next few months the said $250,000 will be increased by the amount of $15,000 or $20,000, as your petitioners believe. That by the filing of said contest, and the delay in the settlement of said estate, the said city of Sacramento will, in all probability, be a large loser by delaying the payment of said bequest for said purpose from one to three years, by reason of the fact that land in the vicinity of Sacramento City which is suitable for such park purpose is rapidly advancing in value, and in two years from now, in all probability land suitable for such park will cost in the neighborhood of $50,000 more than the same can be purchased for at the present time."

In the order granting leave to compromise it is recited:

> "That if said contest is instituted and prosecuted to final judgment it will interrupt and delay the settlement of said estate for one and possibly a second or third year, and will entail great additional expense upon the estate, as well as upon the said legatees cited to appear herein, and that the said city of Sacramento will suffer the greatest loss by contest of said last will and testament, and will be at a considerable expense to defend its share under said last will and testament, and will be injured far in excess of the amount it has agreed to give toward said compromise in the loss of interest upon said bequests, together with the appreciation of the value of lands situate in the vicinity of said city of Sacramento and suitable for park purposes as is directed in said will, and that it will be to the advantage of all persons beneficially interested in said last will and testament that said threatened litigation be averted."

Authority was therefore given to compromise the same. This order was made January 18, 1913. The decree of distribution herein appealed from was dated June 14, 1917. It will be observed that the delay in securing the distribution was more than anticipated in the contract in the event of a contest. It is evident that one of the primary reasons for settling the proposed contest was the damage which would result to the city of Sacramento from delay, this damage, as stated, consisting in loss of interest, in possible depreciation of the assets of the estate, thus decreasing the $250,000 legacy, and in the appreciation of the values of park lands which were to be purchased by the city with the fund so bequeathed to it. That the prediction of the city and of the executors with reference to the depreciation of the assets of the estate was well founded seems to be shown by the fact that the amount distributed to the city under the twenty-eighth clause of the will, instead of being $270,000 as anticipated, was $231,165.66. Suffice it to say that it is apparent from the whole proceeding that one of the important considerations moving the city was the avoidance of the expense of litigation and the delay involved in a will contest. By reason of the contest filed by Alexander Morrison they have suffered both a delay and the expense of litigation. It was because of this possibility, no doubt that the payment of the $15,000 was made contingent upon "the condition that no person other than Francis E. Land shall at any time pending the final distribution of such estate, file or attempt to file any contest of any kind of said will, or of any item thereof, or seek in any way to have the order setting the same for probate changed, modified, canceled or annulled."

Under the plain language of the contract between the parties there should be no payment to the appellant, and we see no reason why the contract should not be so construed, and many reasons why it should be so construed. Plaintiff surrendered a right to inaugurate a contest against the will of the decedent. In consideration therefor he received a conditional promise to pay him the sum of $15,000. By reason of the act of third parties, for which neither party to this contract was responsible, respondents were deprived of some of the substantial benefits contemplated by such compromise, and the appellant, under the plain terms of his own agreement, cannot receive his anticipated benefit.

The judgment is affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(36 Cal. App. 759)

ALISON v. CHAPMAN. (Civ. 1857.)

(District Court of Appeal, First District, California. April 11, 1918. Rehearing Denied by Supreme Court, June 10, 1918.)

1. BROKERS ⟹64(2)—COMPENSATION—"WHEN SALE IS CONSUMMATED."
Where broker was to sell land at $22,000 on commission of 5 per cent., and a contract was entered into at $21,500, which was signed and agreed to by the owner, with proviso that broker should get only an even $1,000 "when the sale is consummated," the latter words referred to some future event, and not the time of signing the contract of sale.

2. BROKERS ⟹64(2)—COMPENSATION—FAILURE TO COMPLETE SALE.
Where contract of sale provided that broker should have the right to demand the delivery of a deed, the broker cannot insist that it was the duty of the owner to enforce specific performance of the contract.

3. BROKERS ⟹86(5) — COMPENSATION — FURNISHING BUYER—EVIDENCE.
In action by broker for commission for furnishing a prospective buyer for land, evidence *held* sufficient to sustain finding that such buyer was not able to perform.

4. BROKERS ⟹84(2)—COMPENSATION—WHEN DUE—BURDEN OF PROOF.
The burden is on broker, suing for commission for furnishing a buyer, to prove the financial ability of the proposed buyer.

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by E. J. Alison against F. F. Chapman. Judgment for defendant, and plaintiff appeals. Affirmed.

E. F. Fitzpatrick and A. Kincaid, both of Redwood City, for appellant. Kirkbride & Gordon, of San Mateo, for respondent.

BEASLY, Judge pro tem. Plaintiff brought this action upon an assigned claim of one Irving against defendant for a commission in a real estate transaction. There are two questions in the case; one perhaps vital, and the other certainly so. The first is whether Adolph Uhl at the time of the transaction in question was able to pay $21,500 for the property involved therein; and the other question is whether the words "when the sale is consummated," as used in the contract of sale, are to be construed as meaning when the deed was passed and the deal closed.

The controversy arose in this way: The defendant in writing authorized Irving to sell certain real property for him at a price of $22,000, and agreed to pay a commission of 5 per cent. if the property should be sold within the time mentioned in the contract. Irving found a purchaser in Adolph Uhl at $21,500, and entered into an agreement of sale and purchase with him at that price, taking a $500 deposit on the property. The defendant Chapman accepted this $500 payment and agreed to the sale of the property under this contract, but with the proviso that Irving's commission should be a flat $1,000, to be paid, as stated in the contract, "when the sale is consummated." The trial court found that Uhl was unable to pay the purchase price or carry out the contract. The deal was never closed.

[1] It may be conceded that, generally speaking, a broker has earned his commission when he has brought an acceptable purchaser to the vendor—one who is ready, able, and wiling to buy the property upon the terms on which the agent is authorized to sell: or when a written contract acceptable to the seller has been entered into with a purchaser brought to the vendor by the agent. But there are special features in this case which indicate a different intention of the parties. This was not strictly a case of a broker employed to go out and find a purchaser on certain terms. The broker had found the purchaser and brought him to the vendor. A contract was thereupon entered into by which the purchaser became bound to the vendor to buy the property upon terms satisfactory to the vendor. The question of the ability of the vendee to carry out his contract to purchase the property may have been the very reason why the vendor agreed to this contract only upon condition that the commission should be paid when the deal was finally closed. The words "when the sale is consummated" could hardly have referred to the time when the written contract of sale was made because that was already completed simultaneously with this agreement as to the time of payment of the commission. Those words must have referred to some future event and not to the time of signing the contract of sale.

[2-4] It is argued that it was the duty of Chapman to enforce the specific performance of this contract, and that if he failed to take steps to do this he must be held liable for this commission; in other words, that it was his duty to secure the closing of the deal. But it cannot be so held for two reasons: First, Irving, in the contract of sale, provided that he should have the right to demand the delivery of a deed from Chapman thus retaining in his own control the power to secure this deed and demand performance of Uhl. No other reason has been suggested for this provision of the contract. Again, the court found (and although the evidence sustaining the finding is meager we think it sufficient) that Uhl was not able to perform his contract. The evidence upon this point is conflicting. A single question asked of Uhl would have settled the point absolutely, but it was not asked. Such lapses give rise to many of the appeals that come to this court. Mr. Uhl testified that he could have carried out this contract, but he also testified that it would have been inconvenient for him to do so, and that to do so he would have been compelled to borrow money at high rates of interest upon certain securities, which seem to have been of questionable value. There is no real evidence as to Uhl's financial ability or property, nothing but hearsay. Uhl was on the witness stand, and, while questioned generally as to his ability to carry out this contract, was not questioned at all as to what property he owned or its value.

The burden of proving his financial ability rested upon the plaintiff in this case, and it may well be that from the testimony in the case the court concluded that he was not financially able to pay for this property. Neither Chapman nor Uhl made any attempt to carry out this contract until the time for doing so had lapsed. Uhl thereupon endeavored to get Chapman to accept certain bonds in part payment of the contract price, and this Chapman refused to do, and Uhl thereupon said that his errand was finished and he would go home. Neither did Irving demand a deed from Chapman nor endeavor in any way to see the deal through.

Under the circumstances, we think the judgment must be affirmed. It is so ordered.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

(37 Cal. App. 8)

JORDAN v. COMBINED AMUSEMENTS CO. (Civ. 2328.)

(District Court of Appeal, First District, California. April 17, 1918. Rehearing Denied by Supreme Court June 14, 1918.)

CORPORATIONS ⟹79—AGENTS FOR SALE OF STOCK—EVIDENCE—SUFFICIENCY.

In an action by the assignee of a subagent for his commission on the sale of corporate stock against the corporation on an alleged agreement to make direct payment to subagent, evidence *held* insufficient to sustain findings for plaintiff.

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by John A. Jordan against the Combined Amusements Company. Judgment for plaintiff, and defendant appeals. Reversed.

Walter R. Bacon, of San Francisco, for appellant. Ross & Ross, of San Mateo, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of the plaintiff in an action against the defendant corporation for commissions on sales of its capital stock. We think the judgment must be reversed on the ground that the evidence does not sustain the findings made in plaintiff's favor.

The facts of the case as disclosed by the record may be stated briefly as follows: F. W. Swanton had entered into a written contract with the defendant whereby he undertook the sale of a certain number of shares of its capital stock, for which he was to receive 25 per cent. of the receipts from such sales as a commission. He in turn entered into a written agreement with W. G. Loomis, plaintiff's assignor, wherein it was provided that Loomis would co-operate and assist Swanton in the sale of the stock, for which service Swanton would pay him one-half of his commissions. Under this last agreement sales of stock were made by Loomis, and Swanton had made one payment of commission to him, when they, being both officials of the company, Swanton being president and Loomis secretary, directed the bookkeeper of the defendant to keep the account of their sales and commissions in the books of the corporation. This was done, and accordingly, when sales were made by either Swanton or Loomis, they would each be credited with 12½ per cent. of the proceeds of the sales, and would be charged with the expenses incurred by them and with commissions paid by the corporation to subagents, and the balance due each when settled was paid by the defendant's check.

It is not shown, so far as the evidence discloses, that it was the understanding of any of the parties to the transaction that the corporation was to assume the obligation of Swanton to pay Loomis the commission due him on sales of stock, or that its obligation to Swanton under the contract first mentioned was modified. The course it pursued in making payments to Loomis was apparently with the consent of Swanton, and a natural consequence of the assumption by the corporation of the task of entering upon its books the sales of stock made under its contract with Swanton so as to show the state of the account between Swanton and Loomis. The latter on the witness stand admitted that the corporation undertook the matter of bookkeeping merely as a convenience to Swanton and himself. It is true that the directors of the corporation knew that the commission accounts of Loomis and Swanton were being kept in the corporation's books, and it is true that Loomis testified that when he was pressing for payment of $11,000 due to him as commissions the directors promised payment as soon as the Panama-Pacific International Exposition opened, at which time the corporation, through the ownership of certain concessions in connection therewith, expected to be in daily receipt of sums of money. But this testimony is entirely consistent with the theory that the corporation was handling the bookkeeping, and making payments directly to Loomis on account of commissions earned by him under his contract with Swanton as a matter of accommodation and convenience. In other words, the corporation in effect admitted that it owed the amount claimed to Swanton, and that under its arrangement with him, and the latter's arrangement with Loomis, it would as soon as it was in possession of funds pay each the amount due. After Loomis had received about $18,000 in commissions and when he was pressing for payment of the balance due him, he accepted from Swanton an order drawn by the latter on the defendant, and which directed the defendant to pay to Loomis $2,000 and to charge the same to his personal account. This is a circumstance indicating that at that time the parties concerned regarded Swanton as the person primarily entitled to the commissions, and that he in turn was personally liable to Loomis for the proportion thereof to which he was entitled; and there is no evidence of any change in the relationship which Loomis bore to the corporation as regards this account, which would place his present claim on any different footing. Loomis also testified on cross-examination that the defendant employed an assistant bookkeeper at a salary of $150 per month, whose salary was charged in equal parts to the commission accounts of himself and Swanton. From this additional circumstance the inference is quite plain that the defendant consented to keeping the commission accounts between Swanton and Loomis merely as a matter of accommodation to them, and the course pursued by the corporation in this respect in no manner affected its original obligation to pay Swanton alone the commissions due upon sales of its capital stock.

Since the taking of the appeal the parties have settled their differences with respect to a part of the amount recovered, to wit, the amount of the draft hereinbefore referred to and which was the subject-matter of one of the counts of the complaint. Consequently as to that part of the judgment no action by this court is necessary. As to the remainder, for the reasons heretofore given, the judgment is reversed.

We concur: ZOOK, Judge pro tem.; BEASLY, Judge pro tem.

(36 Cal. App. 762)

PEOPLE v. TAYLOR. (Cr. 416.)

(District Court of Appeal, Third District, California. April 12, 1918.)

CRIMINAL LAW ⟹1141(1) — APPEAL — PRESUMPTIONS.

Where no argument is made, and the court's attention is not called to any ground for interfering with the judgment, the presumptions are in favor of the regularity of the proceedings of the trial court.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Earl Taylor was convicted of receiving stolen property, and he appeals. Affirmed.

Walter F. Lynch, of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. Defendant was convicted of receiving stolen property. His appeal was regularly taken, but it has not been prosecuted. No argument has been made in his behalf in this court, and therefore our attention has not been called to any ground for interfering with the judgment of the lower court. The presumptions are, of course, in favor of the regularity of the proceedings in the court below. Moreover, an examination of the record discloses sufficient evidence to justify the verdict without prejudicial error being shown therein. People v. Wagner, 171 Pac. 699.

The judgment and order are therefore affirmed.

(36 Cal. App. 757)

CITY OF VENICE et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 2662.)

(District Court of Appeal, Second District, California. April 11, 1918.)

Prohibition 🔑24—Moot Questions.

A proceeding to prohibit superior court from proceeding with trial of action to enjoin election has become moot, where the alternative writ was modified so as to permit defendants to make an amended return, but they have not done so, although the day of the election has passed and the alternative writ will be discharged, and the proceedings dismissed.

Petition for writ of prohibition by the City of Venice and others against the Superior Court of the State of California in and for the County of Los Angeles and Dana R. Weller, Judge thereof, to prohibit said court from proceeding further in the trial of a case, wherein Daniel W. Daniels is plaintiff, and the City of Venice and others defendants. Alternative writ discharged, and proceedings dismissed.

C. W. Lyon, City Atty., and S. W. Odell, both of Los Angeles, for petitioners. Paul W. Schenck and Richard Kittrelle, both of Los Angeles, for respondents.

PER CURIAM. This is a proceeding by which it was sought to prohibit the defendant superior court from proceeding further with the trial of an action entitled Daniel W. Daniels v. City of Venice et al., pending in that court. That action was one in which the plaintiff Daniels sought to obtain a decree of injunction to prevent the city of Venice and it officers from submitting to the electors of the city at the general election to be held therein on the 8th day of April, 1918, a question relating to the prohibition of the sale of alcoholic liquors in that city.

The defendants having filed their answer to the petition and made their return to the alternative writ theretofore issued, the matter was submitted for decision on the 29th day of March, 1918. Later, on that same day, the justices of this court, being of the opinion that the court did not have before it facts sufficient for an appropriate decision upon the merits, ordered that the restraining order theretofore issued in this case be modified to this effect: That the defendants be permitted to make findings of fact in the case of Daniels v. City of Venice et al., and to make an amended return showing the said findings of fact.

No amended return has been made, and the day of election in the city of Venice has passed. We may safely presume that there was no injunction against the submission of said question to the voters upon the subject above mentioned, and that the election has been held. Under these circumstances it is manifest that this has become a moot case, and that no useful purpose can be subserved by its further prosecution. For these reasons, it is ordered that the alternative writ be discharged, and this proceeding is hereby dismissed.

(36 Cal. App. 754)

FARRELL v. CITY OF ONTARIO et al. (Civ. 2525.)

(District Court of Appeal, Second District, California. April 10, 1918.)

1. Municipal Corporations 🔑846—Changing Level of Street—Drainage of Surface Waters—Injunction by Owner.

A property owner can enjoin the city from maintaining a paved street at such level and in such condition, different from its original state, that in time of rainfall or storm it will be a storm drain carrying off surface waters from other streets instead of a street for traffic, whereby the owner's land will be gullied and will have deposited upon it silt, sand, and other débris, although the work of changing the level of the street was completed before the owner sued for injunction.

2. Injunction 🔑48—Continuing Trespass.

An injunction against a continuing trespass will not be denied merely because acts of trespass actually have been accomplished.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Action by P. Farrell against the City of Ontario, a municipal corporation, E. R. Alter, as President of the Board of Trustees of the City, and George Chaffin, and others, Trustees of the City. From judgment for defendants, plaintiff appeals. Reversed.

Joseph Scott, of Los Angeles, A. S. Maloney, of San Bernardino, and A. G. Ritter, of Los Angeles, for appellant. Archie D. Mitchell, of Ontario, for respondents.

CONREY, P. J. The plaintiff appeals from the judgment, which was entered after an order sustaining a general demurrer to the amended complaint, which complaint the plaintiff refused to amend.

[1] As shown by the complaint, the plaintiff is the owner of real property which lies immediately south of and adjacent to the city limits of the city of Ontario. For a number of years prior to the acts complained of in the complaint, there has been and now is in the city of Ontario a street known as San Antonio avenue, extending south from the northerly city limits and having its southerly terminous at the junction of plaintiff's property and the southerly limits of the city. The city of Ontario, on or about August 1, 1916, passed an ordinance and awarded a contract for the paving of San Antonio avenue south from a point about 1½ miles north of the junction of plaintiff's property with the southerly boundary of the city. Pursuant to these proceedings the defendants caused San Antonio avenue to be excavated below its former level and thereby brought that avenue to a lower level than the land through which the avenue runs. By so excavating the defendants increased the fall along the avenue from north to south to a considerable extent. By each and all of said acts the defendants have made of San Antonio avenue a water course and a drain which will inevitably collect and carry great volumes of surface water in time of storm and rainfall and pour said water in immense quantities upon the plaintiff's property in augmented and accelerated volume and will bring great quantities of said surface water upon plaintiff's land which would not have reached said land under natural conditions or if San Antonio avenue had been graded, paved, and curbed in a proper manner. The defendants have made no provisions of any kind for carrying off said surface water, which will be collected by and be diverted into said avenue through the acts of the defendants, and which by reason of said acts will flow down said avenue to and upon the plaintiff's real property to the great injury and damage thereof. There are various dirt roads and streets running east and west in the city of Ontario intersecting with San Antonio avenue. The defendants negligently have so arranged and diverted the surface drainage of the country through which said paved street passes as to cause the intersecting streets and the lands to the east and west of said avenue to pour their surface drainage into San Antonio avenue, and have so arranged San Antonio avenue that it will act as a principal canal, drain, and water conduit into which said intersecting streets and a great deal of the country surrounding said avenue will drain in time of rainfall or storm, so that thereby in time of rainfall or storm the avenue will be a storm drain instead of a street for traffic. The result will be that the avenue will collect all of the waters of the portion of the city through which it passes, contrary to the natural flow of said waters, and inevitably pour the same in great and increased volume upon the land of the plaintiff, to his great injury. The waters thus discharged upon the plaintiff's land will cause large portions of said land to be flooded in time of storm, will cause gullies to be made therein and will cause to be deposited upon said land large quantities of silt, sand, and various kinds of débris, whereby the said property will be damaged to a great and irremediable extent and will decrease materially in value.

The foregoing statement merely summarizes the facts, which are set forth in great detail in the complaint. Plaintiff's prayer is for an injunction to restrain the defendants from maintaining San Antonio avenue in the condition in which it now is or in any condition which will make the same a water course for the surface waters aforesaid, or that the defendants be required to provide suitable means to carry off from said avenue any storm waters which may pour down the avenue and effectually to prevent said waters from reaching or flooding or in any way damaging plaintiff's property.

We are satisfied that the complaint stated a cause of action. The facts alleged therein make fully as strong a case for the plaintiff as those shown in the recent case of Dick v. City of Los Angeles, 168 Pac. 703, where the city was held liable for damages caused to the plaintiff's real property by the grading of one of its streets adjacent thereto, whereby surface water, which theretofore had not flowed there, was caused to accumulate in unusual quantities and was turned upon the land of the plaintiff. See, also, Stanford v. San Francisco, 111 Cal. 198, 43 Pac. 605; Shaw v. Town of Sebastopol, 159 Cal. 623, 115 Pac. 213; Baker v. Town of Akron, 145 Iowa, 485, 122 N. W. 926, 30 L. R. A. (N. S.) 619; Dillon on Municipal Corporations (5th Ed.) § 1736.

[2] We find no merit in the suggestion made by respondents that the plaintiff is not entitled to an injunction because the work of which he complains had been completed before the commencement of this action. If it were important to do so, we might observe that according to the allegations of the complaint it does not appear that the flooding of his land has yet occurred. The charge is that such flooding inevitably will occur in times of rainfall or storm. Besides this, it is almost axiomatic to say that an injunction against a continuing trespass will not be denied merely because acts of trespass actually have been accomplished.

The judgment is reversed.

We concur: JAMES, J.; WORKS, Judge, pro tem.

(36 Cal. App. 778)

WATSON et al. v. ANDERSON. (Civ. 2160.)

(District Court of Appeal, First District, California. April 15, 1918.)

1. Appeal and Error ⇨500(2) — Record — Ruling on Demurrer—Waiver.

Where the order made on demurrer does not appear in the transcript, the demurrer must be held to have been waived in view of Code Civ. Proc. § 670, requiring a copy of an order made on demurrer to be made a part of the judgment roll.

2. Appeal and Error ⇨1052(2)—Harmless Error—Incompetent Testimony—Cure by Subsequent Evidence.

In action for failure to erect a building according to contract, any error in admitting in evidence certain specifications which were not signed by the parties was cured by defendant's testimony that such specifications covered the work, and were followed as closely as possible.

3. Contracts ⇨323(1)—Breach—Evidence.

In action for damages for failure to erect a building in a workmanlike manner according to contract, defendant's motion for nonsuit was properly denied; there being no evidence that plaintiffs were responsible for the faulty construction complained of.

4. Trial ⇨66 — Reopening Case — Discretion.

It was within the discretion of the trial court to reopen the case for the purpose of permitting a witness to testify.

5. Appeal and Error ⇨1011(1)—Findings—Review.

There being a substantial conflict in the evidence on several points, and the court having found for plaintiff on such points, the findings will not be disturbed on appeal.

Appeal from Superior Court, Alameda County; H. D. Burroughs, Judge.

Action by Thomas F. Watson and another against John Anderson. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. B. Rinehart, of Oakland, for appellant. Hayes & Oliphant, of Oakland, for respondents.

BEASLY, Judge pro tem. This is an action in which the plaintiffs recovered a judgment against the defendant for the failure of the latter to erect a building in a workmanlike manner in accordance with his contract so to do. Defendant appeals.

[1] The first point made by the appellant is that his demurrer should have been sustained, but, as the order made on demurrer does not appear in the transcript, the demurrer must be held to have been waived. Code Civ. Proc. § 670; Silcox v. Lang, 78 Cal. 118, 20 Pac. 297.

A number of findings made by the trial court are attacked on this appeal as unsupported by the evidence. It would serve no good purpose to particularize each of these findings here, and to specify and recite the evidence supporting them. It is sufficient to say that all of the material findings find support in the evidence.

[2] Certain rulings of the court made during the course of the trial to which appellant excepted will be considered. The first related to the admission by the court of certain specifications for the building which were not signed, and which it is therefore claimed could not form part of the contract in the case. These specifications were present when the contract was signed and corrected in some particulars on the night the contract was signed and before the signing of that instrument. They were not attached to the contract, nor were they actually and separately signed by the parties. The work, however, or most of it, was done in accordance with these specifications, and the defendant himself testified that, while no written specifications were ever signed, there were specifications covering the job, namely, these specifications to the admission of which exception was taken, and that he followed these specifications in doing the work as closely as he could; that he was supposed to follow these specifications in the mixing of the plaster, which was a vital matter, as will hereafter be seen. Some of this evidence was introduced as a part of defendant's case, and after the specifications had been admitted in evidence. If there was error originally in admitting these specifications, it was cured by this subsequent evidence.

[3] The second error occurring at the trial upon which the defendant relies related to the denial of a nonsuit. Briefly, the evidence as it stood at the time the nonsuit was denied showed that the plaintiffs had contracted with the defendant for the erection of the building; that by the contract the defendant had agreed to complete the building in a workmanlike manner and to superintend its construction; that the building after its erection leaked in all the rooms on its south and east sides; that the leakage was due to the defective construction of the fire walls, which were not constructed in a workmanlike manner. The motion for nonsuit was made specifically on the grounds that the plaintiffs had failed to prove that the defendant was in any way bound as guarantor or otherwise of the work performed by him in the construction of the building, and, second, that any damage resulting to plaintiffs from the construction of the building was due to the fault of plaintiffs equally with that of defendant.

As to the first ground it may be said that there was a provision in the contract to the effect that the contractor was to perform his agreement and complete the building in a workmanlike manner in accordance with the plans, drawings, and specifications for the same. While, as we have seen, no specifications were ever signed, the specifications above described and admitted in evidence did actually form a part of this contract, and were so considered by both parties while the building was being erected, although not actually attached to the contract. This showed an agreement on the part of the defendant to do his work in a workmanlike manner. There was no evidence at the time the nonsuit was denied to show that the plaintiffs were in any way responsible for the faulty construction complained of, and in view of this state of the record the motion for nonsuit was properly denied.

It may be noted here that this is not an action to foreclose a mechanics' lien, but for damages for failure on the part of the contractor to perform his contract.

[4] The defendant also specifies as grounds of reversal the irregular and unwarranted allowance by the court of evidence in rebuttal of the witness Melbourne. The court appears to have reopened the case for the purpose of permitting Melbourne to testify, and this was within its discretion.

The defendant's principal complaint against the decision of the court is that he was not responsible for the defects of the building, but upon this point the trial court found against him. These defects consisted of certain poor workmanship in the exterior walls of the building which permitted the rain to beat through and wet the inside thereof. The contract and specifications provided for three coats of plaster, and two coats of plaster only were used. The defendant contends that the whole trouble was caused by this omission of the third coat of plaster, and that he stated to the plaintiffs when the change was made that he would not be responsible for the resulting workmanship. However, there is much evidence in the record to the effect that it was not the thinness of the coating of plaster which caused the water to leak through the building, but rather the defective material of which it was composed and the manner in which the plastering was done. This plastering was done by one McTye, and defendant claims that McTye was employed by the plaintiffs to do this work; but the record discloses the fact that the trial court found that the plastering as executed was done by the defendant as a part of his contract, and the defendant himself testified that he was to make 10 per cent. on the total cost of the building, and the amount to be paid on the plastering was included in the amount to make the 10 per cent. There was other evidence showing that this work was part of his contract. The fact that a reduction of $228 was made upon the cost to the plaintiffs of doing this work because of an agreement subsequent to the execution of the contract to the effect that two coats of plaster should be used instead of three does not change the fact that the contractor was to do this work.

[5] Without going further into this matter, it may be said that, while there was a substantial conflict in the evidence upon several points, the court found on these points in favor of the plaintiffs, and the findings must therefore be permitted to stand.

The judgment is affirmed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

(178 Cal. 321)

LAMBERSON v. BASHORE. (Sac. 2599.)

(Supreme Court of California. May 27, 1918.)

1. JUSTICES OF THE PEACE ⚷150(1)—THEORY OF THE CASE BELOW—PLEADINGS.

Where plaintiff sued to recover wheat and defendant answered that the wheat was grown on his own land, and demanded that the case be certified from the justice's court to the superior court on the ground that title to real estate was involved, he could not thereafter be heard to claim that plaintiff's proof of ownership of the land at the time when the wheat was grown thereon did not suffice to establish plaintiff's ownership of the wheat.

2. APPEAL AND ERROR ⚷1011(1)—SCOPE OF REVIEW—FINDINGS OF FACT.

The trial court's action in resolving a conflict of the evidence will not be reviewed upon appeal.

Department 1. Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Charles G. Lamberson against John Bashore. Judgment for plaintiff, and defendant appeals. Affirmed.

J. C. Thomas, of Oakland, for appellant.

Power & McFadzean, of Visalia, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment in plaintiff's favor. The action was originally brought in the justice's court to recover the possession of some wheat valued at $50. The defendant filed an answer, denying that the plaintiff was the owner of the wheat, or "that this defendant wrongfully came into the possession thereof, but alleges that the ground upon which it grew and from which it was harvested was and is the real estate of this defendant." Upon filing this answer the defendant demanded that the cause be certified to the superior court for trial upon the ground that the title to real estate was involved. The justice thereupon transferred the cause to the superior court, whereupon the defendant filed a cross-complaint, in which he sought to quiet title to the land, and also to have a trust declared thereon in his favor and to have such trust terminated. The case being called for trial the plaintiff introduced in evidence a judgment of the superior court entered prior to the time when the wheat in question was grown, in an action between the plaintiff and the defendant, quieting the title of the plaintiff to the land as against the claims of the defendant, and adjudging the plaintiff to be the owner and entitled to the possession of said land. With this proof the plaintiff rested his case, whereupon the defendant moved for a nonsuit upon the ground that plaintiff had not shown any right or title to the wheat in question. The court denied this motion, whereupon the defendant offered some evidence in support of his claim of ownership of the land. The cause being submitted, the court found the plaintiff to be the owner of the land upon which the wheat had been grown and of the wheat grown thereon, and found against the defendant upon the issues tendered in his cross-complaint. From the judgment based upon these findings the defendant prosecutes this appeal.

[1] The main point which the appellant urges is that the court erred in denying his motion for nonsuit, and erred in adjudging the plaintiff to be the owner of the wheat in question upon the mere proof of the plaintiff that he was the owner of the land upon which the wheat had been grown. There is no merit whatever in this contention. The sole theory upon which the defendant's answer in the justice's court was drawn and upon which his demand for the transfer of the case to the superior court was predicated was that the plaintiff was not the owner or entitled to the possession of the wheat because he was not the owner or entitled to the possession of the land upon which such wheat had been grown. Having thus narrowed and defined the issues, and having obtained a transfer of the cause to the superior court upon the claim that the title to the wheat involved depended upon the issue as to the title to the land; that having further gone to the extent of attempting to affirmatively assert and seek to have quieted his title to the land in an action originally involving only the ownership and right of possession of the wheat, he could not be heard to claim in the trial court, and may not here assert, that the plaintiff's proof of ownership of the land at a time prior to that wherein the wheat was grown did not suffice to establish the plaintiff's right to the ownership and possession of the wheat grown upon his own land. The trial court, therefore, properly denied the defendant's motion for nonsuit.

[2] Assuming that there may have been some conflict as to the ownership of the land created by the evidence offered on behalf of the defendant after the denial of the motion for nonsuit, the trial court was entitled to resolve such conflict in the plaintiff's favor, and its findings and judgment in so doing will not be reviewed upon appeal.

Much space is devoted in the brief of counsel for appellant to a discussion of matters which were concluded in other litigation between the parties hereto and which are irrelevant to this appeal.

The members of the bar could well render much aid in the way of relieving courts of last resort of their accumulating business by withholding their aid in the taking and prosecution of unmeritorious appeals.

Judgment affirmed.

We concur: SLOSS, J.; SHAW, J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(178 Cal. 318)

BLEVINS v. BLEVINS. (Sac. 2582.)

(Supreme Court of California. May 27, 1918.)
Rehearing Denied June 24, 1918.)

1. APPEAL AND ERROR 🔑965—VENUE 🔑52(1)—CHANGE OF VENUE—DISCRETION.

Applications for change of place of trial on the ground of convenience of witnesses are addressed to the sound legal discretion of the trial court, and its action should not be disturbed on appeal, unless it clearly appears that there has been an abuse of discretion.

2. VENUE 🔑72—CHANGE—REOPENING HEARING—DISCRETION.

Where two days were occupied in hearing motion for transfer of case upon affidavits and stipulations of the respective parties, and plaintiff had every opportunity to amplify her former stipulation, so as to entitle her to a transfer, the court did not abuse its discretion in refusing to reopen the hearing the day after the matter had been submitted for decision.

3. APPEAL AND ERROR 🔑965—REVIEW—DISCRETION—CHANGE OF VENUE—REOPENING HEARING.

Reopening hearing on motion for retransfer of case after matter had been submitted for decision being within discretion of trial court, his action thereon will not be disturbed, in the absence of manifest abuse.

Department 1. Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by Anita P. Blevins against Michael Blevins. From an order denying motion for change of place of trial upon the ground of convenience of witnesses, plaintiff appeals. Affirmed.

Howard Harron, of San Francisco, and Alva A. King, of Colusa, for appellant. Millington & Millington, of Colusa, and Frank Freeman, of Willow, for respondent.

RICHARDS, Judge pro tem. This is an appeal from an order denying a motion for change of place of trial upon the ground of convenience of witnesses. The action is one for divorce on the ground of extreme cruelty. It was originally commenced by the plaintiff in the superior court of the city and county of San Francisco. Upon the appearance and demand of the defendant the action was transferred for trial to the county of Colusa, the place of the defendant's residence. Thereafter his answer and cross-complaint were filed, in the former of which the defendant made specific denials of the averments of the plaintiff's complaint in so far as they referred to his alleged acts of cruelty, while in his cross-complaint the defendant averred numerous acts of cruelty on the plaintiff's part. To this cross-complaint the plaintiff answered with specific denials. The issues having thus been made up, the plaintiff made her motion for the transfer of the case to the city and county of San Francisco upon the ground of convenience of witnesses, supporting the same with an affidavit containing the names of 25 witnesses residing in San Francisco, with a statement as to the matters in support of the averments of her complaint to which she expected each of said witnesses to testify. In resisting this motion the defendant filed a counter affidavit, denying that the convenience of witnesses and the ends of justice would be promoted by the change of place of trial, deposing that the calendars of the several departments of the superior court of San Francisco were congested to the extent that a trial of this action could not be had for several months if the cause should be transferred to said court, while in the county of Colusa it could be tried speedily. The defendant further set forth the names of 19 witnesses residing in the county of Colusa or counties adjacent thereto, together with the matters to which he expected each of them to testify, in denial of the averments of the plaintiff's complaint, or in support of those of his cross-complaint. The motion came on for hearing on or about July 18, 1916, whereupon the plaintiff presented and filed a so-called stipulation in which she agreed that if certain specified witnesses named in the defendant's affidavit did not appear on his behalf at the trial of the cause if transferred to San Francisco, she would admit that said witnesses would testify to the matters set forth in the defendant's affidavit to which they were severally expected by him to testify. The admission as to 11 of these witnesses was unqualified, but as to the remaining 8 was so qualified as to largely impair its value. Upon the presentation and filing of this affidavit on plaintiff's behalf the defendant presented a stipulation on his behalf to the effect that as to 17 of the plaintiff's witnesses he would admit that their proposed testimony, as shown in the plaintiff's affidavit, was true and to be considered as admitted facts in the case, and that as to one other of the plaintiff's witnesses, subject to an objection to the admission of the testimony of said witness upon the ground that it was immaterial, he would admit that said witness would testify as stated in the plaintiff's affidavit. The matter came on for hearing before the court upon this state of the record. Two days were occupied in the hearing of the motion and the matter was then submitted for decision and taken under advisement by the court. On the following day after such submission counsel for plaintiff presented for filing a further stipulation to the effect that if the cause should be transferred to the city and county of San Francisco for trial, and if any of the enumerated witnesses in the defendant's affidavit did not appear at such trial the plaintiff would agree that each of the said witnesses for the defendant not so appearing would testify to such of the facts set forth in the defendant's affidavit as were admissible in evidence. The defendant objected to the consideration by the court of this belated stipulation unless the whole matter was reopened. The court declined to reopen the matter and for that reason refused to consider this latter stipulation, and thereafter denied the plaintiff's motion for a retransfer of the cause to San Francisco for trial. It is from the order so made that the plaintiff prosecutes this appeal.

[1] Applications for change of place of trial on the ground of convenience of witnesses are addressed to the sound legal discretion of the trial court, and its action will not be disturbed upon appeal unless it clearly appears that there has been an abuse of that discretion. Hanchett v. Finch, 47 Cal. 192; Avila v. Meherin, 68 Cal. 478, 9 Pac. 428; Clanton v. Ruffner, 78 Cal. 268, 20 Pac. 676; Stockton, etc., Works v. Houser, 103 Cal. 377, 37 Pac. 179. From a careful examination of the pleadings in the case and of the issues tendered thereby and of the respective affidavits of the parties as to the witnesses upon whose testimony they relied to support or controvert these issues, we are convinced that as the case stood before the court at the time of its submission there would have been not only no abuse of discretion in the denial of the plaintiff's motion, but upon the showing made it should have been denied.

[2] The appellant, however, contends that she was entitled to have had considered her stipulation filed after the submission of the cause, containing further admissions as to the witnesses for the defendant. Conceding, for the sake of argument, that had this belated stipulation been presented before the submission of the cause it would have entitled the plaintiff to a transfer, we are unable to say that the court abused its discretion in refusing to reopen the hearing. The cause had been before the court for two days upon the affidavits and stipulations of the respective parties to it. During that hearing the plaintiff had every opportunity to have amplified her former stipulation by the presentation of her later one containing no new matter, but she permitted the cause to be heard, argued, and submitted without doing so, and apparently only brought to light the latter when, upon reflection, she feared that her former showing might prove insufficient.

[3] The matter of reopening a cause once submitted for decision in order to present proofs which were fully known during the pendency of the hearing to the party now seeking their admission was even more largely within the discretion of the trial court than was its conclusion upon the main issue, and hence its action thereon will not be disturbed upon appeal in the absence of a manifest abuse of discretion. There is no such showing in this case, and hence the conclusion of the court in relation to both matters will be upheld.

Order affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.

(178 Cal. 302)

BROWN v. FRANKLIN FIRE INS. CO.

(L. A. 4189.)

(Supreme Court of California. May 24, 1918.)

INSURANCE ⚷328(2)—ASSIGNMENT OF OWNER'S INTEREST—ACTIONS.

In an action on a fire insurance policy, where it appeared that plaintiff had installed a third party as his agent and employé in charge of the store insured, permitting him to conduct the business in plaintiff's name as owner under an agreement for a stated salary and a half interest as soon as the profits amounted to a certain sum, such agreement was one of employment, and did not constitute an assignment of an interest in the property so as to defeat plaintiff's right to recover under the policy.

Department 2. Appeal from Superior Court, Los Angeles County; John S. Mitchell, Judge.

Action by E. M. Brown against the Franklin Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hindman & Yakey, of Los Angeles, for appellant. G. C. De Garmo, of Los Angeles, for respondent.

WILBUR, J. This is an action to recover upon a fire insurance policy upon a stock of goods destroyed by fire. The question raised is whether or not there was an assignment of an interest in the property by plaintiff to one Stewart, or such a change of possession as would prevent plaintiff recovering under the terms of the policy. The court found that plaintiff owned the property. The evidence is that he purchased the store and paid therefor, and installed Stewart as his agent and employé in charge thereof, permitting Stewart to conduct the business in the latter's name as owner, under an agreement by which Stewart was to receive $125 a month and was to be given a half interest in the business as soon as the profits amounted to $2,000 (the estimated value of a half interest in the business). This was an agreement of employment, by which the employé was to be paid upon the basis of a stated salary and a proportion of the profits. He was not to share in the losses, and his ownership in the business was contingent upon the profits amounting to enough to purchase a half interest therein. The finding of the court that Brown owned the property is supported by the evidence.

The judgment is therefore affirmed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(36 Cal. App. 773)

ARMOUR & CO. v. R. ROSENBERG & SONS CO. (Civ. 2104.)

(District Court of Appeal, First District, California. April 13, 1918. Rehearing Denied by Supreme Court June 10, 1918.)

1. CORPORATIONS 🔑484—TRADING CORPORATION—POWER TO GUARANTEE ACCOUNT OF CUSTOMER.

A corporation, to enable its customer to continue business and to pay an old account, had power to guarantee such customer's payment for goods purchased of another company.

2. CORPORATIONS 🔑416—AGENT'S OSTENSIBLE AUTHORITY—GUARANTY OF ACCOUNTS.

The general manager of a company manufacturing bottles, not only a director, but having for several years had exclusive control and management of the business, who, after agreeing with a customer to guarantee payment for raw materials used by such customer, executed guaranties in conformity therewith for a long period of time and covering numerous transactions, his authority to do so never being questioned by his corporation, had ostensible power to execute such guaranties.

3. CORPORATIONS 🔑426(10) — REPRESENTATION BY AGENT—ESTOPPEL—ACCEPTANCE OF BENEFITS.

A corporation is estopped to deny the authority of its manager to guarantee the account of its customer with another company, where it has received benefits under the contract with its customer pursuant to which its manager guaranteed his accounts.

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by Armour & Co., a corporation, against R. Rosenberg & Sons Company, a corporation. From judgment for defendant, plaintiff appeals. Reversed.

Herrington & Clausen, of San Francisco, for appellant. Louis H. Brownstone, of San Francisco, for respondent.

KERRIGAN, J. This is an action brought upon two guaranty contracts executed by defendant corporation for the payment of certain merchandise sold and delivered by plaintiff corporation to one W. Y. Lawton, an individual doing business under the fictitious name of "American Packing Company." Judgment was rendered in favor of defendant on the ground that the manager of defendant corporation had no authority to execute the guaranties in question. Briefly stated the facts are as follows:

Plaintiff is a manufacturing and trading corporation dealing in food products. Defendant is a business corporation dealing among other things, in new and secondhand bottles. American Packing Company originally was a corporation engaged in manufacturing, and in the conduct of its business prepared and put up in bottles salad oil which it sold to the trade. It was adjudicated bankrupt in March, 1913. W. Y. Lawton was one of its stockholders, and after the bankruptcy proceedings were closed he began and continued in the same line of business on his personal account. Defendant was one of the creditors in bankruptcy of the American Packing Company, having a claim for the sum of $875.58. No dividend was received on this account from the assets of the defunct corporation, and it was a total loss to the defendant. Later on, however, the claim was paid in full by Lawton after he had resumed the business on his individual account. This payment was made in pursuance of an agreement with the manager of defendant under the following circumstances: When Lawton resumed business he did so under the name of the American Packing Company. At that time Lawton was, to the knowledge of defendant's director and manager, Joseph Rosenberg, without resources or commercial credit, and in order to begin and continue business he made an agreement with defendant, through Rosenberg, its general manager, by the terms of which defendant agreed to guarantee payment of Lawton's purchases of raw material for his manufacturers, and, further, to sell him on credit such bottles as he might need in preparing and putting up his food products. In return for this financial assistance on the part of defendant, Lawton as an individual assumed and agreed to pay to defendant the amount of its claim against the American Packing Company, and also agreed to purchase exclusively from defendant such bottles as his business needs required. In the bankruptcy proceedings certain personal property of the defunct corporation was sold, and as part of the agreement with Lawton defendant advanced the sum of $310 for its purchase, which Lawton agreed to repay, and this property was acquired by Lawton. These agreements were substantially performed by Lawton. He paid the amount of defendant's claim against the defunct company, repaid the sum advanced for the purchase of the bankrupt stock, and during the period from July, 1913, to April 26, 1916, purchased all his bottles from defendant amounting to some $15,000. This agreement between Lawton and defendant had not been authorized by defendant's board of directors by resolution or other formal order. It was, however, made known by Rosenberg to another director, who was also president of defendant company. Defendant's board of directors consisted of five persons, two of whom resided in Chicago, and they only came to San Francisco, where the principal place of business of the corporation was situated, once a year. The other three of whom Rosenberg was one, resided in San Francisco.

After the arrangement with Lawton, Rosenberg guaranteed in the name of his company, certain purchases made by Lawton, among them being those which are the subject of this action. Except as to the date, the guaranties are duplicates, and the amount of goods sold thereunder total $1,840. In form they are as follows:

> "San Francisco, March 2, 1916.
>
> "Armour & Co. Battery and Union, San Francisco, Cal.—Gentlemen: We herein guarantee payment of forty (40) barrels of salad oil to be delivered to the American Packing Company.
>
> "Very truly yours.
> "R. Rosenberg & Sons Co.,
> "By J. R."

The evidence conclusively shows that Rosenberg had the entire and complete management of Rosenberg & Sons Company, defendant herein, and transacted all of its business, and this fact is not disputed. The evidence further establishes the execution by defendant, through its manager, of the guaranties sued upon, as well as many others covering a period of two years. The guaranties sued upon were the last of a series. Those theretofore made were for approximately $20,000, and were paid. It was proved that the sales to Lawton were made by plaintiff relying upon the guaranties and that invoices of goods and monthly statements were sent by plaintiff to defendant, which in turn forwarded them to Lawton. At first Lawton made payments direct to plaintiff, but later on he sent them to defendant, which from time to time sent them to plaintiff. It further appeared that defendant kept files of carbon copies of the numerous guaranties and of letters relating to Lawton's purchases and the state of his indebtedness. There were, however, no entries in defendant's books of account showing that guaranties had been executed. Under these circumstances it is the claim of appellant that Rosenberg had complete authority to bind his company in issuing the guaranties.

[1] It is not contended that trading corporations may indiscriminately guarantee their customers' purchases from others, or exercise generally the functions of corporations chartered for the special purpose of executing surety or indemnity contracts. Whether such a corporation would have power to lend its credit to another with whom it had no business, or where such an accommodation had no relation to the business it was organized to transact, is not here presented. The rule denying corporations the right under such circumstances is one of strict construction applied by the earlier cases based upon the doctrine of ultra vires, that a corporation may not enter into a contract or do any act not specifically authorized. The contract here sued upon involves a different principle. The question presented by the different assignments of error is whether or not the general manager of a trading corporation has the implied power to guarantee debts or obligations of a customer or other person when such course is deemed by him necessary for the promotion of the business of the corporation. The obligation here guaranteed had relation to the corporation's own interest and was designed to promote its own business. In such a case the rule now seems to be firmly established that trading corporations may, in furtherance of their own interests, extend financial aid to their customers. Hess v. Sloane, 66 App. Div. 522, 73 N. Y. Supp. 313; Bacon v. Montauk, 130 App. Div. 737, 115 N. Y. Supp. 617; Winterfield v. Cream City, 96 Wis. 239, 71 N. W. 101; Koehler v. Reinheimer, 26 App. Div. 1, 49 N. Y. Supp. 755; Timm v. Grand Rapids, 160 Mich. 371, 125 N. W. 357, 358, 27 L. R. A. (N. S.) 186; McQuaide v. Enterprise Brewing Co., 14 Cal. App. 315, 111 Pac. 927. And this aid may be in the form of a guaranty. 10 Cyc. 1105. Nor does the fact, as suggested by counsel for respondent, that the arrangement did not prove profitable, affect the power. The right is not dependent upon, nor is it in any manner impaired by, the fact that the welfare of the corporation was not promoted by the transaction. The power existing, the result of its exercise becomes unimportant.

In the instant case it is manifest that the contract entered into by Rosenberg and Lawton was one made in furtherance of the interest of the corporation defendant. The American Packing Company, a customer, was in its debt to a considerable amount, which debt without the arrangement was a total loss. The agreement for the payment of the debt and the promise of Lawton to purchase exclusively from the defendant all the bottles required in his business, establish this fact. In both of these particulars the corporation was benefited by the agreement. Concluding, as we do, that the defendant corporation, therefore, had the implied power to enter into this contract, it only remains to be considered whether or not under the circumstances Rosenberg, as manager, had ostensible power to execute the guaranties there being no evidence of express authorization.

[2] As before stated, Rosenberg was not only a director of the company, but for several years he had entire and exclusive control and management of its business. After making the agreement he executed guaranties in conformity therewith during a long period of time and covering numerous transactions. This authority was never questioned. The bills guaranteed were always paid. This course of business dealing was sufficient to justify plaintiff in believing that Rosenberg had the power to contract as he did, and the defendant corporation was bound by his acts to the same extent as though his power was expressly granted. 10 Cyc. 937.

[3] In addition thereto we think that the defendant is further estopped to deny the authority of its manager. Having received benefits under the contract it should not be permitted to repudiate the burdens resulting therefrom. A discussion of the claimed ratification is unnecessary.

For the reasons given the judgment is reversed.

We concur: ZOOK, Judge pro tem.; BEASLY, Judge pro tem.

(36 Cal. App. 813)

CUDAHY PACKING CO. v. R. ROSENBERG & SONS CO. (Civ. 2154.)

(District Court of Appeal, First District, California. April 13, 1918. Rehearing Denied by Supreme Court June 10, 1918.)

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by the Cudahy Packing Company against R. Rosenberg & Sons Company. From the judgment, plaintiff appeals. Reversed.

Ornbaun & Fraser, of San Francisco, for appellant. Louis H. Brownstone, of San Francisco, for respondent.

KERRIGAN, J. The questions involved in this appeal are in all respects similar to those presented in Armour & Co. v. R. Rosenberg & Sons Co. (No. 2104) 173 Pac. 404, this day decided, and upon the authority of that case the judgment is reversed.

We concur: ZOOK, Judge pro tem.; BEASLY, Judge pro tem.

(37 Cal. App. 20)

DOW et al. v. GEORGE E. DOW ESTATE CO. et al. (Civ. 2378.)

(District Court of Appeal, First District, California. April 20, 1918.)

1. Appeal and Error 🔑1011(1)—Review—Trial by Court—Weight of Evidence.

In an action to set aside an assignment on the ground of mental incapacity and undue influence, where action is brought after death of assignor, the trial court's preference of the evidence of mother, brothers, and sister, who saw assignor only occasionally during last few years of life, to that of wife and nurses, who saw him every day, *held* no abuse of right given trial court to weigh evidence.

2. Evidence 🔑474(4)—Opinion Evidence—Mental Incapacity—Undue Influence.

In an action to set aside an assignment on the ground of mental incapacity and undue influence, where action is instituted following death of assignor, the mother, brothers, and sisters of assignor may testify as intimate acquaintances of assignor, although their visits to him were infrequent during last few years of his life.

3. Descent and Distribution 🔑86 — Assignment of Interest in Estate—Validity—Evidence.

Where the estate of a deceased person is incorporated, an assignment of a one-eighth interest in such estate, in return for one-eighth of the stock of such corporation, will not be set aside on the ground of mental incapacity and undue influence, except upon considerable preponderance of evidence.

4. Appeal and Error 🔑1071(1)—Review—Harmless Error.

Court's finding that a cause of action was barred by laches, if error, was harmless, where there was a complete hearing of the case on its merits.

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Nette Sexton Dow, a widow, and others against George E. Dow Estate Company, a corporation, and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Mastick & Partridge and H. F. Chadbourne, all of San Francisco, for appellants. Coogan & O'Connor and Julius Kahn, all of San Francisco, for respondents.

ZOOK, Judge pro tem. This is an action by the widow and minor child of Edwin Tyson Dow, deceased, against the mother, brothers, and sister of said decedent and certain corporation defendants to set aside, upon the ground of decedent's mental incapacity and the undue influence of his relatives, a certain transaction whereby Edwin Tyson Dow transferred his one-eighth interest in his father's estate to the defendant George E. Dow Estate Company, a corporation, and took one-eighth of the stock of the corporation in return therefor. Defendants had judgment, and as the questions raised on this appeal may be briefly disposed of, it will be unnecessary to set forth facts of the case herein.

[1-3] Appellants' main contention is that the evidence was insufficient to support the judgment, and their brief is devoted mainly to a discussion of the evidence. They claim that, because their witnesses, the wife, nurses, and the intimates of Dow saw him every day during his last illness, which began some time prior to the transfer, their testimony should, as a matter of law, have been accepted in preference to that of defendants' witnesses, who saw Dow only occasionally, and that the failure of the trial judge so to hold was an abuse of discretion, requiring a reversal of the judgment. In support of this rather unusual contention, a more startling claim is made, namely, that the mother, brothers, and sisters of decedent were not qualified as intimate acquaintances because their visits to him during the last few years of his life were rather infrequent. Both points are equally devoid of merit. We have carefully examined the whole record, and find ample evidence to support the court's finding in support of the validity of the transfer. Indeed, it would require a considerable preponderance of evidence to upset the transfer under any circumstance, for it is apparent that, in making the transfer, the decedent in effect changed the form only of his interest in his father's estate, without altering the extent thereof in the slightest degree.

[4] The only other question raised is as to the correctness of the court's finding that the action was barred by laches. As there was a complete hearing of the case on its merits and a finding adverse to appellant thereon, the question whether or not the cause of action was barred becomes wholly immaterial.

The judgment is affirmed.

KERRIGAN, J.; BEASLY, Judge pro tem.

(36 Cal. App. 782)

PEOPLE v. GONZALES et al. (Cr. 421.)

(District Court of Appeal, Third District, California. April 15, 1918. Rehearing Denied by Supreme Court June 14, 1918.)

1. Criminal Law 🔑1208(9)—Sentence—Indeterminate Sentence Law.

Since under Pen. Code, § 213, robbery is punishable by imprisonment in the state prison not less than one year, the indeterminate sentence law (Pen. Code, § 1168, as added by St. 1917, p. 665) applies on conviction for robbery.

2. Criminal Law 🔑991(3)—Sentence—Indeterminate Sentence Law.

Since to make a crime subject to the indeterminate sentence law (Pen. Code, § 1168, as added by St. 1917, p. 665) it need not be punishable by penitentiary imprisonment for a definite term, Pen. Code, § 671, providing that where the maximum term is not fixed by statute, the court may, in its discretion, fix such maximum term, does not require, on conviction for robbery, or other offenses subject to the indeterminate sentence law, that the judge shall fix a maximum term.

3. Robbery 🔑30 — Sentence — Maximum Term.

Pen. Code, § 213, making robbery punishable by penitentiary imprisonment for not less than one year, is within the indeterminate sentence law (Pen. Code, § 671), and thereunder robbery may be punished by maximum penalty of imprisonment for life.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Pedro Gonzales and Joe Valeskes were convicted of robbery, and they appeal. Reversed, with directions.

Fred J. Harris, of Sacramento, for appellants. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. [1] The appeal is from the judgment of conviction sentencing the defendants to a term of imprisonment in the state prison, the former for a period of 15 years, and the latter for 10 years. The only question involved herein is as to the form of the judgment. Appellants contend that under the provisions of section 1168 of the Penal Code (Stats. 1917, p. 665), providing for an indeterminate sentence the court should not have fixed the term or duration of the punishment. The language of that section is:

> "Every person convicted of a public offense, for which public offense punishment by imprisonment in any reformatory or the state prison is now prescribed by law * * * shall be sentenced to be confined in the state prison, but the court in imposing such sentence shall not fix the term or duration of the period of imprisonment."

There is no question that said act of the Legislature was in effect at the time the offense herein was committed, and we may add that the constitutionality of said act has been determined by the Supreme Court in the matter of the application of Charles Lee on Habeas Corpus, 171 Pac. 958. The language as to the form of the sentence is so plain as not to admit of discussion. We may state that the provision was incidentally alluded to in the decision of this court in the case of the People v. Charles Lee, 172 Pac. 158.

The only question remaining is whether the offense is one for which punishment by imprisonment in any reformatory or the state prison is now prescribed by law or was so prescribed at the time the offense was committed. As to this there can be no possible doubt. Section 213 of the Penal Code provides:

> "Robbery is punishable by imprisonment in the state prison not less than one year."

This was in force at all the times herein mentioned. In fact, it has been the law since 1872. It is therefore entirely manifest that punishment for the crime of which the appellants were convicted was and is prescribed by the law to be imprisonment in the state prison. Hence the indeterminate sentence law is applicable, and the judgment should have been in the form which we have indicated.

[2] It seems hardly necessary to go any further in consideration of the matter, but a moment's attention may be devoted to the contention of respondent that the duty was cast upon the lower court to fix the maximum punishment by virtue of section 671 of the Penal Code providing:

> "Whenever any person is declared punishable for a crime by imprisonment in the state [prison] for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the court authorized to pronounce judgment upon such conviction may, in its discretion, sentence such offender to imprisonment during his natural life, or for any number of years not less than that prescribed."

But it is manifest that said section does not authorize any punishment other than imprisonment in the state prison. It is equally as clear from that section as from said section 213 that robbery is punishable by imprisonment in the state prison, and hence within the terms of said indeterminate sentence law. To make the crime subject to the provisions of this latter act it is not necessary that the crime be punishable by imprisonment in the penitentiary for a definite term fixed by the law. It is sufficient if it be thus punishable for any term.

Indeed, where there is a maximum and minimum term prescribed by the law, it was left prior to said act of 1917 to the discretion of the court to impose the punishment within these limits. That was the case in nearly all the penitentiary offenses, but the purpose of the new law was to take from the trial judge the discretion of fixing definitely the term of imprisonment and to vest it in the prison directors within the limits prescribed by the Penal Code.

[3] We can see no merit in the claim that the law does not prescribe the maximum penalty for the crime of robbery. The maximum penalty "prescribed by the law" is the ex-

treme penalty that the law authorizes to be imposed; that is, life imprisonment in the present case, as we have seen.

The two sections of the Penal Code may be read together, and they amount to this:

> "Robbery is punishable by imprisonment in the state prison not less than one year and it may be for life."

As before suggested, the fact that a maximum and a minimum penalty is prescribed necessarily implied a discretion to be exercised by the judge pronouncing the sentence, and the circumstance that such discretion is specifically mentioned in said section 671 does not affect the legal aspect of the case.

It is clear that the judgment is informal, and it is therefore reversed, with direction to the lower court to pronounce judgment in accordance with said indeterminate sentence law of 1917.

We concur: CHIPMAN, P. J.; HART, J.

(36 Cal. App. 763)

FOREMAN v. HUNTER LUMBER CO. et al.
(Civ. 2330.)

(District Court of Appeal, First District, California. April 12, 1918. Rehearing Denied by Supreme Court June 10, 1918.)

1. Master and Servant 🔑92, 376(1)—Injuries to Servant—Liability of Master for Negligence of Physician.

The liability of a master and its surety at common law and under the Employers' Liability Law (St. 1911, p. 796) for the negligence of a physician employed to treat an injured employé is secondary to and dependent upon proof of the physician's negligence.

2. Master and Servant 🔑385(16) — Injuries to Servant — Employers' Liability Law—Medical Services.

Under Employers' Liability Law, § 8, subd. 1, providing liability of master for medical services to injured employé, the master is under no duty to furnish medical services for more than 90 days after injury.

3. Physicians and Surgeons 🔑18(4)—Actions for Negligence—Pleading—Complaint—Res Ipsa Loquitur—Non Sequitur.

A complaint alleging a course of treatment entirely consistent with the physician's exercise of all necessary care and skill, but alleging nonsuccess of the treatment, is insufficient to charge negligence or malpractice; the case not being res ipsa loquitur, and the complaint pleading a non sequitur.

4. Physicians and Surgeons 🔑14(1)—Contracts of Employment—Liability.

The implied contract of a physician taking a case is that he possesses a reasonable degree of learning and skill in his profession, and that he will apply the same to the treatment of the case, and if he possess and use such skill therein, he is not liable for the result, for a physician of necessity is not a warrantor of cures.

5. Physicians and Surgeons 🔑15—Negligence—Definition.

Negligence on the part of a physician consists in his doing something which he should not have done, or omitting to do something which he should have done.

6. Physicians and Surgeons 🔑18(4)—Actions for Negligence — Pleading — Presumption.

A complaint to charge a physician with liability for negligence must allege such negligent act or omission, for otherwise it will be presumed he used the necessary care and skill.

Appeal from Superior Court, Alameda County; William H. Donahue, Judge.

Action by James Foreman against the Hunter Lumber Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Austin Lewis and R. M. Royce, both of Oakland, for appellant. Chickering & Gregory, of San Francisco, for respondents Hunter Lumber Co. and others. D. C. Dutton, of Oakland (M. C. McDonough, of Oakland, of counsel), for respondent Lohse.

ZOOK, Judge pro tem. In this action plaintiff appeals from a judgment in favor of defendants after demurrer sustained to plaintiff's amended complaint. The cause of action attempted to be stated arises out of an injury received by plaintiff on March 18, 1913, while in the employ of defendant lumber company, which, at the time of the accident, was operating under the Employer's Liability Law of 1911, commonly known as the Roseberry Act. The defendant surety company was the insurer for the lumber company, and defendant Lohse was the physician employed by the two corporations to treat plaintiff for the injury received. Each of the defendants demurred generally and specially to the complaint.

[1] The brief of the corporation defendants contained a very able discussion of the nature and extent of the liability of an employer, at common law and under the Roseberry Act, for the negligence of a physician engaged by the employer to treat an injured employé; but inasmuch as the liability of the employer and its surety in such a case is secondary to, and dependent upon, a showing of negligence on the part of the physician, it will not be necessary for this court to consider the questions above referred to, for the complaint fails to state a case of negligence or malpractice on the part of the attending physician.

[2, 3] The allegations of the complaint in which plaintiff seeks to show this negligence on the part of defendant Dr. Lohse commence with a statement that Dr. Lohse undertook to treat plaintiff, "but did not use due, proper, reasonable, or any care or skill in treating plaintiff's injury, but, on the contrary, carelessly and negligently treated said injury in this." Then follow several paragraphs in which the course of treatment pursued by the doctor is set forth. It is alleged that for a time plaintiff's leg remained unset, except in splints, and that on a certain day the splints were removed, the leg set, and a cast put on; that thereafter

the cast was taken off, and, it being found that the leg had not knitted, it was rebroken and reset and a plate and longer cast put on, which last cast was taken off after 9 days and a shorter cast put on, and that thereafter plaintiff was discharged by Dr. Lohse, returned home, and remained in bed for four weeks. On or about July 4, 1913, and more than 90 days after the accident, it was discovered that the leg bones were not knitting, and plaintiff called upon the defendants to furnish the treatment necessary to cure him, which demand was refused. It may be here noted that under the provisions of the Roseberry Act (section 8) there is no duty imposed upon the employer to furnish treatment to an injured employé for more than 90 days after the injury, and the complaint alleges that Dr. Lohse was employed to treat plaintiff for such 90-day period. Therefore no liability on the part of any of the defendants can be predicated on their refusal to treat the plaintiff after the 18th day of June, 1913. The remaining allegations of the complaint set forth the course of treatment pursued by physicians thereafter employed by plaintiff, the expenses incurred by plaintiff in obtaining such treatment, and a general damage clause.

In pleading their case in the manner above set forth, plaintiff's counsel evidently misapprehended the law as to the duty and liability of physician to client. Their brief is wholly directed to the question of the liability of the corporation defendants, and the sole reference to the law of physician and patient to be found in their brief is the following phrase: "As to the liability of Lohse, it seems a case of res ipsa loquitur." What they have really pleaded is a non sequitur, for the description of the course of treatment pursued by Dr. Lohse, contained in the complaint, is entirely consistent with his having exercised all necessary care and skill in treating plaintiff, and it does not follow from the allegation of the nonsuccess of the treatment that Dr. Lohse was negligent.

[4-6] As was said in Houghton v. Dickson, 29 Cal. App. 321, 155 Pac. 128, the implied contract of a physician in taking a case is that he possesses a reasonable degree of learning and skill in his profession, and that he will apply the same to the treatment of the case; and if he possess and use such skill therein, he is not liable for the result, for a physician of necessity is not a warrantor of cures. "Negligence on the part of a physician consists in his doing something which he should not have done, or omitting to do something which he should have done" (McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 870), and in order to charge him with liability, some such negligent act or omission must be alleged in the pleading. In the absence of such allegation, it will be presumed that the physician has used the necessary care and skill. Houghton v. Dickson, supra, and cases there cited.

The demurrers were properly sustained. Judgment affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

(37 Cal. App. 51)

PEOPLE v. GASTONE. (Cr. 588.)

(District Court of Appeal, Second District, California. April 23, 1918.)

Criminal Law ⚿1160—Appeal—Review—Denial of New Trial.

The denial of new trial, involving finding on conflicting evidence against the charges of misconduct of the district attorney, must prevail on appeal.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Peter Gastone was convicted of grand larceny, and from the judgment and a denial of new trial appeals. Affirmed.

John L. Richardson and T. E. Parke, both of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

CONREY, P. J. Defendant was convicted of the crime of grand larceny. He appeals from the judgment and from an order denying his motion for a new trial.

On behalf of appellant it is claimed that the verdict is contrary to the evidence, in that the evidence is not sufficient to support the verdict; that the verdict is "contrary to law, in that the evidence taken does not establish as matter of law that the defendant committed the offense found by the jury by the verdict." These contentions are without merit. The testimony of the complaining witness fully described the facts constituting the crime charged and identified the defendant as the guilty person. Our attention is not directed to any errors claimed in the course of the trial, either in the reception or rejection of evidence or in the instructions given to the jury. The facts found as indicated by the verdict of the jury are entirely sufficient to establish the commission of the offense by the defendant.

The only other point made in support of the appeal relates to alleged misconduct on the part of the district attorney at the trial of the case. The defendant testified as a witness in his own behalf. In giving that testimony he stated that at the time of his arrest the complaining witness Eppick was present; that Eppick took a picture from his pocket and said, "He is the man." On cross-examination of the defendant the district attorney showed to the witness a photograph and asked if that was the picture which he saw at the time referred to in his direct testimony and if he had seen that picture before. The witness having replied in the negative to these two questions, the district attorney asked: "Do you know whose picture that is?" The witness replied, "That is me." The district attorney then offered the picture "for identification," but it was not received in evidence and was not referred to any further during the trial.

The defendant moved for a new trial on various grounds, including that of misconduct of the district attorney prejudicial to the defendant occurring during the progress of the trial. In support of this motion affidavits were introduced with respect to the conduct of the district attorney at the time of the above-mentioned cross-examination of the defendant with reference to the photograph. The photograph of the defendant did not show him in prison garb, but it did have across the breast in plain figures the number 15545. In one of the affidavits the affiant referred to a conversation which he said he had with the deputy district attorney after the trial of this case in which, according to affiant, the deputy district attorney said:

> "That something was brought out on direct examination by counsel for defendant and that he (the said deputy district attorney) had a picture in his file of the defendant taken while the defendant was in custody and that it had a big prison number on it, and that he took the picture and held it in his hand, with the back of his hand toward defendant's attorney and to the court and to the court reporter, but in plain view of the jury; that he held it that way until he walked up to the defendant and asked him the question, 'Is that your picture?' that upon defendant answering that it was. the deputy district attorney turned to the clerk and asked that it be marked for identification, but that he never intended to introduce it and he never did."

The deputy district attorney testified in response to this and the other affidavits which were offered in support of the motion for a new trial and positively denied the facts thus charged against him. In passing upon the motion for a new trial the court found in favor of the district attorney with respect to the charges involving his alleged misconduct. In view of the conflicting evidence presented, the conclusion of the trial court as to those matters must prevail here.

The judgment is affirmed, and the order denying the defendant's motion for a new trial is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

(37 Cal. App. 42)

VALENTINE et al. v. HAYES et al.

(Civ. 2295.)

(District Court of Appeal, First District, California. April 22, 1918. Rehearing Denied May 2, 1918.)

1. DEATH 🔑32 — ACTION FOR WRONGFUL DEATH—PERSONS FOR WHOSE BENEFIT SUIT MAY BE BROUGHT.

In an action for a wrongful death brought by the surviving wife and children as heirs, it was not error to instruct that the action was properly brought under Code Civ. Proc. § 377, providing that when the death of a person not being a minor is caused by the wrongful act or neglect of another his heirs or personal representatives may maintain an action for damages against the person causing the death, and not under Civ. Code, § 1970, giving a right of action for the death of a servant to the widow, children, dependent parents, and dependent brothers and sisters, in the order named, and contention that action should have been maintained for benefit of widow alone, instead of widow and children, was not sustainable.

2. APPEAL AND ERROR 🔑854(6) — REVIEW — GROUNDS FOR DECISION BELOW — MOTION FOR NEW TRIAL.

Where the reason given by the trial court for granting a new trial is erroneous, and the motion is based on several grounds, the reviewing court is not concluded by the reason so given, but may examine the record to determine if the new trial should have been granted on any other ground set forth except as to the sufficiency of the evidence, where conflicting.

3. MASTER AND SERVANT 🔑278(12) — INJURIES TO SERVANT—ACTIONS—EVIDENCE.

In an action for the wrongful death of an employé through falling down a light well of a building in the course of construction, evidence *held* to show that the accident was not caused by defective construction or dangerous place of work or by any fault of defendant.

4. MASTER AND SERVANT 🔑101, 102(1)—INJURY TO SERVANT—"SAFE PLACE TO WORK."

The word "safe," as used in connection with the master's duty to furnish a reasonably safe place to work, does not mean a place so made and guarded that it precludes all possibility of danger, the term being merely a relative one; and the safety of the place is to be judged by the nature of the work.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Safe Place to Work.]

Appeal from Superior Court, Alameda County; Stanley A. Smith, Judge.

Action by Flora A. Valentine and others against W. W. Hayes and another. From an order granting a new trial as to defendant Hayes, plaintiffs appeal. Affirmed.

Stanley Moore and Geo. K. Ford, both of San Francisco, for appellants. Jas. Alva Watt and Rolla B. Watt, both of San Francisco, for respondent.

KERRIGAN, J. This is an action brought to recover the sum of $50,000 as damages for the death of one Clarence C. Valentine, caused by a fall from a building in course of construction, and alleged to have been due to the negligence of defendants. The action was instituted by Flora A. Valentine as the surviving wife, and by the other plaintiffs as surviving children of the deceased. Defendant Bickel, the owner of the building, was made a party defendant by reason of the existence of the state statute and a city ordinance making it incumbent upon the contractors for the erection of a building of more than two stories to cover all beams and girders with flooring to prevent workmen from falling more than one floor, and upon the owner where the contractor has neglected to do so. At the conclusion of plaintiffs' case the action was dismissed as to defendant

Bickel on her motion for a nonsuit upon the ground that the evidence showed that this duty was complied with by the contractor, and that the accident occurred in a light well where there was to be no permanent flooring. The trial then proceeded as to defendant Hayes, the contractor, and resulted in a verdict in favor of plaintiffs in the sum of $7,500.

[1] The action was begun and prosecuted under section 377 of the Code of Civil Procedure, which in substance provides that when the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. The trial court so instructed the jury, and upon his motion for a new trial defendant Hayes urged as one of his grounds in support of the motion that this instruction was erroneous, claiming that in actions for damages where the relation of master and servant existed, section 1970 of the Civil Code was the only section authorizing such action. This section gives a right of action to the widow, children, dependent parents, and dependent brothers and sisters in the order of their precedence therein stated. It was urged that this action should have been maintained for the benefit of the widow alone, and not for the benefit of the widow and children. The trial court concurred in this view of the case, and granted a new trial on the sole ground that the giving of the instruction relating to section 377 of the Code of Civil Procedure constituted error. Subsequent to the perfecting of this appeal the Supreme Court had occasion to pass upon this very question (Gonsalves v. Petaluma, etc., Ry. Co., 173 Cal. 264, 159 Pac. 724); and it is conceded—as indeed it must be—that the later view of the law adopted by the trial court was incorrect, and that the giving of the instruction on account of which the new trial was granted did not constitute error.

[2] The motion for a new trial, however, was based upon several grounds; and notwithstanding the reason the court below gave for granting the order, we are not concluded by such reason, but have the right from an examination of the record to investigate and determine if the new trial should have been granted upon any of the grounds set forth in the notice of intention, except as to the sufficiency of the evidence where it is conflicting. Thompson v. Cal. Const. Co., 148 Cal. 35, 82 Pac. 367.

[3] The main ground relied on here in support of the order is the insufficiency of the evidence to justify the verdict; it being claimed that the evidence shows conclusively and without conflict that the deceased met his death through no fault on the part of the defendant. We are of the opinion that the record supports this contention. It appears from the evidence that the defendant Hayes was engaged as a contractor to construct a certain building in San Francisco for one Abby Frink Bickel, and that deceased was employed by defendant as a carpenter on such building, where he met with the accident which resulted in his death. In the construction of the building the defendant provided a system of ladders in a light well for his employés to be used in ascending to and descending from their work. At each floor planks were run across the light well resting on the window sills. From these platforms ladders were run, each ladder being one floor in height, running from alternating sides of the light well. The platforms so constructed were about 2 feet 6 inches in width, filling up the entire space in the windows between which they extended, and the boards thereof were 2 inches thick. The ladders resting upon these platforms were about 22 inches wide at the bottom and 18 inches wide at the top. The platforms were secured by nails, and there is no evidence to show that the system adopted was not strong and substantial and reasonably safe for the purpose for which it was used. At the time deceased received the injuries resulting in his death nothing gave way or broke about the ladders or platforms. The evidence further shows that when the accident happened deceased was going down one of the ladders carrying a lot of tools, with his face outward from the ladder and his back turned thereto, and that he lost his balance and fell, receiving the injuries from which he died.

These facts are without contradiction, and conclusively show that the accident was not caused by any improper or faulty or defective construction or dangerous place of work, but solely through the carelessness and negligence of the deceased. It is true plaintiffs introduced evidence to show that the ladder from which deceased fell was not securely nailed at the top a week after the accident occurred. This testimony was objected to as being too remote; it having appeared in evidence that the ladder had been in continuous use for all of this intervening period by from 15 to 25 men daily, and might have broken loose from such use. Assuming the evidence to have been properly admitted, however, it can have no weight in the face of the positive and undisputed testimony of several witnesses to the effect that both before and after and at the very time of the accident the ladder was securely fastened.

[4] One of the questions presented was whether or not the deceased was provided with a safe place to work. The word "safe," as used in connection with the duty of employers to furnish a reasonably safe place to work, does not mean a place so made and guarded that it precludes all possibility of danger. Many employments are in themselves dangerous; and it has been said that it involves no paradox to say that a place of danger may be safe in the proper sense of

the word. Martin v. Des Moines Edison Light Co., 131 Iowa, 724, 106 N. W. 359. In the construction of buildings some places must of necessity present danger. "Safe place to work" is a relative term as to which the word "reasonably" is important; and the safety of the place is to be judged by the nature of the work. Saversnick v. Schwarzchild, 141 Mo. App. 509, 125 S. W. 1192; Welch v. Carlucci Stone Co., 215 Pa. 34, 64 Atl. 392, 7 Ann. Cas. 299. An absolutely safe place of labor is not required of an employer. It is to be reasonably safe having regard to the character of the work itself.

In Spivok v. Independent Sash & Door Co., 173 Cal. 438, 160 Pac. 565, it is said:

> "Carpenters walk freely and unhesitatingly, and expect to walk, over floor joists before the floor is laid. One would not look to see a cause of action for injuries occasioned by an inadvertent slip of a carpenter walking over such floor joists, predicated upon the fact that the employer had not caused the floor to be laid so as to make the place of labor safe."

Here no duty was imposed upon defendant to maintain floors in the place of the accident. The evidence to our minds shows conclusively that the proximate cause of the injury was the negligence of deceased in descending the ladder in the hazardous and unusual manner in which he did with his arms filled with tools, and that this act, and not any act or omission of defendant Hayes, was the cause of the injury complained of.

For the reasons given the order granting a new trial is affirmed.

We concur: LENNON, P. J.; BEASLY, Judge, pro tem.

(36 Cal. App. 690)

GABBERT v. PERRY, City Clerk, et al.

(Civ. 2666.)

(District Court of Appeal, Second District, California. April 6, 1918.)

1. Municipal Corporations ⚷108—Initiative and Referendum—Certificate.

Under St. Ex. Sess. 1911, p. 131 (Deering's Gen. Laws 1915, Act 1624), requiring a city clerk to examine and from the records of registration ascertain whether or not an initiative petition is signed by the requisite number of qualified electors, and attach to such petition his certificate showing the result of such examination, a city clerk is required personally to examine the records; otherwise he has no jurisdiction to make a certificate, and one based on the report of the county clerk after examination of the registration record, at request of city clerk, is invalid.

2. Certiorari ⚷64(1)—Review—Matters Considered.

On certiorari to review sufficiency of city clerk's certificate as to requisite number of signatures to an initiative petition, a supplemental return, containing a new certificate, made after the writ issued, cannot be considered.

Certiorari by F. B. Gabbert against H. R. Perry, City Clerk of the City of Needles, the City of Needles, a municipal corporation, John Lorimer, E. N. Baker, Charles Battye, C. H. Burt, F. W. Quirmbach, Members of the Board of Trustees of the City of Needles, to review an act of the City Clerk in certifying to the sufficiency of an initiative petition. Certificate annulled.

Fredericks & Hanna and Byron C. Hanna, all of Los Angeles, for petitioner. W. J. Bailey, City Atty., of Needles, and S. W. Odell, of Pasadena, for respondents.

CONREY, P. J. Certiorari. This is a proceeding to review the action of the defendant city clerk of the city of Needles whereby on March 4, 1918, he certified to the sufficiency of an initiative petition by which the board of trustees of the city of Needles was petitioned to adopt an ordinance set forth in the petition, or to submit the question of adopting said ordinance to the qualified electors of the city of Needles at the general municipal election to be held in said city on the 8th day of April, 1918. The proposed ordinance is an ordinance providing that the sale of intoxicating liquors for beverages be prohibited in the city of Needles after the 31st day of December, 1918.

[1] The proceedings initiated by said petition are governed by the provisions of an act entitled "An act to provide for direct legislation by cities and towns, including initiative and referendum," approved January 2, 1912. Stats. Ex. Sess. 1911, p. 131, being Act No. 1624 of Deering's Gen. Laws. In that statute it is provided that within ten days from the date of filing the petition, "the clerk shall examine, and from the records of registration ascertain whether or not said petition is signed by the requisite number of qualified electors, and he shall attach to said petition his certificate showing the result of said examination." The clerk's return to the writ issued herein shows that the initiative petition was filed in his office on the 27th day of February, 1918; that he personally examined the petition and the signatures thereon and the affidavits thereto annexed; that on February 23, 1918, he sent the petition to L. R. Patty, county clerk at San Bernardino, Cal., together with a letter stating that, "I am inclosing herewith a petition which I wish you would have checked in your office and return same by February 28th or March 1st, with any changes that may be necessary;" that the said L. R. Patty did therepon make a comparison of the said petition with the affidavits of registration, known as the great register, in his office, and report the facts contained in the certificate signed by the defendant clerk and attached to the original initiative petition.

The statute requires that "if the petition shall be found to be sufficient, the clerk shall submit the same to the legislative body at its next regular session." It is manifest that the city clerk is without authority to make any certificate concerning the sufficiency of the petition until after he shall have examined the records of registration and by such examination ascertained whether or not said petition is signed by the requisite number of qualified electors. The duty imposed upon him involves an inquiry of a judicial nature. He cannot delegate this duty to the county clerk. The certificate cannot be made arbitrarily, but must be based upon the evidence obtained by the city clerk by making the examination required by the statute. Without taking the evidence, he has no jurisdiction to make the certificate.

[2] In his supplemental return filed herein on April 5, 1918, the defendant clerk states that, on the 4th day of April, 1918, he personally took said petition to the office of the county clerk of San Bernardino county, and personally examined and from the records of registration ascertained whether or not said petition was signed by the requisite number of qualified electors; and thereupon he has made a new certificate, dated April 4, 1918, which certificate is set forth in the supplemental return, and wherein he certifies that the petition was signed by the requisite number of qualified electors. The certificate thus made on April 4, 1918, is entirely irrelevant to the case now before us. The writ issued by this court is a writ issued for the purpose of testing the jurisdiction of the clerk to make the certificate made by him on March 4, 1918. With his actions subsequent to that date we are not concerned.

The said certificate of March 4, 1918, is annulled.

We concur: JAMES, J.; WORKS, Judge pro tem.

(178 Cal. 396)

MARCONE et al. v. DOWELL. (L. A. 4223.)

(Supreme Court of California. June 10, 1918. Rehearing denied July 8, 1918.)

1. DEEDS 🔑140—EXCEPTIONS.

A deed by metes and bounds, excepting in terms land covered by recorded mortgage of certain date, conveys all within the description if there was no such mortgage or record.

2. QUIETING TITLE 🔑44(1) — TITLE — DEED WITH EXCEPTION—BURDEN OF PROOF.

Plaintiff by deed by metes and bounds covering the land in question shows sufficient title prima facie, requiring defendant, especially where asserting only right by taking and fencing, to show the land is within the exception in the deed of land covered by a certain mortgage.

3. DEEDS 🔑114(1)—DOUBLE DESCRIPTION.

The words in a deed after a description of the land by metes and bounds, "being the same premises whereon * * * now actually reside," is not a second description, as regards control by the one or the other, but merely a further identification of the premises.

4. BOUNDARIES 🔑37(5) — EVIDENCE — SUFFICIENCY—AGREEMENT.

Proof of mutual agreement between adjoining landowners to fix the boundary line must be clear.

5. BOUNDARIES 🔑37(5)—EVIDENCE—AGREEMENT.

On the issue of location of boundary line between adjacent lots, proof that one adjoining landowner conveyed to the city a strip along one side of his property of a certain length, and that the other owner conveyed a similar strip beginning where the other strip ended, did not prove a mutual agreement to fix the common boundary line at a point which would give the first owner a frontage of the length of the strip first conveyed, especially where the first owner refused to pay an assessment on that extent of frontage, and the second owner, although paying, expressed doubt on the subject.

6. EXECUTORS AND ADMINISTRATORS 🔑315(5) —DECREE OF DISTRIBUTION—DESCRIPTION OF LAND.

Right of distributees to a greater tract of land is not defeated by decree of distribution describing land by metes and bounds, it also distributing, in general language, all the land to which deceased had title.

7. BOUNDARIES 🔑36(3, 4)—EVIDENCE—MAPS AND REPORTS.

On the issue of the boundaries of property reports of street commissioners and accompanying maps, in proceedings to open a street, were inadmissible, where the surveyor who made the original map testified he could not say that he measured the lines on the ground, and he made no field notes, and there was no evidence that the proceedings were called to the property owner's attention.

8. EVIDENCE 🔑355(1)—REFRESHING MEMORY —MEMORANDA.

Memoranda from which, under Code Civ. Proc. § 2047, a witness who made them may refresh his memory, are not admissible as independent evidence.

In Bank. Appeal from Superior Court, Santa Barbara County; Samuel E. Crow, Judge.

Suit by Giselda Schiappa Pietra Marcone and others against Richard H. Dowell. From judgment for plaintiffs and from order denying new trial, defendant appeals. Affirmed.

Canfield & Starbuck, of Santa Barbara, for appellant. Edward M. Selby, of Los Angeles, and Orestes Orr, of Ventura, for respondents.

MELVIN, J. Defendant appeals from the judgment and from an order denying his motion for a new trial. The suit was one to quiet title. Appellant contends that in reality it was an action in ejectment; that, as respondents must depend upon the strength of their own title rather than any supposed weakness in that of their adversary, they must establish a perfect chain of title from the holder, admittedly having once owned the property in dispute; that the pretended chain of title upon which plaintiffs rely is broken in two places; and that the court erred in excluding certain testimony proffered by the defendant.

The lot in controversy is 19.5 feet wide and 34.85 feet deep. It fronts on the northwest side of De la Guerra street in the city of Santa Barbara. The principal controversy in the case was centered around the question whether or not this property, when it was seized by the defendant, belonged to the heirs of Schiappa Pietra.

Defendant's asserted title depends upon the following facts: In 1909 defendant was told by Artura Orena, who owned other property then occupied as a place of business by defendant, that Mr. Orena did not want the land now in controversy, and that Mr. Dowell might as well have it as anybody else. Defendant made an examination which led him to believe that the Schiappa Pietra estate had no title to the land. He then fenced the property here in dispute except where the line over which he wished to extend one of the boundaries was covered by a part of a small brick building. This house stood partly upon the lot which defendant wished to claim and partly upon land which he knew to be a portion of the Schiappa Pietra property. The first fence was torn down by Mr. Parma, agent of the Schiappa Pietras (at least so defendant was informed), but Dowell built a stronger fence in the place of the one destroyed. After building the fence defendant caused a quitclaim deed to the lot to be executed in his favor by Geraldine C. Valde, who, so far as the record discloses the facts, had no interest in the land. This instrument was recorded, and defendant caused the lot to be assessed to him, after which he paid taxes on it. After building the fence defendant wrote to Mr. Power, who was familiar with the Schiappa Pietra property and was one of the executors of the will of Leopoldo Schiappa Pietra, that said Power had part of the house on said lot, and "it didn't belong there." The letter was not answered, but about a year later (June 29, 1910) this action was commenced.

It was stipulated that Peter Francis Aubrey owned and occupied certain land, including that here in controversy, in April,

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

1867, taking under a deed from one Puig. Aubrey conveyed this land in September, 1877, to William Lavies, who on the same day agreed with him in writing to reconvey it in one year for a specified price, leaving the grantor meanwhile in possession. This deed of conveyance, however, contained the following language succeeding a description by metes and bounds:

> "And being the same premises conveyed to said Aubrey by Felipe Puig by deed dated April 8, 1867, excepting and excluding from this conveyance that portion of land improvements mortgaged heretofore to Bernardo Llata by mortgage dated the 23d day of May, A. D. 1877, and recorded in the recorder's office of the County of Santa Barbara."

It is argued that, since the exception was indefinite, it may have included the land now claimed by defendant. This contention will receive attention in another part of this opinion.

On July 2, 1878, Peter Francis Aubrey, without reference to any previous mortgage or to his conveyance to Lavies, granted to Bernardo Llata a lot described as running southeasterly on State street from New De la Guerra street 46 feet, more or less, by 100 feet in depth, and also characterized as "being the same premises whereon the said P. F. Aubrey and family now actually reside." Subsequently, in the same year, Bernardo Llata conveyed this land in trust for his creditors to Gaspar Orena, describing it by reference to Aubrey's grant to him. On January 21, 1879, Aubrey confirmed this conveyance by a deed containing substantially the same description as that used in his former deed to Llata. This deed also recited the fact that a certain recorded bond was made and executed by Llata to Aubrey on the date of the former deed, and that "P. F. Aubrey is unable to comply with the conditions recited in said bond." This language is succeeded by the following:

> "Now, therefore, in consideration of the premises and of the amount specified in said bond hereby grants unto Gaspar Orena, trustee for the creditors of Bernardo Llata, all his right," etc.

On June 9, 1879, the creditors of Bernardo Llata, confirming a sale in trust made for their benefit to Gaspar Orena as the highest bidder, granted the same premises to the said Orena. The description in this deed was substantially the same as in the others referring to a rectangular piece of property running 46 feet, more or less, along State street and 100 feet along New De la Guerra, and bounded on its other long side by the lands of Moraga.

On November 28, 1882, William Lavies granted to Cayetano Machiavelli the property which had been deeded to said Lavies by Aubrey, referring to the former deed for a full description of the premises. On April 1, 1889, Lavies conveyed the same property by a correction deed to the same grantee. In the deed, after description by metes and bounds, the land was further described as "being the same premises conveyed to P. F. Aubrey by Felipe Puig by deed dated April 8, 1867, and recorded in Book E of Deeds, p. 588, excepting and excluding from this conveyance that portion of land and improvements conveyed heretofore to Bernardo Llata by P. F. Aubrey by deed dated the 2d day of July, A. D. 1878, and recorded in the recorder's office of the County of Santa Barbara in Book T of Deeds, p. 65." In April, 1889, Machiavelli conveyed all of the property he had acquired from Lavies to Antonio Schiappa Pietra, expressly excepting the lot conveyed by Aubrey to Llata.

On the 29th of April, 1889, to facilitate the opening of De la Guerra street, Orena conveyed to the city of Santa Barbara a strip of land 12 feet in width running from State street along the northwesterly side of the new street 119½ feet. This was described by metes and bounds, and was further designated as:

> "A piece of land with the improvements thereon lying and being situated in De la Guerra street between State and Chapala streets in the city of Santa Barbara, county of Santa Barbara, state of California, as said street was surveyed by Salisbury Haley and as the lines of said portion of De la Guerra street were retraced and surveyed by George F. Wright, city surveyor of said city, for the commissioners appointed by the mayor and common council of said city in the matter of opening De la Guerra street between State and Chapala streets in said city."

Prior to that time Antonio Schiappa Pietra, describing himself as Machiavelli's successor in interest, had conveyed to the city a similar strip 12 feet wide commencing 119½ feet from State street. This was described by metes and bounds, and contained the same reference to Wright's retracing that was employed in the later deed to the city which Orena executed.

After the introduction in evidence of these two deeds last described defendant's counsel sought to introduce two reports and accompanying maps, being the reports of two boards of commissioners to open De la Guerra street, one made in 1885 and the other in 1888, the maps in one case having been made by City Surveyor Barker and in the latter by his successor, Mr. Wright. Defendant wished to show that the earlier proceeding had been abandoned; that the subsequent report had been substantially identical with its predecessor; that it was used in the proceedings which culminated in the opening of the street; and that the report indicated the line between the properties of Orena and Schiappa Pietra as 119½ feet southwest from State street and the existence of a fence on this line. These reports and maps were not admitted in evidence.

The city block book showed the depth of Orena's lot from State street as 119½ feet, but the county block book, made in 1889, followed the description by metes and bounds contained in the grant from Aubrey to Llata in 1878.

After Antonio Schiappa Pietra died his property was distributed to his brother Leopoldo by a decree entered December 7, 1896. While this decree contained the usual general provision distributing all property therein described, "or otherwise," and any property not then known or discovered which might belong to the estate, in the specific description of the land in block 175, the line on De la Guerra street was described as running 330.50 feet to the corner of Gaspar Orena's land; thence northerly along Orena's line 34.85 feet; and thence along the northerly line of Orena's lot 119.50 feet to State street. This description involved a depth of 119.50 feet for Orena's land and a width of 34.85 feet. The difference between this area and the lot 100 feet in depth acquired by Orena from Llata's creditors accounts for the tract here in dispute which defendant sought to acquire by fencing it, having it assessed to him, and paying taxes upon it.

In 1906 De la Guerra street was paved, and Mr. Orena was assessed for the improvement on a frontage of 119 feet. He refused to pay for more than 100 feet. The agent for Mr. Schiappa Pietra said he did not know whether the land belonged to his principal or not. He paid for the frontage assessed to Mr. Schiappa Pietra, excepting the 19½ feet, but subsequently, and before the time when a lien might be declared, he paid the balance.

In addition to the record proof which was offered, plaintiffs showed that at one time there had been a fence perpendicular to De la Guerra street and distant 100 feet southwesterly from State street, and that in 1910 Mr. Orena constructed a brick building to the line of this fence.

Upon this record appellant contends that plaintiffs have made out no complete record title; that "it was twice broken, and the two breaks were neither of them repaired." With this contention we are unable to agree.

[1, 2] The first "break" specified is the exception of the lot mortgaged to Llata, and, as no such mortgage was produced at the trial, appellant contends that it is impossible to determine what was conveyed. It will be noticed that in Aubrey's conveyance to Lavies the description by metes and bounds included the land in question, and that the mortgage applying to the excepted property was described by date and by the specification that it was recorded. If, in fact, there was no such mortgage or record, then the deed carried title to the lot now in dispute. Los Angeles & Arizona Land Co. v. Marr, 173 Pac. 83. The description by metes and bounds in the deed to the predecessor of plaintiffs gives at least color of title which as against defendant's mere title by seizure is good, and throws upon him the burden which he did not meet of showing that this land was within the area sought to be excepted. This principle is well stated in the quotation which respondent makes from Bernhardt v. Brown, 122 N. C. 587-590, 29 S. E. 884, 885 (65 Am. St. Rep. 725), as follows:

> "The defendants except because, '5,000 acres being excepted from the grant of 1795 under which the plaintiffs claim, the burden is on the plaintiffs to show that the land sued for is not the excepted part.' The law is well settled otherwise. 'The locus in quo being within the boundary of plaintiff's deed and defendant claiming under exceptions in said deed, it is clear that it is incumbent on him to bring himself within the exceptions by proof.' Steel & Iron Company v. Edwards, 110 N. C. 353 [14 S. E. 861]; Gudger v. Hensley, 82 N. C. 481."

True, that was a case in which both claimed from a common title, but that fact would have been a stronger reason for the rule sought to be invoked than any existing here. In this case defendant connects himself with no outstanding title, but asserts only such rights as may arise from the taking and fencing of the lot. He can have no possible right to the property unless it belonged to some one other than the plaintiffs. They have shown a sufficient title prima facie to put upon him the burden of proving that the lot here in controversy came within the indefinite exception in Aubrey's deed to Lavies.

Moreover, in 1882 Lavies conveyed to Machiavelli by deed which referred to his deed from Aubrey, and in a correction deed made in 1889 confirmed the grant by a deed excepting land conveyed to Llata (not mortgaged, but conveyed) by a recorded deed of later date than the mortgage specified in Aubrey's deed to Lavies. The land included in the deed from Aubrey to Llata was only 100 feet deep from State street—afterwards the Orena property. Clearly, therefore, Lavies intended to convey the lot here involved to Machiavelli. Llata in his conveyance to Orena only claimed a lot 100 feet in depth. Aubrey conveyed to Orena his rights under the contract to repurchase from Llata (asserting no equity under any mortgage), describing a lot only 100 feet in depth. Machiavelli possessed and occupied the land in dispute, and his successor, Schiappa Pietra, through the latter's agent, collected rent for a building admittedly occupying a part of the lot which Dowell could not fence completely upon the lines of his intended occupation because it was there. This agent testified that Machiavelli occupied this very building as a shop for several years before he sold it to Schiappa Pietra. With such proof of record title we think defendant is not benefited by the mere failure to account for the mortgage specified in the earlier deeds.

[3] The second alleged "break" in the title of plaintiffs which defendant's counsel specify arises as follows: In the deed from Machiavelli to Schiappa Pietra, executed in April, 1889, was contained a description

which, if unqualified, would have included this land. But this description was qualified by an exception of the land conveyed by Aubrey to Llata by the deed of July, 1878. It is conceded that the description in the latter deed by metes and bounds would exclude the lot now claimed by Mr. Dowell, but appellant's counsel insist that there is a "double description" due to the words following the indicated courses by metes and bounds, "being the same premises whereon the said P. F. Aubrey and family now actually reside," and it is contended that the latter designation controls the description by metes and bounds. The contention was made that in order to justify their title under this deed the plaintiffs should have proven just what land had been so occupied by Aubrey and his family, and that their failure so to do makes another "break" in their chain of title. In this behalf defendant's counsel quote the following language from 2 Devlin on Deeds, § 1018:

> "If the land is described as the whole of a certain farm, and is again described in the deed by courses and distances, which, however, do not embrace the whole farm, this latter description will be rejected, and the title to the whole farm will pass by the deed."

The rule invoked has no application because the reference to the fact of Aubrey's residence is obviously merely a further identification of the premises and not another description. There is no uncertainty in the description by metes and bounds and no suggestion that the place of Aubrey's residence differed from the property of which the measurements were given. In other words, this is not a case of uncertainty in the description.

[4, 5] The deeds to the city by which Orena conveyed a strip of land 119½ feet in length, extending from State street along De la Guerra, and Schiappa Pietra transferred a similar strip beginning where the other ended, undoubtedly furnish evidence of some uncertainty in the minds of the grantors regarding their respective holdings, but these conveyances do not prove a mutual agreement to fix the common boundary between their properties. In the first place, proof of such agreed location of a line should be clear (Grants Pass Land & Water Company v. Brown, 168 Cal. 456, 143 Pac. 754), and the mutual acquiescence should be shown to have existed for a period greater than the statute of limitations or under such circumstances that substantial loss would be caused by a change (168 Cal. 459, 143 Pac. 756). Whatever might be said of the conclusiveness of these deeds as between the city and the grantors in any dispute involving title to the property conveyed to the municipality there was clearly no agreement by the neighbors that the true line between their lots after the opening of the street was 119½ feet from State street, because Mr. Orena refused to pay the assessment on that extent of frontage, while the agent for the owner of the adjoining property expressed doubt on the subject, but paid the bill.

[6] The decree of distribution in the Estate of Schiappa Pietra, while it describes the land of Mr. Orena in accordance with defendant's contention, also distributes, in general language, all of the land to which the decedent had title at the time of his death. Therefore the description by metes and bounds in the decree would not defeat any just claim on the part of plaintiffs; their title of record being otherwise good.

[7] There was no error committed by the court in excluding from the record the reports of street commissioners and the accompanying maps. These were not muniments of title. The surveyor who made the original map (of which the other was apparently a tracing) testified that he could not say that he measured the lines on the ground for the purpose of making the map. He made no field notes. He did not remember whether or not he intended that the Orena lot should take in a portion of the old building to which reference has been heretofore made. Furthermore, it was in evidence that the report was not made by the surveyor. The map and the first report were not used because the proceedings were abandoned, and there is no evidence that either was ever called to the attention of the property owners. The second map does not purport to have been based upon an original survey, and although the second report was made the basis of the assessment, it could not change the title to the property assessed by merely designating certain limits and boundaries of properties as showing the holdings of various individuals. The maps and reports were not declarations of any of the parties in interest and were not binding upon them. They were clearly not admissible as records of title. Payne v. English, 79 Cal. 540–547, 21 Pac. 952.

[8] It was argued that the original map and the reports should have been admitted as memoranda to refresh the memory of Mr. Barker, the surveyor. Such memoranda may be used by a witness to refresh his memory, but may not be admitted as independent evidence. Code Civ. Proc. § 2047; Baum v. Reay, 96 Cal. 462–465, 29 Pac. 117, 31 Pac. 561; Estate of Flint, 100 Cal. 391–399, 34 Pac. 863; Estate of Benton, 131 Cal. 472–480, 63 Pac. 775.

No other alleged errors require discussion or analysis.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; WILBUR, J.; RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

(178 Cal. 308)

MARIN MUNICIPAL WATER DIST. v. MARIN WATER & POWER CO. et al.

(S. F. 8017.)

(Supreme Court of California. May 27, 1918.)

1. EMINENT DOMAIN 🔑198(1) — CONDEMNATION PROCEEDINGS — FINDINGS — PUBLIC UTILITIES ACT.

Despite Public Utilities Act (St. 1911 [Ex. Sess.] p. 18) § 70, the superior court, in an action for condemnation begun under section 47, as amended by St. 1913, p. 683, is not authorized to determine the value of the property at the time of the trial, and to give judgment for such value as the compensation to be paid, for the superior court has no function to perform under the statute concerning the value of the property, but must take the finding of the Railroad Commission on that head as conclusive; and, if any additional findings of value can be made for the purpose of a condemnation suit under section 47, they must be made by the Railroad Commission, and not by the superior court.

2. EMINENT DOMAIN 🔑198(1) — CONDEMNATION PROCEEDINGS—PUBLIC UTILITIES ACT.

Public Utilities Act, § 47, provides a scheme for the condemnation of property by the public corporations mentioned therein by a proceeding wherein the value of the property is to be fixed by the Railroad Commission, and the right and power of the public corporation to condemn the property is to be determined by the superior court, which also has jurisdiction of the enforcement of the right.

3. CONSTITUTIONAL LAW 🔑228, 281 — EMINENT DOMAIN 🔑198(1) — DUE PROCESS — EQUAL PROTECTION OF LAWS.

Public Utilities Act, § 47, providing a scheme for condemnation of property by public corporations by a proceeding wherein the value of the property is to be fixed by the Railroad Commission, and the right and power of the public corporation to condemn to be determined by the superior court, is not violative of the clause of the federal Constitution prohibiting a state from depriving a person of his property without due process of law, or denying him the equal protection of the laws.

4. CONSTITUTIONAL LAW 🔑280 — EMINENT DOMAIN — DUE PROCESS — FOURTEENTH AMENDMENT.

Irrespective of any more specific requirements in state Constitutions, the due process clause of the Fourteenth Amendment to the federal Constitution requires compensation to be made or secured to the owner of private property taken by authority of the state for public use.

5. CONSTITUTIONAL LAW 🔑281—FIXING OF COMPENSATION — JUDICIAL PROCEEDING — PUBLIC UTILITIES ACT.

Public Utilities Act, § 47, providing a scheme for condemnation of property by the public corporations mentioned by a proceeding wherein the value is to be fixed by the Railroad Commission and the right and power of such public corporations to condemn to be determined by the superior court, is not denial of due process, as permitting the taking of private property without provision for the ascertainment of compensation by some form of judicial proceeding, the hearing provided for to determine the amount being required to be held as provided in section 70, guaranteeing to the owner affected written notice of the hearing, together with the right to be heard and introduce evidence.

6. CONSTITUTIONAL LAW 🔑281 — EMINENT DOMAIN—DUE PROCESS—FIXING COMPENSATION—JURY.

As to condemnation proceedings, it is not essential to the due process of law required by the Fourteenth Amendment to the federal Constitution that the compensation to be paid for property taken or damaged under the power of eminent domain be fixed by a jury.

7. CONSTITUTIONAL LAW 🔑228 — EMINENT DOMAIN — EQUAL PROTECTION OF LAWS — CONDEMNATION OF PROPERTY OF PUBLIC UTILITIES.

The procedure authorized by Public Utilities Act, § 47, for condemnation of the property of public utilities in certain cases, does not deprive such a utility of the equal protection of the laws because it differs in nonessential matters from the mode of condemning property under the general law, since the constitutional provision as to the equal protection of the laws does not prohibit a state from establishing different rules of procedure for different classes of cases or of litigants, providing the variations relate merely to matters of procedure, and do not operate to deprive any class of substantial equality in the adjudication of its rights or liabilities.

8. STATUTES 🔑92 — EMINENT DOMAIN — CLASS LEGISLATION—PUBLIC UTILITIES.

Public corporations, empowered to own and operate public utilities, clearly constitute a class sufficiently distinct from all other persons or corporations engaged in public service, and desiring to acquire property for public use, to justify peculiar legislation, such as Public Utilities Act, § 47, relating to them and their power to acquire property by eminent domain.

9. EMINENT DOMAIN 🔑124 — PROPERTY OF PUBLIC UTILITIES—DATE OF ESTIMATION OF VALUE—STATUTES.

Code Civ. Proc. § 1249, as to the date with respect to which compensation shall be assessed for property taken under power of eminent domain, has no application in actions authorized by Public Utilities Act, § 47, providing a scheme for the condemnation of property of public utilities, with respect to the date at which the value shall be estimated.

In Bank. Appeal from Superior Court, Marin County; Emmet Seawell, Judge.

Proceedings in condemnation by the Marin Municipal Water District against the Marin Water & Power Company and the Mercantile Trust Company of San Francisco. From judgment for plaintiff, defendants appealed to the District Court of Appeal, which affirmed the judgment, and on petition the decision was vacated and the case transferred to the Supreme Court. Judgment affirmed.

Lilienthal, McKinstry & Raymond, of San Francisco, for appellants. Curtis H. Lindley, of San Francisco, and George H. Harlan, of San Rafael, for respondent.

SHAW, J. This was a proceeding in condemnation by the plaintiff to acquire the property devoted to public use by the defendant Marin Water & Power Company. The other defendant is only indirectly interested in the proceeding, and its interests need not be further considered. The appeal was originally taken to the District Court of Appeal of the First District, and the judgment was there affirmed upon an opinion by Mr. Justice Richards. Thereafter, upon petition the decision of that court was vacated, and the case transferred to this court for further consideration. The facts and questions involved in the case are well stated in the following portions of the opinion of Justice Richards:

"This is an appeal from a judgment in favor of the plaintiff in an action instituted for the purpose of the condemnation of the defendants' properties for public uses. The appeal is taken upon the judgment roll.

"The first and practically only point presented by the appellants is that the court erred in striking out certain portions of the defendants' amended answer upon plaintiff's motion, and upon the ground that the portions of the said amended answer assailed by said motion tendered no issuable facts, and that the same were immaterial, irrelevant, and redundant matter.

"A brief statement of the facts of the case will suffice for the purpose of a review of this contention: The plaintiff herein is a public corporation formed for the purpose of supplying the inhabitants of a designated district in Marin county with water. The defendant Marin Water & Power Company owned the lands and properties described in the complaint, and upon these the defendant Mercantile Trust Company of San Francisco had a lien under the terms of a trust deed. The said plaintiff determined by proper resolution that the public interest required the acquisition by it of the said properties of the defendants for its public uses, and thereupon instituted a proceeding before the Railroad Commission of the State of California under the provisions of the Public Utilities Act, for the purpose of having determined the values of the defendants' said properties and the just compensation which should be paid by the plaintiff therefor in its proposed condemnation suit; and such steps were taken in that proceeding that on the 9th day of April, 1915, the Railroad Commission filed its findings, to the effect that the just compensation which should be paid for said properties was the sum of $1,200,500. This decision of the Commission became final on May 10, 1915; and under the provisions of section 47 of the Public Utilities Act the earliest date thereafter upon which the plaintiff could commence this action for the condemnation of said properties was May 31, 1915. This action was begun on June 5, 1915. The answer of the defendants was filed on December 17, 1915, and in their said answer the defendants did not put in issue by any sufficient pleading the question as to whether the findings and conclusions of the Railroad Commission as to the values of their properties were just and reasonable, but attacked the proceedings before the Commission on other grounds. On March 16, 1916, a few days before the case came to trial, the defendants filed an amended answer in which the following averments appear:

" 'For a separate and distinct defense alleges that the value of the properties of defendant Marin Water & Power Company is at the present time far greater than the value thereof at the date of the said award of the said Railroad Commission of the State of California, and that the condemnation thereof at this time for a price determined at a time when their value was less, as aforesaid, operates to deprive defendants and each thereof of property without due process of law.'

" 'For a separate and distinct answer denies that the proceedings before the Railroad Commission of the State of California referred to in said complaint were conducted in all respects, or any respects, according to law; and in this connection alleges that such proceedings were not conducted according to law, and in this connection admits that the compensation fixed by said Railroad Commission of the State of California for the lands, properties, and rights of defendant Marin Water & Power Company was and is the sum of $1,200,150, and denies that such compensation is just.'

"The plaintiff moved to strike out the above averments from the defendants' amended answer as presenting no issuable facts, and as immaterial, irrelevant, and redundant. The court granted said motion, and its order in so doing constitutes the chief ground of the defendants' contention upon this appeal."

[1] The first of the above-quoted paragraphs of the answer was filed upon the theory that the superior court, in an action for condemnation begun under section 47 of the Public Utilities Act, is authorized to determine the value of the property at the time of the trial, and give judgment for such value, as the compensation to be paid to the owner. We find nothing in support of this theory in the statute governing the subject.

Section 47 is extremely prolix and complex in its diction but, so far as this case is concerned, the plan therein provided is comparatively simple, and may be briefly stated.

Certain named classes of public corporations, including the plaintiff, desiring to take over and operate an existing public utility, may proceed, as in that section provided, to acquire the property of the owner of such public utility which is devoted to such public use. It must file a petition with the Railroad Commission to have the just compensation to be paid to the owner of the property determined. Thereupon the commission shall proceed, in the manner provided in section 70 of the act, to determine such compensation. Within 60 days after the commission has certified its findings, such public corporation must commence an action in eminent domain to take the property, the value of which has been so determined by the commission. In such action the finding of the commission on the subject of value "shall be deemed final and conclusive between the parties," and, after determining the right and power of the public corporation to take the property as proposed, as provided in the chapter of the Code of Civil Procedure relating to proceedings in eminent domain (sections 1237–1264), the court in such action shall give judgment, fixing as the amount of compensaton to be paid to the owner the value of the property as found by the commission in such certified findings.

It will be seen from these provisions that in the action in eminent domain to be begun under this section, the superior court has no function to perform concerning the value of the property, but must take the finding of the commission as conclusive on the subject. The appellant claims that authority for a new finding on the subject by the superior court is to be found in section 70 of the act. Section 47 declares that the commission shall proceed to make the determination as to compensation and value "in accordance with the provisions of section 70 of this act." Section 70 was originally enacted, before the amendment of 1913 to section 47, providing for valuations for purposes of condemnation by the public corporations there named. It has not been changed since its original enactment in 1911. At that time the commission was authorized to value the property of public utilities only for purposes of regulation. With this end in view the section provided that after determining the value of the property of any public utility the commission may from time to time make revaluations thereof, and of any improvements thereto, for the purpose of ascertaining the value thereof at some subsequent time, and that said supplemental finding shall be considered in connection with and as a part of the original findings, and as amendatory thereof. There is nothing in these provisions which authorizes the superior court to inquire concerning the value of the property or to find a value different from that previously determined and certified by the Railroad Commission. If any additional findings of value can be made for the purposes of a condemnation suit under section 47, they must be made by the Railroad Commission and not by the superior court. That section provides for a deduction from the valuation originally fixed by the commission, on account of depreciation or deterioration in the value of the property before payment of compensation is made. The amount of such deduction, however, is not to be determined by the superior court, but is to be determined by the Railroad Commission after the judgment of condemnation is made in the superior court. Section 47 declares that the judgment shall provide that it shall be subject to modification accordingly, if such finding is made. There is no provision for any finding on the subject by the superior court. The section provides that a petition to the commission to determine the amount of such deduction may be made by the public corporation at any time after the first application to the commission and before the payment of the compensation fixed by the judgment of the superior court. But no provision is made for a finding by the court of a subsequent increase in value.

[2] The effect of section 47 is to provide a scheme for the condemnation of property by the public corporations mentioned therein, by a proceeding wherein the value is to be fixed by the Railroad Commission, and the right and power of such public corporation to condemn the property is to be determined by the superior court. The enforcement thereof is also given over to the superior court. The appellant contends that if it shall be construed to provide for the taking of the property at the time of the judgment in the superior court, upon payment of the value previously fixed by the commission, it would be unconstitutional. The argument is that the owner is entitled to the value of the property at the time it is taken, and that he cannot be deprived thereof for public use, upon payment as compensation of the value fixed at a previous time, unless it shall appear that there has been no increase in value up to the time it is taken. So far as the provisions of the Constitution of California are concerned, the proposition is without merit. In November, 1914, after the amendment of section 47 in 1913, the Constitution itself was amended by the addition thereto of section 23a, art. 12, giving the Legislature authority to confer upon the Railroad Commission the power to fix the just compensation to be paid for existing public utilities as provided in section 47, and confirming and declaring valid all acts of the Legislature previously adopted, which, of course includes said amendment of section 47. It follows that if any of the provisions of said section should be deemed to be in violation of any provision of the Constitution on the subject of eminent domain, the amendment of 1914 to article 12 would supersede such provision and render the act immune from attack on such grounds.

[3] Nor is the enactment, we think, violative of the clauses of the federal Constitution prohibiting a state from depriving a person of his property without due process of law, or denying him the equal protection of the laws.

[4] It is not to be doubted that, irrespective of any more specific requirements in state Constitutions, the due process clause of the Fourteenth Amendment requires compensation to be made or secured to the owner of private property taken by authority of the state for public use. C., B. & Q. R. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979. But section 47 of the Public Utilities Act provides in express terms for the ascertainment, and the payment to the owner, of "just compensation" for property taken. It is contended that the scheme of valuation is not fair to the owners of public utilities, in that the value is fixed as of the time of the hearing by the Railroad Commission, which must precede the commencement of the formal condemnation suit. Under the general law relative to eminent domain, the value of property taken is assessed as of the date of the issuance of summons. Code Civ. Proc. § 1249. It is settled by our decisions that this rule, the equivalent of which is found in many other states (15 Cyc. 721), involves no violation of constitutional right. Cal. So. R. R. Co. v. Kimball, 61 Cal. 90; Tehama County v. Bryan, 68 Cal. 57, 8 Pac. 673; San Jose, etc., R. R. Co. v. Mayne, 83 Cal. 566, 23 Pac. 522; Los Angeles v. Pomeroy, 124 Cal. 597, 648, 57 Pac. 585; Sacramento Term. Co. v. McDougall, 19 Cal. App. 562, 126 Pac. 503. On analysis, it will be found that the distinction between the Code provisions and those of the Public Utilities Act is formal rather than substantial. Section 47 creates a special proceeding in eminent domain. The ascertainment of value by the Railroad Commission, and the subsequent action in the superior court, in which the previous finding of value is made conclusive, are both parts of that proceeding. The hearing by the commission on the question of value is merely a step in the litigation prosecuted to enforce the right of eminent domain. In effect, therefore, the value is fixed as of the date of the institution of the condemna-

tion proceeding, as it is in cases prosecuted under the Code sections alone.

[5] The fixing of the amount payable as compensation for property taken for public use presents a judicial question (Monongahela Nav. Co. v. United States, 148 U. S. 312, 327, 13 Sup. Ct. 622, 37 L. Ed. 463), and it may well be that due process of law would be lacking in a proceeding by which the state should assume to take private property without providing for the ascertainment of compensation by some form of judicial proceeding. The Public Utilities Act is not, however, open to criticism on this ground. The hearing provided for to determine the amount, under section 47, is to be held in the manner provided in section 70, and that section guarantees to the owner affected written notice of the hearing, together with the right to be heard and to introduce evidence. That the valuation proceeding before the commission is judicial in character was directly held by this court in its review, on certiorari, of the finding of value made in the case of this very appellant. Marin Water & Power Co. v. Railroad Com'n, 171 Cal. 706, 712, 154 Pac. 864, Ann. Cas. 1917C, 114.

[6] Finally, on this branch of the inquiry, it may be remarked that it is not essential to the due process as required by the Fourteenth Amendment that the compensation to be paid for property taken or damaged under the power of eminent domain be fixed by a jury. 15 Cyc. 873; C., B. & Q. R. R. Co. v. Chicago, 166 U. S. 244, 245, 17 Sup. Ct. 581, 41 L. Ed. 979; Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270. See Koppikus v. State Capitol Com'n, 16 Cal. 248; People v. Blake, 19 Cal. 579.

[7, 8] The contention that the procedure authorized by the Public Utilities Act deprives the appellant of the equal protection of the laws is based upon the discriminations to which we have just referred between the mode of condemning property under the general law and that provided by section 47 for condemning the property of public utilities in certain cases. None of these discriminations, as we have seen, goes to any matter of essential justice or fundamental right. The constitutional provision under consideration does not prohibit a state from establishing different rules of procedure for different classes of cases or of litigants, provided the variations relate merely to matters of procedure, and do not operate to deprive any class of substantial equality in the adjudication of its rights or liabilities. 12 C. J. 948; Cin. St. Ry. Co. v. Snell, 193 U. S. 30, 24 Sup. Ct. 319, 48 L. Ed. 604; Cook v. Ray Mfg. Co., 159 Cal. 694, 115 Pac. 318. In condemnation proceedings, so long as the state provides a fair and equitable judicial inquiry, in which the parties interested are allowed to be heard and present evidence, and are protected in their right to have just compensation, they are not deprived of the equal protection of the laws because the state, under authority of its own Constitution, has seen fit to provide for other classes of cases a different method or a different tribunal for accomplishing the same result. Railroad Co. v. Tel. Co., 65 S. C. 459, 43 S. E. 970; Kennebec Water D. v. Waterville, 96 Me. 234, 52 Atl. 774. Whether the property of public utilities forms a class which may fairly be thought to require a different kind of procedure from that adopted for the taking of other property by eminent domain is primarily a question for the state itself. Elements of peculiar complication and difficulty are often involved in the valuation of the property of a public utility. The fact that public utilities are subject to constant regulation and examination by the Railroad Commission may well have led the Legislature to conclude that that commission was best able to make a just and equitable appraisement of their property. Kennebec Water D. v. Waterville, supra. So far as defendants are concerned, the classification made by the act cannot therefore be regarded as purely arbitrary. It is not claimed that any constitutional right of the appellant is invaded by the limitation of the right to proceed as plaintiffs under section 47 to certain kinds of public corporations, which are empowered to own and operate public utilities. Such corporations clearly constitute a class sufficiently distinct from all other persons or corporations engaged in public service, and desiring to acquire property for the public use, to justify peculiar legislation relating to them.

Little need be said concerning the second of the above-quoted paragraphs stricken out by the court below. The appellant calls attention to the fact that the complaint itself alleged that the proceedings before the Railroad Commission were conducted in all respects according to law, and it is claimed that this is an allegation of fact which it is proper for the defendant to deny in the answer. If the superior court in the action in eminent domain had power to review the conduct of the proceedings before the Railroad Commission and to amend its findings, this allegation of the complaint might be material, and, if so, it might be proper to answer it, if it is not a mere conclusion of law, which we do not decide. But the superior court had no such power. The Public Utilities Act provides that in all collateral actions the orders and decisions of the commission which have become final shall be conclusive (section 65), and that no court except the Supreme Court shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission (section 67). The complaint alleges that the finding of the commission as to compensation was made after due notice had been given to the appellant herein, and upon a hearing regularly had by the commission. This allegation is not denied. Jurisdiction of the person of the appellant was established, and jurisdiction of the subject-matter is given by the provisions of section 47, and by the Constitution. The finding was therefore conclusive, so far as the superior court and the action in eminent domain were concerned. The allegation was therefore wholly immaterial, and was properly stricken from the answer.

[9] We do not think section 1249 of the Code of Civil Procedure has application in actions authorized by section 47 of the Public Utilities Act, with respect to the date at which the value shall be estimated.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; WILBUR, J.; RICHARDS, Judge pro tem.

(178 Cal. 324)

MARIN MUNICIPAL WATER DIST. v. NORTH COAST WATER CO. et al.

(S. F. 7873.)

(Supreme Court of California. May 27, 1918.)

1. Courts 🔑24, 37(1)—Jurisdiction—Consent.

Jurisdiction of the subject-matter cannot be conferred upon a tribunal by consent, so that the parties cannot make an effective waiver of lack of such jurisdiction.

2. Public Service Commissions 🔑27—Review of Decisions—Powers of Court—Limitations—Validity.

Public Utilities Act (St. 1911 [Ex. Sess.] p. 18) §§ 66, 67, providing that any party interested in an order or decision made by the Railroad Commission may petition for rehearing, and that, if such rehearing is denied, application may be made to the Supreme Court for writ of review to have the lawfulness of the order or decision determined, are valid limitations on the powers of the courts of the state.

3. Eminent Domain 🔑243(1)—Irregularity of Procedure—Waiver.

Where, at the time the Railroad Commission's decision was made valuing property sought to be condemned, Const. art. 12, § 23a, had validated legislation vesting the commission with such authority, the fact that the finding was based on a proceeding instituted and testimony heard before the constitutional amendment had become valid and effective was a matter going only to the regularity and propriety of the procedure leading to the finding, rather than to the fundamental jurisdiction of the commission to make the finding itself; and defendant, by failing to ask the commission for rehearing pursuant to Public Utilities Act, § 66, or to apply to the Supreme Court for writ of review pursuant to section 67, waived any objection, and permitted the commission's decision to become final.

In Bank. Appeal from Superior Court, Marin County; Emmet Seawell, Judge.

Condemnation proceedings by the Marin Municipal Water District, a public corporation, against the North Coast Water Company, a corporation, and others. From the judgment, defendants appeal. Affirmed.

Charles S. Wheeler and John F. Bowie, both of San Francisco, for appellants. George H. Harlan, of San Rafael, and Curtis H. Lindley, of San Francisco, for respondent.

SLOSS, J. The defendants appeal from a judgment in condemnation. The case presents a situation very similar to that discussed in the opinion which we have just filed in Marin Municipal Water District v. Marin Water & Power Company (S. F. No. 8017) 173 Pac. 469. In the present action, the Marin Municipal Water District sought to acquire the property of North Coast Water Company, comprising the system devoted to supplying water to the towns of Mill Valley and Belvedere, together with surrounding territory, in the county of Marin. Here, as in the Marin Water & Power Company Case, the plaintiff had applied to the Railroad Commission for a valuation of the property under the terms of section 47 of the Public Utilities Act (as amended in 1913 [St. 1913, p. 683]), and the commission had made its decision, finding the just compensation to be paid for the lands, property, and rights to be purchased. The value of this appellant's property was fixed at $289,200. In the ensuing proceeding for condemnation, this sum was taken as conclusively establishing the amount of compensation to be paid to the North Coast Water Company, and judgment was entered accordingly. Certain additions had been made to the plant after the Railroad Commission had made its finding of value, and the parties stipulated that these additions should be taken over by the plaintiff at an agreed value of some $1,500, if the plaintiff should ultimately succeed in establishing its right to acquire the original plant at the price fixed by the Railroad Commission.

The main point of controversy, in both condemnation suits, turned on the validity of the scheme provided by section 47 of the Public Utilities Act. It was claimed by the respective water companies that the provisions of this section were in violation of both the state and the federal Constitutions. In each instance, the proceeding before the Railroad Commission was commenced, and the evidence taken, before the adoption of section 23a of article 12 of the Constitution, which expressly confirmed and validated the prior legislation (i. e., section 47 of the Public Utilities Act), undertaking to confer upon the Railroad Commission power to find, for purposes of condemnation, the value of property to be taken in cases like this. The findings were, however, made after the change in the Constitution. This constitutional amendment "removes all doubt of the present validity of the said amendment of section 47," so far as any objection based upon the terms of the state Constitution is concerned. Marin Water & Power Co. v. R. R. Com., 171 Cal.

706, 710, 154 Pac. 864, Ann. Cas. 1917C, 114. The claim that the scheme embodied in that section is in violation of the federal Constitution is met and answered by our decision in Marin Municipal Water District v. Marin Water & Power Company.

[1-3] That decision virtually disposes of every point here involved, with one exception. The point thus remaining is one which arises, not so much from any difference in the essential facts in the two cases, as from the different modes in which the controversies have been conducted by the respective defendants and appellants. The present appellant maintains that, under the Constitution as it read prior to the adoption of section 23a of article 12 the Legislature was not authorized to confer upon the Railroad Commission power to make a conclusive finding of value for condemnation purposes, as provided by section 47 of the Public Utilities Act; that, inasmuch as the proceeding was initiated and the hearing of evidence concluded before the adoption of the confirmatory provision of the Constitution, all of the steps taken under the supposed authority of section 47 were coram non judice and void; and that, accordingly, the commission's finding of value should not have been admitted in evidence, and a fortiori, should not have been given conclusive, or any, effect. We shall, for present purposes, assume, without deciding, that the appellant is correct in its claim that the Constitution, as it read prior to the amendment of section 47 of the Public Utilities Act, did not authorize the grant of the powers specified in that section. It will be observed that the point that the action of the commission was totally void, because the proceeding was commenced before the amendment of the Constitution, would have been equally available to the Marin Water & Power Company. But that corporation did not take this position. It applied for and obtained a writ of certiorari to review the decision of the Railroad Commission fixing the value of its property for purposes of the proposed condemnation. In that proceeding, however, it expressly waived any objection that might be urged because of the enactment of section 47 before the amendment of the Constitution. Marin Water & Power Co. v. R. R. Com., 171 Cal. 706, 711, 154 Pac. 864, Ann. Cas. 1917C, 114. This court, in the proceeding for review, affirmed the determination of the Railroad Commission. In the course of the opinion it dealt with the matter of the waiver of this objection in a manner to which we shall advert further. The present appellant, on the other hand, did not seek to attack the decision and finding of the Railroad Commission, by certiorari or otherwise. After contending, before the commission, that the proceeding there was unauthorized, it allowed the decision of the commission to become final, so far as any direct attack was concerned, and contented itself thereafter with urging, on the trial of the present action, its objections to the commission's finding when that finding was presented as a basis for an adjudication of value in the condemnation suit now before us. Its right to take this position must rest upon the premise that the finding, or decision, of the commission was absolutely void as beyond the jurisdiction of the commission, because, although such decision was made at a time when power to make it was vested in the commission, the proceeding had been instituted and the testimony taken before the adoption of the constitutional provision confirming the grant of power which the Legislature had theretofore attempted to make. We think, however, that this premise cannot be accepted without departing from our ruling in Marin Water & Power Company v. Railroad Commission, supra. As we have already suggested, the petitioner there waived the objection now urged by this appellant. In that connection we said, in our opinion, that:

> "We have no doubt that the petitioner may effectually waive a matter of that character."

While the question was not discussed at length, the expression just quoted necessarily involves a holding that the objection was one that did not go to the commission's jurisdiction of the subject-matter at the time the finding in question was made. For if the commission was absolutely without power to make a finding in a proceeding instituted and partially heard before the constitutional confirmation of section 47, the want of power could not be waived. It is the universal rule that jurisdiction of the subject-matter cannot be conferred upon a tribunal by consent, and it follows that the parties cannot make an effective waiver of a lack of such jurisdiction. 7 R. C. L. 1043. The necessary import of our holding in the certiorari proceeding brought by Marin Water & Power Company was therefore that, where at the time the decision was made, the law had vested the commission with authority to make it, the fact that the finding was based upon a proceeding instituted, and testimony heard, before the law purporting to vest jurisdiction in the commission had become valid and effective was a matter going to the regularity and propriety of the procedure leading to the finding, rather than to the fundamental jurisdiction to make the finding itself. Adhering to the view thus taken in the certiorari proceeding, we must hold that this appellant, also, has waived the right to object to the premature institution and hearing of the proceeding to fix the value of its property to be taken. It is true that it did not at any stage make an express waiver. But by failing to ask the commission for a rehearing, or to apply to this court for a writ of review, it permitted the commission's decision to become final, so far as the law could make it so. Under section 66 of the Public Utilities Act any party interested in an order or decision made by the commission may petition for a rehearing, and, under section 67, if such rehearing is denied, application may be made to this court for a writ of review, for the purpose of having the lawfulness of the order or decision inquired into and determined. No court of this state except the Supreme Court, to the extent specified "shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission." These are valid limitations upon the powers of the courts of this state. Pac. T. & T. Co. v. Eshleman, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822; Clemmons v. R. R. Com., 173 Cal. 254, 159 Pac. 713. The failure to apply for such rehearing, or, in the event of its denial, for a review by the Supreme Court, must necessarily, therefore, operate as a waiver of any objection except, perhaps, the one that the order of the commission is absolutely void on its face. But the decision here in question was not so void. It was rendered at a time when the commission had jurisdiction to make such an order, and it did not show on its face that any of the proceedings leading to it had been taken before the adoption of the constitutional amendment.

There is therefore no substantial distinction between this case and that of Marin Water & Power Company, and the result here must be that reached in the other case. The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; WILBUR, J.; RICHARDS, Judge pro tem.

(177 Cal. 313)

KEYES et al. v. CITY AND COUNTY OF SAN FRANCISCO. (S. F. 7017.)

(Supreme Court of California. Jan. 25, 1918. On Petition for Rehearing, Feb. 23, 1918.)

1. MUNICIPAL CORPORATIONS 🔑974(3)—TAXES—LIMITATION OF AMOUNT.

Whether, under Charter of City and County of San Francisco, art. 3, c. 1, §§ 11, 13 (St. 1899, p. 261), there exists a "great necessity or emergency" justifying a levy of taxes in excess of $1 on each $100 valuation, is not finally determined by ordinance of the supervisors therefor, but may be reviewed by the courts.

2. MUNICIPAL CORPORATIONS 🔑977—CLAIMS—PRESENTATION OF AS A CONDITION PRECEDENT.

The provision of Charter of City and County of San Francisco, art. 2, c. 1, § 19, requiring all demands payable out of the treasury to be approved by the board of supervisors before being approved by auditor and paid by treasurer, except as provided in article 3, c. 3, and also article 3, c. 4, § 1, and article 4, c. 2, § 7, do not apply to or make approval by such board of a claim for repayment of taxes paid under protest a condition precedent to action for their recovery.

3. TAXATION 🔑542—RECOVERY OF TAX PAID—VOLUNTEER PAYMENT.

Unless there is a law for the recovery of illegal taxes paid under protest, the payment is voluntary and cannot be recovered in the absence of duress or coercion.

4. MUNICIPAL CORPORATIONS 🔑977—TAXES—RECOVERY OF TAXES PAID.

Pol. Code, § 389 (St. 1893, p. 32), providing that a payment of taxes under protest shall not be regarded as voluntary, applies to taxes collected by the city and county of San Francisco in view of its title, "Collection of Property Taxes."

5. MUNICIPAL CORPORATIONS 🔑958—TAXATION—CHARTER AND OTHER STATUTORY PROVISIONS.

The charter of the city and county of San Francisco authorizing the board of supervisors to provide for the collection of taxes is not self-executing, and, the board not having acted thereon, the general laws remain paramount.

6. COUNTIES 🔑190(1)—TAXATION—VOLUNTARY PAYMENT.

In so far as the city and county of San Francisco has the attributes of a county, Pol. Code, § 3819, providing that payment of taxes under protest shall not be regarded as voluntary, is applicable.

In Banc. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Alexander D. Keyes, as executor of the estate of Mary L. Zimmerman, deceased, and another, against the City and County of San Francisco. From a judgment sustaining a general demurrer to the complaint, plaintiffs appealed and on affirmance by the District Court of Appeal the case was ordered up for rehearing in Supreme Court. Reversed and remanded.

Alexander D. Keyes, of San Francisco, in pro. per. Percy V. Long, Jesse H. Steinhart, Harry G. McKannay, Maurice T. Dooling, Jr., and George Lull, City Atty., all of San Francisco, for respondent. Drown, Leicester & Drown, Cushing & Cushing, Wm. H. Gorrill, A. R. Baldwin, Morrison, Dunne & Brobeck, Geo. J. Hatfield, C. Irving Wright, Elmer Westlake, and E. J. Foulds, all of San Francisco, amici curiæ.

LAWLOR, J. The court below sustained a general demurrer to the complaint, and from the judgment thereupon entered the plaintiffs prosecuted an appeal to this court, which was transferred to the District Court of Appeal, Third Appellate District, for decision. After an affirmance of the judgment by the District Court the case was ordered up for a rehearing by this court. The facts and general nature of the case and the contentions of the parties appear in the following excerpts from the opinion of the District Court of Appeal, which we hereby adopt and make a part of this opinion:

"The object of the action is to recover taxes alleged to have been paid under protest to the tax collector of the city and county of San Francisco, the plaintiffs claiming that the tax levy under and in pursuance of which said taxes were paid was illegal and void.

"The lands upon which the protested taxes were levied are situated in the city and county of San Francisco, and are owned and were assessed against the estate of Mary L. Zimmerman, testate of the plaintiff Keyes and the plaintiff Mary E. Chilton.

"Section 11 of article 3 of the charter of said city (Stats. 1899, p. 261) provides that the supervisors thereof shall, on the last Monday of June in each year, levy the amount of taxes for city and county purposes required to be levied upon all property not exempt from taxation. 'The amount shall be sufficient to provide for the payment during the fiscal year of all demands upon the treasury authorized to be paid out of the same; but such levy, exclusive of the state tax and the tax to pay the interest and maintain the sinking funds of the bonded indebtedness of the city and county, and exclusive of the tax to pay for the maintenance and improvement of the parks, squares, and public grounds of the city and county, shall not exceed the rate of one dollar on each one hundred dollars valuation of the property assessed.' Section 13 of said charter provides, in part, as follows: 'The limitation in section eleven of this chapter upon the rate of taxation shall not apply in case of any great necessity or emergency. In such case the limitation may be temporarily suspended so as to enable the supervisors to provide for such necessity or emergency. No increase shall be made in the rate of taxation authorized to be levied in any fiscal year, unless such increase be authorized by ordinance passed by the unanimous vote of the supervisors and approved by the mayor. The character of such necessity or emergency shall be recited in the ordinance authorizing such action, and be entered in the journal of the board.'

"On June 21, 1911, the board of supervisors passed an ordinance purporting to suspend the dollar limitation. Said ordinance recited and declared that a great necessity and emergency exists within the city and county of San Francisco, which requires that the limitation upon the rate of taxation provided by said section 11 of article 3 of the charter of said city be temporarily suspended; that the character of such necessity and emergency is as follows, to wit, that taxable property of said city of approximately the value of $175,000,000 had been destroyed by the conflagration commencing on the 18th of April, 1906, and continuing for several successive days thereafter; that the assessment roll for said year aggregated $525,000,000, but that at no time since said year has the assessment roll of said city equalled said amount; that said fire checked the normal increase of said assessment roll, 'and its restoration to the former amount has been impossible'; that the adoption by the people at the election of November 8, 1910, of senate constitutional amendment No. 1 (Stats. 1909, p. 1332, providing for the separation of state and local taxation, and providing that taxes levied, assessed, and collected upon railroads and other public utilities and the franchises thereof shall be entirely and exclusively for state purposes) still further reduced the amount of taxable property of said city and county by approximately $75,000,000 and at the same time deprived the city of certain license tax revenues amounting to a large sum; that, by certain amendments to the charter, the salaries in the police and fire departments had increased to the amount of more than $1,000,000, and that by other amendments to said charter other additional expenses were added to the burdens of the city amounting in the aggregate to the sum of $100,000. The ordinance proceeds:

" 'That at the several sessions of the Legislature since 1905, large additional expenses and financial burdens were laid upon the city and county of San Francisco, which expenses and burdens could not be anticipated and provided for under the provisions of the charter of said city and county when adopted in 1898. That furthermore, the Legislature, by various enactments, has materially reduced the sums heretofore received from the state in support of the public school system, which reductions could not be foreseen and provided for at the time of the adoption of the said charter.

" 'That the demands due to the rapid growth of the city, particularly in new districts of the city and county, developed as a result of shifting of population caused by the fire aforesaid, for additional public institutions, services and necessities have been great, which demands and necessities could not be reasonably foreseen.

" 'That the estimated and necessary expenditures of the city and county of San Francisco for the fiscal year commencing June 30, 1911, will be $11,938,750. * * *

" 'Section 3. There is hereby levied a tax of sixty-two and one-half cents upon each one hundred dollars of assessed valuation of property within the city and county of San Francisco as the same appears, or will appear upon the assessment roll of said city and county for the fiscal year ending June 30, 1912, and the proceeds of such tax shall be part of the general fund of said city and county.

" 'Such tax is and shall be an increase of and an addition to the rate of one dollar taxation on each one hundred dollars of assessed valuation. * * *'

"On the same day that said ordinance was passed, to wit, on the 21st day of June, 1911, the supervisors, by ordinance, fixed the tax rate and levied taxes upon all the taxable property in said city in accordance with the ordinance suspending the 'dollar limit.'

"The complaint alleged that the plaintiffs, upon paying the two installments of taxes levied under the suspension of the restriction referred to, protested, on each occasion of the payment of said installments, against the payment of so much of said levy as is in excess of the dollar restriction prescribed by the charter, and that they filed with the tax collector their protests in writing. Said written protests were expressly based upon section 3819 of the Political Code (which provides that where the owner of property assessed by the proper county authorities claims that such assessment is void in whole or in part and pays the taxes so assessed under written protest, specifying that the assessment is in whole or in part void, such payment shall not be regarded as a voluntary payment, and that such owner may, at any time within six months after such payment, bring an action against the county in the superior court to recover back the taxes so paid).

"The points urged against the validity of the tax levy complained of by the plaintiffs may be stated in the language of their counsel as follows: 'The ordinance suspending the dollar limit is void: First, because it did not recite the character of any emergency or great necessity; secondly, because the alleged emergency levy was not made for the purpose for which it could lawfully be made, namely, to provide for the great necessity or emergency in question; thirdly, because the proceedings to levy taxes in excess of the dollar limit were begun and the ordinance making the levy was passed by the supervisors before the dollar limit was suspended.' "

[1] Counsel for defendant concede that the determination by the supervisors of the existence of a "great necessity or emergency" is not conclusive, but may be reviewed by the courts. See San Christina Investment Co. v. City and County of San Francisco, 167 Cal. 762, 131 Pac. 384, 52 L. R. A. (N. S.) 676; Spring Valley Water Works v. San Francisco, 82 Cal. 286, 22 Pac. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116; Davis v. Mayor of New York, 1 Duer, 451, 497; People v. Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536;

Josselyn v. San Francisco, 168 Cal. 436, 143 Pac. 705.

[2] It is claimed, however, that the complaint is defective in two particulars: First, that according to the charter a prior demand within a specified time must have been approved by the board of supervisors and presented to the proper officer for payment, and the complaint contains no allegation that such a demand was presented or approved; second, that the payment of the taxes by the plaintiffs was voluntary, because the charter does not provide for the payment of taxes under protest, and section 3819 of the Political Code, in pursuance of which the protest alleged in the complaint was made, has no application to taxes levied by the city and county of San Francisco.

As to the necessity of a prior presentation and approval of the demand, the provisions of the city and county charter relied upon by the respondent, in so far as material, are as follows:

> Section 19 (chapter 1, art. 2): "Except as provided in chapter III of article III of this charter, all demands payable out of the treasury must, before they can be approved by the auditor or paid by the treasurer, be first approved by the board of supervisors. * * *"
>
> Section 13 (chapter 3, art. 3), after providing for the allowance of fixed salaries, continues: "All other demands payable out of any funds in the treasury, must before they can be allowed by the auditor, or recognized, or paid, be first approved by the department, board or officer, in which the same has originated, and in all such cases must be approved by the supervisors."
>
> Section 1 (chapter 4, art. 3): "The salaries and compensation of all officers, including policemen and employés of all classes, and all teachers in the public schools, and others employed at fixed wages, shall be payable monthly. Any demand upon the treasury accruing under this charter shall not be paid, but shall be forever barred by limitation of time, unless the same be presented for payment, properly audited, within one month after such demand became due and payable; or, if it be a demand which must be passed and approved by the supervisors or board of education, or by any other board, then within one month after the first regular meeting of the proper board held next after the demand accrued. * * *"

Respondent cites no case in which it has been held that these provisions of the charter apply to a claim for the repayment of taxes paid under protest. Geimann v. Board of Police Com'rs, 158 Cal. 748, 112 Pac. 553, the only decision referred to arising under the present charter of San Francisco, was an action by policemen for salaries alleged to be due them. Such demands are specifically named in the charter and are clearly within the sections above quoted, but bear no resemblance to the claim in controversy. Neither can any reliance be placed upon such sweeping provisions as were considered in Farmers' & Merchants' Bank v. City of Los Angeles, 151 Cal. 655, 91 Pac. 795, and the cases there discussed. McCann v. Sierra County, 7 Cal. 121; People v. Supervisors, 28 Cal. 429; Alden v. Alameda County, 43 Cal. 270; Rhoda v. Alameda County, 52 Cal. 350; Bigelow v. Los Angeles, 141 Cal. 503, 75 Pac. 111. The cases against the city of Los Angeles turned upon the following section of the charter:

> "No suit shall be brought upon any claim for money or damages against the city of Los Angeles, * * * until a demand for the same has been presented as herein provided, and rejected in whole or in part. * * *"

The other cases cited were decided upon the basis of section 24 of the County Government Act (Stats. 1855, p. 51) which was repealed by the Political Code. See Lehn v. San Francisco, 66 Cal. 76, 4 Pac. 965. Section 24 provided that:

> "No person shall sue a county in any case, or for any demand, unless he or she shall first present his or her claim or demand to the board of supervisors" for allowance, and the same shall be rejected in whole or in part.

Manifestly the sections of the San Francisco charter on the subject of prior demand are not of the sweeping and all-inclusive character of the provisions just quoted. We do not believe that the charter was intended to contain a clause requiring prior presentation of all classes of demands as a condition precedent to the right to sue thereon. The Consolidation Act (Stats. 1856, p. 145), to which the present charter is largely similar, had no such general provision. See Lehn v. San Francisco, supra; Bloom v. San Francisco, 64 Cal. 503, 3 Pac. 129; Spangler v. San Francisco, 84 Cal. 12, 20, 23 Pac. 1091, 18 Am. St. Rep. 158. Moreover, to construe the sections of the charter relied upon by respondent as requiring a prior presentation and approval in the case of taxes paid under protest would be inconsistent with other portions of that charter, which are themselves conclusive on the point that no such procedure was contemplated or provided for in this instance.

Section 7 (chapter 2, art. 4) reads:

> "Every demand upon the treasurer, except the salary of the auditor, must, before it can be paid, be presented to the auditor, who shall satisfy himself whether the money is legally due, and its payment authorized by law, and against what appropriation payable, and out of what fund it is payable. If he allow it, he shall indorse upon it the word 'Allowed,' with the name of the fund out of which it is payable, and the date of such allowance, and sign his name thereto. No demand shall be approved, allowed, audited or paid unless it specify each special item, date and amount composing it, and refer by chapter and section to the provisions of this charter authorizing the same."

Section 13 (chapter 3, art. 3) provides:

> "* * * Every demand against the city and county shall, in addition to the other entries and indorsements upon the same required by this charter, show: (1) The ordinance or authorization under which the same was allowed. (2) The name of the board, department or authority authorizing the same. (3) The fiscal year within which the indebtedness was incurred. (4) The appropriation provided to meet the demand [same]. (5) The name of the specific fund out of which the demand is payable. Each demand shall have written or printed upon it a statement that the same can only be paid out of the income and revenue provided, collected

and paid into the specific fund in the treasury for the fiscal year within which the indebtedness was incurred, and shall refer to chapter II of this article, and be numbered with reference to the fund out of which it is payable."

The limitations above set out upon the payment of a demand under the charter show that the only classes of demands that could have been intended are those the payment of which the charter contemplates or authorizes. The charter nowhere provides for the repayment of taxes paid under protest, and under the provisions of the charter referred to there would be no authority in any officer of the municipality to approve or pay the plaintiffs' demand if the same were presented as contended for. In this situation, of course, such presentation and approval cannot be a condition precedent, and we conclude that the charter does not make it such.

[3, 4] The more important contention of the respondent, and the one upon which the District Court upheld the action of the trial court in sustaining the demurrer to the complaint, is that section 3819 of the Political Code, in pursuance of which the protest was made, does not apply to the city and county of San Francisco, and the charter itself makes no provision for the payment of taxes under protest; consequently the payment was voluntary and no action to recover the taxes lies. It may be conceded that if there is no provision of law, applicable to the city and county of San Francisco, for the payment of taxes under protest, and for the recovery thereof after such protest, where the tax is illegal, then in the absence of an allegation of duress or coercion they were paid voluntarily and cannot be recovered. McMillen v. Richards, 9 Cal. 365, 417; Bucknall v. Story, 46 Cal. 589, 597, 13 Am. Rep. 220; Bank of Woodland v. Webber, 52 Cal. 73; Wills v. Austin, 53 Cal. 152; Dear v. Varnum, 80 Cal. 86, 22 Pac. 76; Justice v. Robinson, 142 Cal. 199, 75 Pac. 776. But we are unable to agree that section 3819 of the Political Code, the substance of which is set out in the portion of the opinion of the District Court which is quoted above, has no applicaton to the city and county of San Francisco. The provision in question is found in title 10 of part 3 of the Political Code, which deals with the revenue of the state and is limited, so far as taxation is concerned, to the matter of state and county taxation. The particular chapter in which section 3819 appears (chapter 7) is entitled "Collection of Property Taxes." The Political Code, under the caption "The Government of Cities" (title 3 of part 4), contains the following provision (section 4390):

> "The assessor, in addition to the duties prescribed by the common council, must make out, within such time as the common council orders, a correct list of all the taxable property within the city limits, with the valuation thereof, which list, certified by him, must be returned to the common council. The mode of making out the list and of ascertaining the value of property, and of collecting all taxes, is the same as prescribed in this code for assessing and collecting the state tax."

[5] Taxation for municipal purposes is a municipal affair; accordingly, a scheme of local taxation framed by a municipality whose charter empowered it to devise its own taxing system would be superior to the general law of the state on that subject. Ex parte Braun, 141 Cal. 204, 209, 74 Pac. 780. But if the charter itself does not contain such a scheme of taxation, and the legislative body of the municipality has also failed to devise a system, then there is no local law with which the general law can be inconsistent. Merely to authorize the board of supervisors to provide for the collection of taxes is not sufficient to exclude the operation of general laws for the collection of taxes. The provision of the charter in this instance (article 3, c. 1, § 14) reads:

> "The supervisors shall fix the amount of municipal revenues and provide for the collection thereof. * * *"

If this can be taken as referring to the collection of taxes, it is a mere authorization to the supervisors; it is not self-executing, and without further action by the supervisors has no effect whatever upon the general law. Had legislation been enacted to carry out the power thus lodged in the municipality, it may be that whatever plan of local taxation would thus have been adopted would have been paramount to the general law. In this case nothing was done by the supervisors to execute the power lodged in them by the charter. Under such circumstances, only the general law governing the collection of taxes, which is the same for cities and for counties, exists in San Francisco, and obviously that is the only law that can be applied. There has been no other law on the subject since the charter was adopted, in 1899; that is the only law that could have been followed; it is rather strange that it should be questioned now. In arriving at the conclusion that section 3819, as well as the remainder of that portion of the Political Code pertaining to the collection of state and county taxes, applies to the city and county of San Francisco, we do not rely upon former cases where the same remedy was sought and granted without question. Mackay v. San Francisco, 113 Cal. 392, 45 Pac. 696; Mackay v. San Francisco, 128 Cal. 678, 61 Pac. 382; Savings & Loan Society v. San Francisco, 131 Cal. 356, 63 Pac. 665; Bank of California v. San Francisco, 142 Cal. 276, 75 Pac. 832, 64 L. R. A. 918, 100 Am. St. Rep. 130; San Christina Inv. Co. v. San Francisco, 167 Cal. 762, 141 Pac. 384, 52 L. R. A. (N. S.) 676; Josselyn v. San Francisco, 168 Cal. 436, 143 Pac. 705. The propriety of protesting the payment of city and county taxes was not in those cases doubted by the municipality or by this court, so the matter was not put in issue; but on the principle of contemporary construction this fact lends strength to the view that the collection of city and county taxes was not only governed by the general law as a fact, but also as a matter of intention.

The contrary result reached by the District Court was based upon Justice v. Robinson, 142 Cal. 199, 75 Pac. 776. In that case the plaintiff sought to recover taxes paid to a drainage district, the payment having been made under protest in pursuance of section 3819 of the Political Code. We there held that the statute creating the drainage district provided no method of paying taxes under protest, neither did it adopt the provisions of the Political Code relating to the collection of state and county taxes. We are in agreement with the holding in that case. But it has no application to the facts here presented. Once it is fully appreciated that the city and county of San Francisco is, by the very constitutional provision authorizing its existence, a municipality, subject to all the restrictions of a city, it becomes clear that the same rules apply to it as apply to any city having a freeholders' charter. In municipal affairs the charter and any acts of the city in pursuance of it are paramount; but if, as here, the charter contains no provision on the particular subject that is self-executing, and nothing is done to carry the authorization of the charter into effect, then under the Constitution as it was when this action was begun, the general law remains paramount. Civic Center Ass'n v. Railroad Commission, 166 Pac. 351, 354.

It is claimed by respondent that "the mode * * * of collecting all taxes," which is the language used in section 4390, Political Code, does not include the payment of taxes under protest, from which it would follow that while other provisions of the general law for the collection of taxes would apply to San Francisco, section 3819, which is in the same chapter, would have no application. Respondent relies upon Farmers' & Merchants' Bank v. Los Angeles, supra. But that case was decided upon the point that the charter required a prior presentation of the claim, and what was said about section 3819 was a mere expression of doubt on the subject and no decision was made thereon. The exact question was decided in Hellman v. City of Los Angeles, 147 Cal. 653, 82 Pac. 313, where the court said:

> "It is quite plain that section 3819, found in chapter 7 of the Political Code, under the title of 'Collection of Property Taxes,' is a part of the 'mode and manner' of collecting state and county taxes, and is none the less a part of that mode and manner in that it deals with the right of the taxpayer to pay under protest. It would be absurd to say that the mode and manner of collecting taxes was limited solely to the right of the state and its tax collectors, and had reference only to the duties of the taxpayer, and no pertinency whatever to the taxpayer's correlative rights. It is a provision definitely declaring a certain mode and manner in which the taxpayer may pay his taxes and preserve his rights in case the assessment and levy should be found void. The statute is in derogation of the general common-law rule as to voluntary payments, and is befitting to this more enlightened age."

[6] Much of the difficulty that has arisen in this case is caused by the peculiar and anomalous position occupied by the city and county of San Francisco, having the powers and exercising the functions both of a city and of a county. It would be a fruitless task even to attempt to segregate the activities of the municipality and of its officers and employés according as they partake of the character of city or county functions. In so far as San Francisco has the attributes of a county, section 3819 of the Political Code by its terms applies; in so far as it has the attributes of a city, section 3819 is made applicable by reason of the failure of the charter to provide any other system for the collection of taxes. The exact status of the city and county of San Francisco, whether it is to be determined by the provisions relating to counties or by those relating to cities, is not, therefore, pertinent to the issue here presented. It is argued by respondent that the limitation on the rate of taxation cannot apply to taxes used for what are normally county purposes because they are prescribed by the state and no discretion as to their performance by the city and county of San Francisco would be permitted; consequently, the dollar limit would apply only to taxation for municipal purposes, and it is not alleged that the tax rate for such purposes exceeds the limit. Granting that the city and county cannot by a limitation upon its tax rate disable itself from performing the functions properly imposed upon it by the state, it does not appear that the limit fixed in this instance is insufficient to enable such functions to be performed. The question of the due performance of county duties being eliminated, the abstract right to place a limit upon the rate of county taxation becomes unimportant.

It follows that the complaint was not defective in the particulars claimed and that the demurrer was improperly sustained. We are not here concerned with the merits of plaintiffs' contention that the suspension of the dollar limit is invalid. That must in the first instance be determined by the trial court after answer by the respondent.

The judgment is reversed, with directions to the lower court to overrule the demurrer to the complaint and permit the defendant to answer.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.

On Petition for Rehearing.

PER CURIAM. In its petition for a rehearing, the respondent urges that the opinion is in error in holding that section 4390 of the Political Code is applicable to the city and county of San Francisco. The criticism seems to be well founded. Ex parte Simpson, 47 Cal. 127; In re Pfahler, 150 Cal. 71, 88, 88 Pac. 270, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911.

But the decision may well stand without regard to section 4390. No mode for the collection of taxes has been prescribed in the charter itself, or by the legislative body of the city and county, under the authority given by the charter. Section 3819 of the Political Code is a general law, a part of the system established for the collection of county taxes. San Francisco is a county, as well as a city. Unless the provisions of the general law for the collection of taxes apply to San Francisco, the city and county is left without any scheme for collecting taxes. In the absence, at least, of any provision on the subject contained in, or made pursuant to, the charter, the scheme of which section 3819 is a part must be held to be in force in the city and county of San Francisco.

The petition for a rehearing is denied.

(37 Cal. App. 34)

WENTLAND et al. v. CLARK & HENERY CONST. CO. (Civ. 1846.)

(District Court of Appeal, Third District, California. April 22, 1918.)

1. MUNICIPAL CORPORATIONS 🔑281(1) — STREET IMPROVEMENTS—PAVING CONTRACTS —RIGHT OF LOT OWNERS.

In a proceeding for street improvements in a city of the sixth class under St. 1911, p. 736, § 12, providing that the owners of three-fourths of the lots liable to assessment therefor may, within 10 days after first publication of notice of award for paving contracts, enter into a written contract to do the work themselves and that if they fail to so elect within the 10 days the superintendent of streets shall enter into a contract therefor with the person to whom the award was made, section 13, providing for letting of the contract in case original bidder refuses to enter into the contract, and section 18, authorizing the superintendent of streets to make all written contracts, when the board of trustees made its award its powers ended and a notice under section 12, given to them within the 10 days after publication of notice of award, conferred no rights upon the property owners.

2. MUNICIPAL CORPORATIONS 🔑519(1) — STREET IMPROVEMENTS—ASSESSMENT LIEN.

Under the Improvement Act, a lien exists before the making of the record by the superintendent of streets, and an error in the record stating the contract was to be completed in 80 days, when the original contract on file called for 180 days, does not affect the lien.

3. MUNICIPAL CORPORATIONS 🔑444—STREET IMPROVEMENTS—PAVEMENT CONTRACT—SPECIFICATIONS.

Where the specifications and the resolution of intention provided for improvement of a street between certain other streets, it was immaterial that the plans accompanying the specifications were in error as to the exact foot frontage of some owners, particularly where no appeal therefrom, under Improvement Act, § 26, was taken.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Actions by Fred Wentland and another, and Ann M. Phillips and another, against the Clark & Henery Construction Company. Judgment for defendant and the named plaintiffs appeal. Affirmed.

Walter R. Dunn, of Oakland, for appellants. White, Miller, Needham & Harber, of Sacramento, for respondent.

CHIPMAN, P. J. This is an action to quiet title from a street assessment with a cross-complaint by defendant for moneys claimed to be due under the assessment. There were three cases set down in the trial court at the same time for trial—the present case, No. 1846, and the case of Sarah A. Lillie v. Clark & Henery Construction Co. (No. 1845) 173 Pac. 483. In the third case Ann M. Phillips is plaintiff and is here on appeal in No. 1846. The trial court directed:

> "That the evidence introduced, so far as the same is applicable, shall be considered as directed to the case to which the testimony may be pertinent as it may be introduced."

At the hearing here, counsel addressed themselves to No. 1846 (Fred Wentland et al. v. Clark & Henery Construction Co.) with the understanding that the points involved were the same as in No. 1845 and should embrace the case in which said Phillips is plaintiff. Judgment went for defendant and cross-complainant. The appeal is from the judgment and is by plaintiffs Fred Wentland and Ann M. Phillips.

The city of Lodi, a city of the sixth class, by its city council, on October 9, 1914, adopted plans and specifications and passed a resolution of intention to grade, pave, and gutter three blocks of Pine street in said city "from the center line of Garfield street to the easterly city limits." The contract for the work was duly awarded to defendant on November 18, 1914, and publication of notice thereof duly given and made on November 20, 1914. Certain of the owners of lots fronting on that part of Pine street to be improved, among the number appellants Wentland and Phillips, decided to take over the proposed work themselves. A daughter of one of the interested parties telephoned on their behalf to the superintendent of streets, Coleman, within 10 days after the contract was awarded to respondent, informing him of their intention and requesting information as to the necessary procedure. He answered that he could do nothing for them.

Witness Fleming, one of the property owners, testified that he had a conversation with Mr. Coleman, street superintendent, two or three days prior to November 30, 1913, and was asked what the conversation was:

> "I asked him for plans and specifications for to figure on, told him we were to take over the paving and do it ourselves; and he said he didn't have any, couldn't furnish me any. He says: 'By the way, I have some specifications for curbing that I made myself. I can furnish them to you.' And he also gave them to me; and that was practically all there was said. Q.

> Did you or did you not at that time tell him whether or not you wanted to take over the contract? A. I told him we were figuring on it, to take it over, and we wanted those plans and specifications to figure on, to know what we were to do. Q. Did you afterwards have any conversation with him after that, in regard to it? A. I did not. Q. Ever go to see him? A. I don't think I did."

No further notices were given to the superintendent of streets and no other requests were made to him. Counsel for plaintiff offered to prove by this witness that on November 30, 1914, the property holders went before the board of trustees "and then and there told the board of trustees they were there for the purpose of taking over the contract for the performance of this work, and that the board of trustees told them they were too late, and refused to let them have the contract." The offer was objected to as immaterial, irrelevant, and incompetent, and the objection was sustained. Counsel for defendant moved "to strike out the testimony of the witness concerning the conversation between him and the superintendent of streets, Coleman, as being irrelevant and immaterial." The court:

> "I can state right from the bench, with regard to testimony of that kind, it is not sufficient in legal effect to justify the court in taking any action on it. Now whether any testimony will be introduced upon which the court could take action, I cannot say until I have heard all the testimony."

No further testimony was offered by plaintiffs. The remaining evidence consisted of copies of certain of the proceedings in the matter of letting the contract, namely: the contract and the contractor's bond; certificate of the engineer; assessment; contractor's return; diagram; warrant; street superintendent's certificate; plans and resolution of intention.

It should be noted that plaintiffs made the following offer:

> "Mr. Dunn (plaintiff's attorney): We want to prove by this witness (Mr. Coleman), the superintendent of streets, after the recording of this assessment, did not keep his office open during business hours, between the 14th day of—after recording the instrument—until the expiration of the 30 days within which the property holders were required to appeal to the board of trustees. Mr. White: To which offer I object as incompetent, irrelevant, and immaterial, on the ground that the property owner, or any citizen has, or any party interested has, an entirely different mode of relief if a public officer don't keep his office open. The Court: The objection is sustained. We are not trying Mr. Coleman as to whether he has innocently rendered himself liable for damages by failure to keep his office open during business hours. Mr. Dunn: That is all."

[1] 1. The point principally urged by appellants is that it was the duty of the board of trustees, in response to the notice given them by the property owners, to direct the street superintendent to let the contract to them. The work in question was being done under the Improvement Act of April 7, 1911, Stats. 1911, p. 730. Section 12 of the act reads, in part, as follows:

> "The owners of three-fourths of the * * * lots and lands liable to be assessed, or their agents, and who shall make oath that they are such owners or agents, shall not be required to present sealed proposals or bids, but may, within ten days after the first publication of said notice of said award, elect to take said work and enter into a written contract to do the whole work at the price at which the same has been awarded. * * *"

The section provides that:

> "Should the said owners fail to elect to take said work and to enter into a written contract therefor within ten days, * * * it shall be the duty of the superintendent of streets to enter into a contract with the original holder to whom the contract was awarded and at the price specified in his bid."

The section does not specifically indicate to what officer or body the application of the owners must be made. Appellants claim, however, that:

> "It may easily be drawn from section 13 that, in letting a new contract, the city council must disregard further election of the owners. In the absence of statutory direction to the contrary, the owners should have the right to make their election before either the city council or the superintendent of streets."

Section 13 throws no light upon the question. It simply provides that:

> "If such original bidder neglects or refuses for fifteen days after the first publication of the notice of award, to enter then into the contract, the city council, without further proceedings, shall again advertise for proposals or bids," etc.

Section 18 provides as follows:

> "The superintendent of streets is hereby authorized, in his official capacity, to make all written contracts, and to receive all bonds authorized by this act, and to do any other act, either express or implied, that pertains to the street department under this act," and setting forth sundry other powers and duties in respect of the contract.

When the board of trustees made its award, its powers and duties in respect of letting the contract ceased. It then became the duty of the superintendent of streets either to cause the contract to be entered into by the original bidder or with the property owners should they elect to take over the work. The statute confers this power and duty upon him, acting of course, in his official capacity, and it was not necessary for the board of trustees to take further action unless there was a failure on the part of the original bidder to enter into the contract, in which case the city council, under section 13, was directed to "again advertise for proposals or bids." The notice given by the property owners to the board of trustees conferred no rights upon them, nor did it impose any duty upon the board of trustees. Somewhat similar provisions to those in the Improvement Act are found in the act of 1889 (Stats. 1889, p. 162). In Fairchild v. Wall, 93 Cal. 401, 29 Pac. 60, the superintendent of streets entered into a contract with the property owners after an award had been made to plaintiff. Mandamus was sought by plaintiff to compel the city council to enter into a contract with the plaintiff for the work. The writ was denied. As we understand that case, the superintendent of streets let the contract to the property owners without further authority than that conferred by the statute and without any action on the part of the city council other than making the award in the first instance.

Appellants do not rely, nor do we think under the facts shown they could rely, upon the notice given to the superintendent of streets. Their reliance is upon their construction of the statute that, upon the election of the property owners being made known to the board of trustees, it became the duty of that body to award the contract to the property owners and to direct the superintendent of streets to enter into the contract for the work with them. We cannot agree with appellants in their construction of the statute.

[2] 2. In copying into the record kept by the superintendent of streets, it was stated that the time for the completion of the contract was within 80 days. Concededly, the work was not completed within that time but was completed within 180 days. Defendant introduced the original contract which showed that the time of completion was within 180 days and the superintendent of streets testified that a mistake was made in copying it into the record. The original contract was on file in his office with other records and was open to inspection, as were other records. The mistake in recording the contract did not affect the lien for the reason that, under the provisions of the improvement act of 1911, a lien exists before the making of the record. Plaintiffs must have known of the terms of the award, and in offering to do the work on such terms they must have known the price to be paid.

It was held under the Vrooman Act, § 10 (St. 1885, p. 155), that a failure to record the contract will not prevent recovery. Perine v. Lewis, 128 Cal. 236, 60 Pac. 422, 772.

[3] 3. It is claimed that the assessment is invalid for the reason that the plans which accompanied the specifications for the work indicated that the frontage of plaintiff Wentland's lot was 155.5 feet and that the record of the assessment shows but 152 feet. Also, that in the case of the assessment of Ann M. Phillips the specifications showed that her lot had 286 feet frontage, whereas the assessment shows 294.51 feet.

The resolution of intention stated that the following work was to be done, to wit:

> "That Pine street in said city between the center of Garfield street and the easterly city limits be improved by grading the same * * * in accordance with the plans and specifications adopted therefor by the board of trustees of said city, October 9, 1914, to which said plans and specifications reference is hereby made for description of said work and further particulars."

No mention of lots is made.

The plans and specifications describe the work to be done the same as above; that is, Pine street between the center of Garfield street and to the easterly city limits. The plans attached to the specifications are made part thereof. The blueprint copy of the plans shows on its face that it is "plan for improvement of East Pine street, city of Lodi, California, between Garfield street and the east city limits."

The court found that this blueprint "indicated that the lot belonging to Fred Wentland, and which fronts on said street, had a frontage of 155.5 feet, and that the lot of plaintiff Ann M. Phillips, fronting on said street, had a frontage of 286 feet. In fact, the lot of Fred Wentland had a frontage of 152 feet and the lot of Ann M. Phillips had a frontage of 294.51 feet." The certificate of the city engineer states the whole amount each of the grading, paving, curbing, and gutters. Assessment No. 4, as made by the superintendent of streets, shows that the assessment is upon certain lots fronting on Pine street to the easterly city limits amounting in all to $3,460.90, and showing "the number of the lot and the amount assessed thereon." Attached to his certificate is a diagram showing the entire line of the work and the lots fronting on Pine street and the actual frontage of each on which the assessment was made. The Wentland assessment was on 152 feet, his actual frontage, and on 294.51 feet, the actual frontage of Ann M. Phillips' lot. It is not claimed that the entire work done was less than was certified to by the city engineer and superintendent of streets, and it is not contended that the actual frontage of the Phillips lot was less than that assessed. The specifications did not call for the improvement of a certain number of feet in front of each lot fronting on Pine street or for any specified number of feet. They called for the improvement of the street between certain stated points—from Garfield street to the easterly city limits, and it was not necessary to state in the specifications the frontage of each lot. The juridiction to do the work had its origin in the passage and publication and posting of the resolution of intention. Plaintiff Wentland has no cause for complaint, since he was assessed for less frontage than shown in the specifications and admittedly for his actual frontage. Nor can we see why plaintiff Phillips should escape payment because of the variance between the statement of an immaterial fact in the specifications and in the final certificate of the engineer of the actual length of the improved line of the street and the actual part of that line which was in front of the Phillips lot. Defendant's obligation was to complete the work as designated in the resolution of intention and this, concededly, it has done. The law fixes the liability of the lot owner, and, as no substantial right of any lot owner is shown to have been violated, the contractor should, pursuant to the statute, be paid for his work in accordance with his contract and the resolution of intention.

Section 26 of the act gives the right of appeal to the city council to all interested persons, if aggrieved, within 30 days after the date of the warrant, and the council is given power "to modify or correct any assessment in such manner as to them shall seem just," and the decision of the council is made final on all matters as to which an appeal is given. "No assessment, warrant, diagram or affidavit of demand and non-payment, after the issue of the same, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality, or other defect in the same, where the resolution of intention of the council to do the work, has been actually published as herein provided, and said notices of improvement have been posted along the line of the work, as provided in section five of this act, before the passage of the resolution ordering the work to be done."

The law was fully complied with in these particulars. No appeal was taken by any of the property owners at any stage of the proceedings.

Appellants seek to excuse their failure to appeal on the grounds: First, that the defects pointed out appeared on the face of the record and no appeal was necessary as the property owner was not aggrieved, citing Ryan v. Altschul, 103 Cal. 174, 176, 37 Pac. 339; and, second, because "the record was inaccessible by reason of being locked up as hereinbefore mentioned, and which appellants offered to prove." We do not think the record shows any invalidity in the assessment on its face or at all. Plaintiffs called Mr. Coleman, superintendent of streets, and made the offer set forth in the early part of this opinion to which objection was sustained. It does not appear, nor did plaintiffs offer to show, that the superintendent of streets was inaccessible and could not be found, or, being found, refused to allow plaintiffs access to the records. Nor does it appear, nor was it attempted to be shown, that plaintiffs had not or could not obtain the information necessary to take an appeal; nor does it appear that they had any intention to appeal, nor that they had any substantial grounds for appeal. On the contrary, as we have seen, the proceedings were regular and without substantial infirmity and that an appeal, if taken, would have been unavailing.

We fail to discover error in the ruling of the court or that appellants were excused from taking an appeal to the board of trustees if they felt aggrieved.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

(37 Cal. App. 815)

LILLIE et al. v. CLARK & HENERY CONST. CO. (Civ. 1845.)

(District Court of Appeal, Third District, California. April 22, 1918.)

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Sarah A. Lillie and another against the Clark & Henery Construction Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Walter R. Dunn, of Oakland, for appellants. White, Miller, Needham & Harber, of Sacramento, for respondent.

PER CURIAM. The questions presented in this case are identical with those considered in Wentland et al. v. Clark & Henery Construction Co. (No. 1846) 173 Pac. 480, this day decided.

Upon the authority of that case, the judgment in the present case is affirmed.

(37 Cal. App. 11)

BOND v. AICKLEY et al. (Civ. 2383.)

(District Court of Appeal, First District, California. April 18, 1918. Rehearing Denied by Supreme Court June 17, 1918.)

ADVERSE POSSESSION ⚷114(1) — EVIDENCE — SUFFICIENCY.

In an action between grantees of a common grantor, in which defendants set up paramount title derived from remote owners by the common grantor after his deed to plaintiff, evidence *held* to show adverse possession by the common grantor and plaintiff as his grantee, which barred the title which the remote owners attempted to convey.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Suit by Mary Bond against Ruth Aickley, administratrix of the estate of W. C. Aickley, deceased, Irving E. Smith, and others. From a decree for plaintiff, defendant Smith appeals. Affirmed.

L. D. Manning and McKee & Tasheira, all of Oakland, and Matt. Wohrhaftig, for appellant. F. A. Berlin, of Oakland, for respondent.

BEASLY, Judge pro tem. This action to quiet title was begun on June 4, 1907, by the plaintiff, Mary Bond, against W. C. Aickley, James Miller, and Lydia A. Larue individually and as the administratrix of the estate of James Larue, deceased. On September 1 1909, Aickley made a deed of the property in controversy to Irving E. Smith, after which Aickley died, and his widow, Ruth, who had become his administratrix, and Smith, his grantee, were substituted in his stead as defendants. From the judgment in favor of the plaintiff, Smith appeals.

The action was once before appealed to the Supreme Court and reversed by that court. Bond v. Aickley, 168 Cal. 161, 141 Pac. 1188. At the time of the first trial, from which that appeal was taken, none of the parties attempted to deraign title from any paramount source. Reference may be had to the opinion of the Supreme Court in that case for the facts as they appeared in the record at that time.

On the second trial the defendants attempted to show a paramount title derived by William C. Aickley subsequent to his deed to Annie Bond. This attempt was based upon two deeds to the property executed the one by Lydia A. Larue upon April 2, 1907, purporting to convey an undivided one-half of the property to Aickley, and the other by R. C. Corrigan, dated September 24, 1908, and purporting to convey the whole thereof to Aickley. The appellant claims that Lydia A. Larue and Corrigan, when they executed these deeds to Aickley, held the title to this property. The property is a part of a small tract 37½ feet wide at one end, and running down to a point apparently at the other, known to searchers of record in Alameda county as "No man's land." It is a portion of the rancho San Antonio, which was a Mexican grant made to Antonio Maria Peralta, confirmed by a patent of the United States dated September 15, 1874. Previous to the patent the title to the strip of land, of which the little lot in controversy here formed a part, had been obscured and entangled by conveyances of parts of the ranch to many parties; and, while we have examined this record with care after the manner of a technical title attorney, and find that the title apparently did not, at the time of their deeds to Aickley, rest in either Mrs. Larue or Corrigan, we are not confronted with the necessity of determining that point, because the plaintiff's title seems to be supported by proof of adverse possession on the part of W. C. Aickley before he deeded to Mrs. Bond, coupled with the possession of Annie Bond, his grantee, and the plaintiff, Mary Bond, subsequent to that date and extending down to the time of filing the complaint in this action.

It appears that this strip of land was vacant in 1890; that there were no improvements thereon, and no one was in possession thereof. About that time W. C. Aickley went upon the land, and between 1890 and 1892 he improved it by placing a two-room house thereon. He retained possession of the property in person, and by the improvements which he placed thereon until the year 1892, when he went to live with Annie Bond, and remained with her without paying any board for five or six years. Evidently feeling under obligation to her, Aickley, on the 16th day of April, 1894, about three or four years after he took possession of the property, conveyed it to Annie Bond, and on the 5th day of February 1895, Annie Bond quitclaimed the same to the plaintiff, Mary Bond. During the years between the time when Aickley took possession of the property and the beginning of this action either Aickley or Annie Bond or Mary Bond maintained the house upon the premises, making various improvements of a substantial character thereon, occupying the house, and at times leasing the same to a tenant. While they were not always in actual, physical possession of the property by being actually personally located in the home, they did always claim title thereto, and always held the possession thereof so far as the acts above described show possession. There is no evidence that any other person ever had possession of the property during this period, and the evidence shows that some one of the parties was at various times and during most of this period in actual physical possession thereof, and that they claimed ownership of the property, Annie Bond and Mary Bond especially asserting title thereto at all times by reason of their deed from Aickley. The evidence of the various movements of this family is not perfectly co-ordinated; but it is sufficient to show an ownership claimed against the world, and a possession adverse to every person who might claim the property against them. Aickley and the Bonds evidently paid the taxes on the property during the years when they respectively occupied it and held and claimed to own it. From 1891 to 1897 the property was assessed to Samuel Lewis. The evidence shows that the plaintiff had the tax bills from 1892 down to 1900 consecutively. These tax bills were in the office of her attorney in San Francisco at the time of the great fire of 1906, and were badly damaged in that catastrophe; but they were produced in court, and this, in connection with other evidence as to the payment of the taxes, is sufficient to sustain the finding of the court that the taxes were paid by Annie Bond and the plaintiff. While the evidence upon the subject of the payment of taxes, and also upon the subject of adverse possession, is not as full as could be desired, it must be said, in passing upon the findings made by the court based upon this evidence that often one of the most difficult things to prove is the name of the person paying taxes, and that we can find no fault with the findings of the trial court upon these propositions. This being so, the after-acquired title of Aickley from Corrigan and Mrs. Larue was barred by the adverse possession of himself, and of Annie and Mary Bond thereafter, before this action was begun.

Judgment affirmed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

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37 Cal. App. 22

EDSON et al. v. MANCEBO. (Civ. 1564.)

(District Court of Appeal, Third District, California. April 22, 1918.)

1. Sales 🔑439 — Breach of Warranty — Proof.

Where a stallion was sold under written warranty that he was a 60 per cent. foal-getter, and that, if not, the sellers would furnish another stallion on his redelivery, etc., to defeat the sellers' action on the buyer's notes it was incumbent on the latter to show that the stallion failed to meet the warranty, that he was properly cared for, and that the buyer delivered or was legally excused from delivering him to the sellers in as good condition as when sold.

2. Sales 🔑287(6)—Breach of Warranty—Duty to Return—Excuse.

Where the buyer of a stallion under warranty as to his procreative powers offered to return the horse on discovery of deficiency in that respect, but the sellers refused to furnish him with another horse, as they had agreed, the sellers' refusal to comply with their agreement relieved the buyer of an obligation to do more than offer to return the horse.

3. Sales 🔑287(3)—Breach of Warranty—Offer to Return—Timeliness.

Where a stallion was sold under warranty as to his procreative powers, which warranty was not limited to the season of 1913, and the buyer, on discovery of his defect in respect to such powers, offered to return him in the latter part of 1913, or the early part of the spring of 1914, as soon as practicable after the ascertainment of the stallion's incapacity, the offer to return was timely within the warranty, since, though the buyer could not retain the horse indefinitely without offer to return, it was not unreasonable to try him for another season.

4. Trial 🔑252(13)—Instruction—Lack of Support in Evidence.

In an action on notes given for the price of a stallion, where there was no evidence that the buyer's offer to return the stallion for breach of warranty of procreativeness was not seasonably made, an instruction that the contract between the sellers and buyer required that the buyer, within a reasonable time after the breeding season of 1913, demand that the seller replace the stallion with another, and that, if the buyer did not within such time demand that the stallion be replaced, and his notes were not induced by fraud or misrepresentation, it was the jury's duty to bring in verdict for the sellers, was unsupported by any evidence, and properly refused.

5. Trial 🔑199 — Determination of Issue of Fraud—Province of Court.

An instruction which would have submitted to the jury the issue of fraud in the notes in suit, given for the price of a stallion, where defendant asked reformation and enforcement of contract, which was reserved and determined by the court itself in accordance with the averments of the answer, was properly refused; it being the province of the court, and not of the jury, to determine the issue.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Suit by James Edson and Frank Brown, doing business under the firm name of Edson & Brown, copartners, against M. A. Mancebo. From judgment for defendant, plaintiffs appeal. Affirmed.

William V. Cowan, of Sacramento, for appellants. F. W. Henderson, of Merced, for respondent.

BURNETT, J. This suit was brought to recover upon three promissory notes executed by respondent on March 5, 1913. The validity of the notes was not disputed nor was it denied that the amount claimed was unpaid. The defense was that they were given for the payment of a certain stallion purchased by respondent from appellants upon a certain guaranty that failed and thereby avoided the contract. It is not disputed that there was a written guaranty, as follows:

> "If the above-named stallion should not get 60 per cent. of the producing mares that are properly bred and returned for second trial at the end of the third week in foal, during the breeding season commencing April 1st, and ending August 1st, with proper care and management, we agree to find another stallion of the same size, breed, and quality upon delivery of the above-named stallion in as good condition as at present to our barn at Sacramento, California."

Another defense was that the respondent was illiterate; that he could not and did not read the contract; that appellants, through their agent, deceived respondent as to the terms of the guaranty, by reading it to him so he thought it provided that said stallion was potent to the extent of getting at least 60 per cent. of the mares bred to him in foal, and, that in the event of his failing so to do, said stallion might be returned and the notes hereinbefore mentioned canceled and returned to defendant. Respondent therefore asked to have the contract reformed in that respect and enforced as thus reformed. There is no dispute as to the sufficiency of the pleadings, and therefore the demurrer need not be considered.

A jury found a general verdict for the defendant, and the court reformed the guaranty as prayed for, and gave judgment to the defendant for his costs.

[1] We may consider the case first upon the theory that the written guaranty contained the real agreement of the parties. In that respect, to defeat the action, it was incumbent upon the defendant to show that the horse failed to meet the procreative requirement, that he was properly cared for, and that respondent delivered or was legally excused from delivering said stallion to appellants in as good condition as when said stallion was sold at their barn in Sacramento. In other words, there must have been a violation of the warranty on the part of appellants and no default on the part of respondent. This, of course, the law required, and the jury was so instructed.

[2] Considering, then, the terms of the warranty, we may say that the evidence was ample to show that the horse was woefully lacking in potency. It would probably not be inappropriate to call him a "slacker." It would do no good to repeat the evidence, but it has been read with some care. Nor can it be doubted that the horse received proper care and management, and that during all the time in controversy he remained in as good condition as when he was sold. The only remaining element relates to the duty of the defendant to redeliver the horse to the plaintiffs at Sacramento. He did not so deliver him, but there is substantial evidence from which the reasonable inference follows

that he was not in default for his omission thus to return the horse. After ascertaining that the stallion was deficient, he had a conversation with one Biggerstoff as follows:

> "I told him that horse is no good, to take that horse away and give me my notes back. 'Take that horse; if you don't give me another horse like that, I want to make money for to pay for it.' * * * I say, 'The horse is no good, Mr. Biggerstoff; you better do that.' He said, 'I am going to sell it.' * * * He said he would not give me the horse that would weigh the same as that. He would not get it; he said, 'This is a big Belgian I got,' and he said, 'I cannot get another horse just like that, that weigh the same.'"

As to this, it might be stated that Biggerstoff represented appellants throughout the transaction. There is no doubt of the sufficiency of the evidence not only to show ostensible, but real, agency on his part. Said conversation may therefore be regarded as if it had taken place with the appellants themselves. The result is that upon the offer of respondent to return the horse as he had agreed appellants declined and refused to furnish him with another horse as they had promised. The conditions being mutual and concurrent, the refusal of appellants to comply with their covenant, of course, relieved respondent of an obligation to do more than to make the offer.

Under such circumstances offer to perform is equivalent to performance. No citation of authority is required for the support of such proposition. We may say, though, that the principle is recognized in section 1511 of the Civil Code. As to the good faith of respondent, we may add that he attempted to sell the horse, in fact, delivering him to said Biggerstoff for that purpose upon the latter's solicitation, but the effort failed of any results, and there is evidence in the record that the horse was and is without any appreciable value.

From the showing made by respondent we may therefore conclude that the consideration for the notes was lost through the failure of the warranty without any default on the part of the respondent.

The evidence being sufficient to support the first defense of respondent, it is unnecessary to consider the second. In fact, support for the first would necessarily cover the second.

Appellants seem to think that the conclusion reached is opposed to the doctrine of the case of Union Investment Co. v. F. M. Landon Co., 32 Cal. App. 305, 162 Pac. 903, decided by this court. Therein it is true that in a similar action upon a similar contract it was held that a mere offer to return was not sufficient to entitle the vendees in an action brought against them to recover the balance of the purchase price to successfully urge the breach of the warranty as to the breeding qualities of the horse as a defense to the action. But in that case there was no waiver of the performance on the part of the vendees, and it was very justly said:

> "And there could be a failure of consideration only in case the stallion failed to come up to the percentage for foal-getting provided by the warranty and the refusal or failure of the vendees to replace the stallion with another of the same breed and value."

Herein we are justified in holding that the horse fell short of the warranty, that there was a refusal of the vendors to supply another animal as agreed, and that they waived the performance by respondent of his agreement to deliver the horse at Sacramento.

[3] Another point made by appellant is:

> "That the failure of the defendant to offer to return the horse within a reasonable time after August, 1913, precluded him from setting up a lack of consideration."

There is evidence, however, that this offer was made in the latter part of the year 1913, or in the early part of the spring of 1914. It was timely, for two reasons: First, because it was as soon as practicable after the ascertainment of the fact as to the horse's incapacity; and, second, because the warranty was not limited to the season of 1913. Manifestly the vendee would not be permitted to retain the horse indefinitely without offer to return him, but it would not be unreasonable to hold that he might elect to try him for another season to determine beyond question the ability of the horse to meet the situation.

Moreover, it appears from the testimony of appellants that, if the offer had been made immediately after August 1, 1913, it would have been of no avail, since it would not have been accepted and no exchange would have been made. Therefore any delay was without prejudice to appellants.

[4, 5] The only other point made is that the court erred in refusing to give the following instruction:

> "I instruct you that the contract between the plaintiff and defendant required defendant within a reasonable time after the breeding season of 1913 to demand that plaintiff replace the stallion Socrates with another stallion. If you find from the evidence that the defendant did not within such time demand that said stallion be replaced, and if you further find that said notes were not induced by fraud or misrepresentation, it is your duty to bring in a verdict in favor of the plaintiff."

But it is sufficient to say that, if there was an offer, it was made within a reasonable time. In other words, there is no evidence that it was not seasonably made. Hence the theory of the instruction in that respect was not supported by any evidence. Besides, appellants admit that they would have refused any offer made after August 1, 1913. In view of that admission, they could not claim that an offer should have been made immediately thereafter. It would have been an idle act, and therefore not required.

Moreover, the instruction would have submitted to the jury the issue of fraud, whereas it was reserved and determined by the court itself in accordance with the averments of the answer. It was the province of the court, and not of the jury, to determine that issue.

Respondent claims that the record shows that the judgment has been satisfied, and therefore no appeal lies. We find no such evidence in the transcript, but for the reasons stated we think the judgment should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

(37 Cal. App. 60)

IRVINE v. POSTAL TELEGRAPH-CABLE CO. (Civ. 2311.)

(District Court of Appeal, First District, California. April 24, 1918. Rehearing Denied by Supreme Court June 20, 1918.)

1. CONTRACTS 🔑138(2)—CONTRACT TO FURNISH TELEGRAPH PRIVILEGES—ILLEGALITY—RELIEF.

Under Civ. Code, § 1451, providing that, if one of the alternative acts required by an obligation becomes unlawful or impossible of performance, the obligation is to be interpreted as though the other stood alone, where a contract whereby a telegraph company secured a right of way for its line over plaintiff's land provided that the consideration for the rights granted was "telegraph privileges to the amount of $1,500, which said amount shall be taken in the use of telegraph privileges at the usual and ordinary rates," on the company's failure to deliver telegraph franks when needed and requested, after federal and state laws prohibited telegraph companies from issuing franks for any consideration whatsoever except cash, the contract became one to pay the sum of money designated as a consideration for the privileges granted, since the amount of money named was the exact equivalent of the telegraph privileges which the company was compelled to furnish.

2. CONSTITUTIONAL LAW 🔑113 — OBLIGATION OF CONTRACTS—PROHIBITION AGAINST STATES.

The provision of Const. U. S. art. 1, § 10, against the passage of laws impairing the obligation of contracts applies expressly only to the states, and not to Congress.

3. CONSTITUTIONAL LAW 🔑155—OBLIGATION OF CONTRACTS—FRANKING PRIVILEGE.

Under Const. U. S. art. 1, § 10, providing that no state shall pass any law impairing the obligation of contracts, where a telegraph company, in consideration of a grant of right of way for its line over plaintiff's land, agreed to furnish telegraph privileges to the amount of $1,500, the state Public Utilities Act, passed thereafter, prohibiting telegraph companies from issuing franks for any consideration except cash, had no effect on the obligation of the telegraph company to furnish franks for intrastate messages.

4. CONTRACTS 🔑137(2)—PARTIAL ILLEGALITY — SEVERABLE CHARACTER — INTRASTATE AND INTERSTATE MESSAGES.

Where a telegraph company's contract, in return for grant of a right of way, to furnish privileges or franks to the amount of $1,500, became void as to interstate messages by the subsequent enactment of the Interstate Commerce Act (Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379), it did not also become void and unenforceable as to intrastate messages, as to which the franking privilege was within the protection of Const. U. S. art. 1, § 10, providing that no state shall pass any law impairing the obligation of contracts, since the contract to furnish telegraph privileges to the amount specified was not entire and inseparable; interstate and intrastate messages being clearly separable in fact and law.

5. CONTRACTS 🔑138(2)—ILLEGALITY OF PERFORMANCE—RIGHT OF ACTION.

Where a telegraph company, in consideration of a right of way, agrees to accord plaintiff $1,500 worth of telegraph privileges, and performance thereafter becomes illegal on account of federal and state legislation prohibiting grant of telegraph franks, the reasonable value of the right of way granted the telegraph company being $1,500, and the only consideration ever received by plaintiff being $500.26 worth of franks, plaintiff has a cause of action for the recovery of $999.74.

6. TELEGRAPHS AND TELEPHONES 🔑20(5) — GENERAL DEMURRER—STATEMENT OF CAUSE OF ACTION.

In an action against a telegraph company to recover on quantum meruit for a right of way furnished it, for which it agreed to accord plaintiff $1,500 in telegraph privileges, performance on its part having become illegal under legislation prohibiting franks, the complaint, which failed to allege the company continued in possession after September, 1913, but alleged that the value of the right of way and the use and enjoyment thereof by the company and its predecessor up to that date was $1,500, stated a cause of action as against general demurrer.

7. CONTRACTS 🔑138(1) — SUBSEQUENT ILLEGALITY—EFFECT.

The rule that, where parties to an illegal contract are in pari delicto, the court leaves them as it finds them, and there can be no recovery for the reasonable value of the property transferred under it, does not apply where the contract, when made, was legal, just, and equitable, but has become unlawful in part by subsequent legislation.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by James Irvine against the Postal Telegraph-Cable Company, a corporation. From judgment for defendant, plaintiff appeals. Reversed, with directions.

Guy C. Earl and W. H. Spaulding, both of San Francisco, for appellant. Willard P. Smith and Berkeley B. Blake, both of San Francisco, for respondent.

LENNON, P. J. This is an appeal from a judgment following an order sustaining defendant's general demurrer to plaintiff's second amended complaint.

The complaint alleges the execution of a written contract on April 29, 1893, between the plaintiff and defendant's predecessor in interest, the Pacific Postal Telegraph-Cable Company, and the assignment of the contract by the Pacific Postal Telegraph Company to defendant; that by the terms of the contract plaintiff granted to the telegraph company a right of way and easement to construct and maintain poles for telegraph lines across his property. The alleged consideration for the said grant was the sum of $1,500 cash, the defendant to have the privilege, however, of paying in telegraph franks to that amount. The contract, which was attached to the complaint and made a part thereof, provided that the consideration for the rights and privileges was to be "telegraph privileges over the lines of the said party of the second part upon what is known as the Pacific Coast lines to the amount of $1,500, which said amount of $1,500 shall be taken in the use of telegraph privileges at the usual and ordinary rates." It is further alleged that the plaintiff performed all of the obligations on his part to be performed, but that the defendant since the month of September, 1913, failed to issue to plaintiff any telegraph franks or allow him any telegraph privileges, and that the only consideration ever received by him was and is telegraph privileges of the value of $500.26; that the right of way granted to defendant is upwards of nine miles in length and extends across valuable lands of the plaintiff; and that said right to erect and maintain telegraph poles and wires, with the right of ingress and egress across plaintiff's said lands, was on the 29th day of April, 1893, ever since has been, and now is, of the reasonable value of $1,500 cash; that the actual use and enjoyment by the defendant and its predecessor in interest of the said rights and easement from said 29th day of April, 1893, to the commencement of this action was and is reasonably worth the sum of $1,500, and as a result of defendant's failure to issue any franks since September, 1913, plaintiff has been damaged in the sum of $999.74. The prayer of the complaint is that defendant be required to issue telegraph franks and to grant plaintiff telegraph privileges in accordance with the agreement of the value, at the usual rates, of $999.74, or that defendant be ordered and directed to pay plaintiff cash in said sum, and for such other or additional relief as the facts would warrant.

In support of the order sustaining the general demurrer it is argued that the law, both federal and state, enacted and in force since the execution of the contract in controversy, prohibited telegraph companies from issuing franks for any consideration whatsoever except cash; that therefore defendant is excused and relieved from any obligation to furnish further franks to plaintiff; and that no consideration other than franks can be required of defendant under the terms of the contract. This position is untenable under the construction of the contract compelled by the weight of authority, namely, that by its terms the contract in question is in effect in the alternative, and, secondly, because intrastate messages are not prohibited either by the state or federal laws.

[1] The contract provides that the consideration for the rights granted by said agreement is "telegraph privileges * * * to the amount of $1,500, which said amount shall be taken in the use of telegraph privileges at the usual and ordinary rates." Upon the failure of the obligor to deliver telegraph franks when needed and requested the contract, in our opinion, became one to pay the sum of money designated as the consideration for the privileges granted by the contract, and this is so, we think, because the amount of money named in the contract was the exact equivalent of the value of the telegraph privileges which the obligor was compelled to furnish.

In the case of Marshall v. Ferguson, 23 Cal. 69, the obligation was "to pay $650 in grain at the market price" on a certain date. The court said:

> "It was not an agreement to deliver any specified parcel or quantity of grain, but he (the obligor) was to deliver a sufficient quantity which, at the market price, would amount to the sum of $650. * * * Under these circumstances it was the duty of the defendant to deliver the grain on or before the day named to the plaintiff, and his failure to do so made him liable to pay the sum named in money."

In the case of Beckwith v. Sheldon, 168 Cal. 742, 145 Pac. 97, Ann. Cas. 1916A, 963, the obligation was "to convey * * * the sum of $50,000 in bonds * * * at par." The court, construing this to be a provision for performance in the alternative, said:

> "Looking to the terms of the agreement, it is easily seen that it is not a mere agreement for the delivery of the bonds. The promise is 'that there shall be paid to' Beckwith 'the sum of $50,000.' This is not an agreement to sell or deliver bonds, but a promise to pay money. The addition of the words 'in bonds of the * * * company at par' does not change it into an agreement solely for the delivery of the bonds, but merely gives the payor the option or privilege of making such payment by delivering the bonds as specified when the time of performance arrived."

We see no difference in principle between the contracts construed in the two cases last cited and the contract in suit here. If, therefore, the obligation to pay "telegraph franks up to the amount of $1,500 at the usual and ordinary rates" is an alternative obligation and gives the obligor an election up to the time of payment (the time of payment being from time to time as the franks are needed by plaintiff), and conceding as the defendant contends, that the obligation to issue the franks has become unlawful, then the alternative obligation to pay the coin stands alone. Civ. Code, § 1451.

[2, 3] The federal Constitution does not prohibit Congress from making laws which impair the obligations of contracts (8 Cyc. 929), but it does provide that "no state shall * * * pass any * * * law impairing the obligation of contracts." Const. U. S. art. 1, § 10. The contract here involved when made was lawful, and while Congress may pass an interstate commerce act which would impair the obligation of the contract in so far as it relates to interstate messages, still there remain the intrastate messages within the state of California covered by the contract which would not be affected by the Interstate Commerce Act (Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379), and which could only be affected, if at all, by the state Pub-

lic Utilities Act (St. 1911 [Ex. Sess.] p. 18). With respect to that act our Supreme Court has held that:

> "There is still the Constitution of the United States, the supreme law of this state, supreme over its Constitution and over its Legislature; and of no protection accorded by that instrument to a litigant before this court can that litigant be deprived. Therefore, if it shall be that among the powers conferred by the Legislature upon the Railroad Commission are those whose exercise by that commission do violence to a petitioner's rights under the Constitution of the United States, protection under that Constitution will be awarded him." Pac. Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822.

It is still legal, therefore, to issue under the contract in question telegraph franks for intrastate messages.

[4] It is urged that the contract is not enforceable as to the intrastate messages if void as to the interstate messages, because the contract is entire and inseparable. This point is not well taken, for interstate and intrastate messages are clearly separable in fact and in law. They constitute distinct classes of messages and are governed by distinct bodies of laws, the one being governed by the laws of the United States, and the other governed by the laws of the state within which the message is to be conveyed. The pleadings allege the failure and refusal of the defendant to issue franks or allow privileges for intrastate messages, and, as the contract might be enforced and plaintiff allowed to receive his consideration in the form of intrastate messages, a perfectly feasible and practicable procedure, the complaint, in this particular at least, states a cause of action upon the contract.

[5] But, apart from these considerations, the prayer of the complaint asks for general relief, and the facts alleged are sufficient, in any event, to constitute a cause of action for recovery of the reasonable value of the rights granted. The complaint alleges that the reasonable value of the privileges granted has at all times been, and now is, $1,500. Facts are alleged to support this claim, and it is averred that the only consideration ever received by plaintiff for the same was $500.26 worth of franks; that plaintiff has actually suffered damage by reason of the refusal to issue franks or to pay any other consideration for the granted rights and easements, such damage being in the sum of $999.74.

[6] Defendant contends that the complaint fails to state a cause of action on a quantum meruit because it fails to allege that defendant continued in possession after September, 1913. This contention is without merit. The complaint alleges that the value of the right of way and the use and enjoyment thereof by the defendant and its predecessor up to September, 1913, was $1,500. Consequently the failure to allege that defendant continued in possession after September, 1913, does not militate against the sufficiency of the complaint when tested by a general demurrer.

[7] Defendant further contends that, where a contract is illegal, there can be no recovery for the reasonable value of the property transferred under it, and in this behalf cites a number of cases where the contract involved, at the time it was made, was contrary to an express provision of law, or to good morals. The rule that, where parties to an illegal contract are in pari delicto, the court leaves them as it finds them, does not apply in the present case, where the contract was a legal, just, and equitable one when made, but which has become unlawful in part by subsequent legislation. To deny recovery for property conveyed under a contract legal when made, and legal when the property was conveyed, but which by reason of a change in public policy has become unlawful, would be to take property without due process of law.

For the above reasons, the judgment is reversed, with directions to the lower court to overrule the demurrer and require the defendant to answer.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

(37 Cal. App. 107)

PEOPLE v. WARRINER. (Cr. 586.)

(District Court of Appeal, Second District, California. April 29, 1918.)

INDICTMENT AND INFORMATION ⚷130—JOINDER OF OFFENSES.

Rape and commission of lewd and lascivious conduct with a child, by Pen. Code, § 288, made a felony, may be charged in different counts in the same information, under section 954, permitting it as to offenses of the same class of crimes.

Appeal from Superior Court, County of San Diego; T. L. Lewis, Judge.

Charles H. Warriner was convicted of rape, and appeals. Affirmed.

E. L. Johnson and E. M. Parker, both of San Diego, for appellant. U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

JAMES, J. By the information of the district attorney filed in this case the defendant was charged under two counts: First, with having committed the crime of rape; and, second, with having committed lewd and lascivious acts, such as are described by section 288 of the Penal Code. Both crimes were alleged to have been committed on the same day and with the same female child, who is alleged to have been of the age of 13 years. The jury returned a verdict finding the defendant guilty of the crime of rape, and not guilty on the second count of the information. Defendant appeals from the judgment

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

of imprisonment entered and from an order denying his motion for a new trial.

Preliminarily it may be stated that there was submitted to the jury ample evidence to justify the verdict of guilty as returned. The only point urged on this appeal is one which goes to the form of pleading in the information. Section 288 makes it a felony for a person to commit lewd and lascivious acts with a child. There was a demurrer to the information. Appellant contends that it is not allowable to charge two offenses in the same information, both of which refer to the same acts alleged to have been committed by a defendant, where it appears that the defendant could not be guilty of both offenses. He argues that the charge is inconsistent in this case, because, had the defendant been guilty as alleged in the second count of the information, he could not have been guilty of the crime of rape, and vice versa. Section 954 of the Penal Code provides that an indictment or information may charge two or more different offenses connected together in their commission, "or two or more different offenses of the same class of crimes or offenses, under separate counts." To our minds it is clear that the two offenses charged by the information in this case were of the same class of crimes. On the face of the information it could not be told whether the acts relied upon to show that the crime of rape had been committed were the same as those relied upon to sustain the charge contained in the second count. Both crimes might have been committed on the same day and with the same person. The demurrer was properly overruled. Had the jury found the defendant guilty on both counts of the information, and had the evidence shown that the crime of rape had been committed, and no other evidence offered against the defendant, the judgment might with more plausibility be attacked. However, the jury affirmatively held the defendant guiltless of the second offense charged, and we can see that he has suffered no prejudice by reason of the double charge made in the information. The crime of rape was charged in language sufficient to satisfy the requirement of the statute.

The judgment and order are affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

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37 Cal. App. 47

RUTHERFORD v. OTT et al. (Civ. 2251.)

(District Court of Appeal, First District, California. April 23, 1918.)

1. TRUSTS 🔑225—CREDITS TO TRUSTEE—EXPENSES FOR BROKER.

The employment of real estate brokers by a trustee, required to sell real estate and distribute the proceeds, being reasonably necessary, and the sum paid by him therefor reasonable compensation, he should be allowed therefor.

2. PERPETUITIES 🔑1—PAYMENT FOR CARE OF CEMETERY LOT.

There is no tying up of property, creating a perpetuity, by payment, in accordance with provision of trust, to a cemetery association, or to person or persons having charge of upkeep of cemetery, to care for cemetery plot, even if there be an agreement to care for it for all time.

3. CHARITIES 🔑33—GIFT TO PASTOR.

A gift to a particular church is a gift to the pastor or other person or persons to whom the revenues of that particular church are payable, or by whom they are controlled or disbursed.

4. CHARITIES 🔑4—LIMITATION ON AMOUNT—STATUTE.

Civ. Code, § 1313, limiting to a third of the estate bequests for devises to charity, does not apply to a trust not testamentary.

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Suit by Wallace Rutherford against Monica L. Ott and others. From the judgment, plaintiff and defendants Lena McNally and others appeal. Reversed in part, with directions.

Wallace Rutherford, of Napa, in pro. per. E. L. Webber, of Napa, James A. Nowland, of St. Helena, and Frank M. Silva, of Napa, for respondents.

LENNON, P. J. This case arises out of a trust created by Lena Ott in her lifetime. After her death the property of the trust was sold, and the trust fully administered. The trustee then brought this suit against the beneficiaries of the trust to settle his accounts and to obtain a judgment directing distribution of the trust assets. A judgment resulted, and two appeals were taken which are here for determination.

The trustee has appealed from the disallowance of three items in his account: (1) $231.25 paid by him as brokers' commissions upon the sale of real property; (2) $150 paid by him for the care of the cemetery plot of the author of the trust at St. Helena as provided in the trust; (3) $250 disallowed in respect of the trustee's claim for compensation. The other appeal is by beneficiaries under the trust who are also heirs at law of the decedent. The trust contained provisions for the payment of certain sums, hereafter to be mentioned, which these appellants claimed to be invalid. The court below held otherwise; hence the appeal.

We shall first take up the appeal of the trustee and deal with the items disallowed below, and then consider the merits of the other appeal.

[1] 1. Under the terms of the trust the trustee was bound to sell the real property of the trust estate and to distribute the proceeds. The trustee attempted to make a sale of the property, but was unable to do so, and after repeated endeavors with many prospective purchasers he finally employed real estate brokers. Through their efforts the sale was made, and the trustee, in good faith, paid them commissions to the amount of $231.25, which was the usual and a reason-

able rate. The court below disallowed this item in conformity with the practice of disallowing commissions established by the learned trial judge to govern the administration of estates of deceased persons in the court over which he presides. The general idea which underlies the custom followed below is a very commendable one, inasmuch as its purpose is to reduce the cost of the administration of estates; but the rule cannot be made an inflexible one, and exceptions thereto must be indulged now and then. In this case we think the evidence shows that the employment of real estate brokers was reasonably necessary, and that the sum paid them by the trustee was a reasonable compensation. The testimony dealing with this phase of the case is not extended, for the reason that no beneficiary made objection to the expenditure, but we think that the evidence, which is uncontradicted, is ample to establish the conclusion reached by us.

[2] 2. The trustee paid to the rector of the Roman Catholic Church at St. Helena, who has charge of the Roman Catholic Cemetery at St. Helena, the sum of $150 to insure appropriate care of the cemetery plot of the author of the trust. This payment was in accordance with the provisions of the trust. The court below, upon the objection of some of the beneficiaries of the trust, held that this payment was an attempt to create a perpetuity, and therefore invalid. In this we think there was error. Such payments to a cemetery association, or to the person or persons who have charge of the upkeep of a cemetery, do not involve a perpetuity. The payment is made as a consideration for an agreement to give appropriate care to the cemetery plot, and, even if there be an agreement to care for that plot for all time, there is no tying up property giving rise to a perpetuity.

3. In his account the trustee made claim to compensation in an amount which the court below reduced by $250. Although the services of the trustee extended over a considerable period of time and were properly and zealously performed, nevertheless, considering the size of the trust estate, we think it was a legitimate exercise of discretion for the court to reduce the compensation by the amount disallowed.

This disposes of the questions presented by the appeal of the trustee, and we shall now take up the appeal of the beneficiaries.

[3] By the terms of the trust the trustee was required to pay specified sums of money to specified Roman Catholic churches for the celebration of masses in line with the pious intention of the author of the trust. It is claimed by the beneficiaries that these churches had not legal capacity to take the donations provided for in the trust, but we think the only question involved is the question to whom these donations were made. In re Gibson, 75 Cal. 329, 17 Pac. 438.

> "A bequest to a school has been held to be a gift to a schoolmaster; one to a church, a gift to the parson and his successors; one to parishioners, a gift to church wardens." Domestic & Foreign Mission Societies' Appeal, 30 Pa. 436.

In line with these obviously correct decisions we hold that a gift to a particular church is a gift to the pastor or rector of that church, or to the vestrymen or trustees of the congregation, or to the presiding elder or bishop, or to any other person or persons to whom the revenues of that particular church are payable or by whom they are controlled or disbursed.

It is conceded by appellants that, if the direction had been to make payment to the pastor of the church rather than to the church itself, the direction would have been valid. Estate of Lennon, 152 Cal. 330, 92 Pac. 870, 125 Am. St. Rep. 58, 14 Ann. Cas. 1024.

The conclusion thus reached by us makes it unnecessary to here deal with the question whether gifts for masses, oftentimes in line with special intentions of donors and which are gifts for the promotion of divine worship, do or do not give rise to charitable trusts, which are defined to involve gifts for the benefit of an indefinite number of persons, either by bringing their hearts and minds under the influence of education or religion, or otherwise contributing to the betterment of their bodies or minds. These questions have been before the courts (Estate of Lennon, 152 Cal. 327, 92 Pac. 870, 125 Am. St. Rep. 58, 14 Ann. Cas. 1024; 11 C. J. 322, 2 Coffey, 165), but the position of the appellants has been otherwise met, and we need not now discuss the question just stated.

[4] It is also argued that the gifts to charity under the trust exceed one-third of the trust estate. Without stopping to decide the question of fact thus presented, we hold that the provisions of section 1313, Civil Code, apply only to wills (Bowdoin College v. Merritt [C. C.] 75 Fed. 480), and therefore do not apply to the trust here involved. Furthermore, it is clear that this trust cannot be said to be testamentary in character. Tennant v. Tennant, 167 Cal. 570, 577, 140 Pac. 242.

This disposes of the appeal by the beneficiaries.

As a result of the views expressed, we order that the judgment be reversed, with directions to the lower court to allow to the trustee the two items above mentioned, $231.25 and $150, with his costs of appeal, and that in all other respects the judgment be affirmed.

We concur: BEASLY, Judge pro tem.; KERRIGAN, J.

(37 Cal. App. 67)

OSBORN v. HENRY COWELL LIME & CEMENT CO.

LONG et al. v. SAME.

(Civ. 2365, 2366.)

(District Court of Appeal, First District, California. April 25, 1918. Rehearing Denied by Supreme Court June 24, 1918.)

1. Landlord and Tenant 🔑22(4) — Contract to Execute Lease—Evidence.

In action against owner for failure to execute lease, evidence *held* sufficient to support a finding that defendant refused to execute the lease according to contract.

2. Landlord and Tenant 🔑22(2)—Lease—Contract for—Construction.

A contract to lease a one-story building, except space leased to J. W., "lessees to have the exclusive right to the roof for sign space, for which privilege they agree to keep the roof in good order and repair," was clearly an agreement to lease the entire roof.

3. Evidence 🔑441(4)—Varying Terms of Written Lease.

Where a contract for lease clearly showed an agreement to lease an entire roof, evidence of statements of the proposed tenant as to what the lease was to cover was inadmissible, because it tended to vary the terms of the written instrument.

4. Landlord and Tenant 🔑22(4) — Contract for Lease—Breach.

Where it was plain that a demand for lease would have been futile, no demand on the part of the proposed tenant was necessary before suing for failure to perform a contract to execute such lease.

5. Landlord and Tenant 🔑22(3) — Contract for Lease—Breach.

Where defendant agreed to execute a lease, plaintiff to furnish satisfactory bondsmen, the duty to furnish the bondsmen did not ripen until the defendant was ready to execute the lease in accordance with its agreement.

6. Landlord and Tenant 🔑22(3) — Contract for Lease—Breach.

Under a contract to execute a lease, where the owner refused to execute such lease, there was such a breach that no further step, such as furnishing agreed securities, was necessary to place him in default.

7. Landlord and Tenant 🔑22(4)—Contract for Lease—Findings—Sufficiency.

A finding that plaintiff was ready, willing, and able to enter into a lease upon the terms of the agreement necessarily included a finding that plaintiff was ready, able, and willing to furnish sureties as provided in the agreement.

8. Landlord and Tenant 🔑22(3) — Contract for Lease—Breach.

Under contract for lease providing that the proposed tenant furnish satisfactory bondsmen, it was sufficient to furnish sureties sufficiently responsible as to be satisfactory to a reasonable person.

9. Landlord and Tenant 🔑22(2) — Contract for Lease—Rescission.

Where the owner of a one-story building contracted to lease part thereof, with entire roof for advertising purposes, a refusal to execute a lease for the entire roof justified a rescission by the proposed tenant.

10. Brokers 🔑63(1)—Obtaining Tenant.

Under a contract to pay a broker a commission upon the execution of a lease satisfactory to the owner, the broker was entitled to commission where he obtained a person with whom the owner entered into a contract to execute a lease, although, due to the sole fault of the owner, the contract was rescinded.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Actions by William C. Osborn against the Henry Cowell Lime & Cement Company, a corporation, and by J. T. Long, as administrator of the estate of J. O. Long, deceased, and Herman Wobber, against the same defendant. From judgments for plaintiffs and orders refusing new trials, defendant appeals. Affirmed.

Mastick & Partridge, of San Francisco, for appellant. Walter H. Linforth and Leo Kaufmann, both of San Francisco, for respondents.

BEASLY, Judge pro tem. The above-entitled cases are here upon the same transcript and were argued in the same briefs. The case of Long and others against the cement company will be considered first.

The defendant, Henry Cowell Lime & Cement Company, agreed to execute a lease to J. O. Long and Herman Wobber of a certain piece of property situated between Sacramento, Market, East, and Commercial streets in the city of San Francisco, and the agreement to execute this lease contained the following provisions, namely:

> The company agreed to lease to Long and Wobber "that certain one story and basement reinforced concrete building to be erected on that certain lot owned by the Henry Cowell Lime & Cement Company, situated on Sacramento, Market, East, and Commercial streets, with the exception of the space leased to J. Welsh as a saloon, as outlined in yellow on a certain blueprint floor plan revised July 7, 1913, and marked Exhibit A, and attached hereto and made a part hereof."

This agreement contained the following further provision:

> "Lessee to have the exclusive right to the roof for sign space, for which privilege they agree to keep the roof in good order and repair."

These are the vital provisions of this agreement so far as the decision of this case is concerned.

When the time came for the execution of the lease the defendant refused to let to the plaintiffs that portion of the roof of the building over Welsh's saloon. It claimed then, and claims now, that this agreement was to lease only the part of the roof situate over the portion of the building to be let to plaintiffs. The part of the roof over the saloon was by far the most valuable for sign purposes, as it was over the corner of Market and East streets. The court found generally that the defendant refused to execute the lease in accordance with their agreement.

The main point in controversy between the parties at the trial, and during negotiations carried on after the execution of the contract with a view to agreeing upon the terms of the lease, was over the question whether the sign space above the saloon should be included in the lease or not. This finding of the court was tantamount to a finding that the defendant refused in this respect to carry out the terms of its agreement. It claims that it did not so refuse, and that this finding is not supported by the evidence.

[1] The defendant presented two written leases to the plaintiffs in both of which it reserved to itself this roof space over the saloon, and the presentation of the last of these two leases was accompanied by a demand in writing that the plaintiffs enter into the lease as presented. Besides this, from the beginning to the end of these negotiations over the form of the lease the attorney acting for the defendant, who carried on all these negotiations, insisted that the plaintiffs could not have this space above the saloon. He so insisted in polite language, but nevertheless with emphasis and finality. The finding is therefore supported by the evidence.

[2] The truth is plain that the defendant was of the opinion that the agreement it had made did not include this space on the roof over the saloon, and it acted upon this opinion. This view is still adhered to, but is a mistaken one. Nothing could be clearer than this agreement. It provided for the exclusive possession of the roof of the entire building for advertising purposes, and the exclusive care of the roof by the plaintiffs in consideration therefor.

[3] The language of the agreement being clear and unambiguous, the questions asked by defendant of Welsh as to conversations with plaintiffs with reference to the portion of the roof over his saloon, and whether he had told them that his lease included sign privileges over the saloon, offered by defendant for the purpose of assisting the court in interpreting the agreement, were incompetent and properly disallowed, in that the evidence thus sought to be introduced tended to vary the terms of a written instrument the language of which is clear.

[4] It being plain that a demand for the execution of a lease in accordance with the terms of the defendant's agreement would have been futile, no demand on the part of plaintiffs was necessary; besides, the defendant assumed the burden of drafting and presenting the lease. The plaintiffs constantly requested a lease including the exclusive sign privilege of the roof. The defendant, as the trial court found, refused to accede to this demand, and nothing further was required to put it in default.

[5-8] The agreement provided that the plaintiffs should furnish to the defendant satisfactory bondsmen for a sum equal to one year's rental as security for the lease. It is claimed that these sureties were never offered, but the obligation of the plaintiffs to furnish bondsmen did not ripen until the defendant was ready to execute a lease in accordance with its agreement, and this it was never ready or willing to do. Besides, the defendant having refused to execute such a lease, and thereby broken its contract, no further step was necessary to place it in default. Moreover, the court found that the plaintiffs were ready, willing, and able to enter into the lease upon the terms of the agreement at all times. This included of necessity ability, willingness, and readiness to furnish the securities provided in this agreement. The names of two sureties were presented to the defendant. It never actually rejected these sureties; and while there is a conflict of evidence as to their financial standing, the record is not without evidence that they were worth the sum required of them. The provisions of this contract were fulfilled if sureties sufficiently responsible as to be satisfactory to a reasonable person were offered to the defendant. Gladding, McBean & Co. v. Montgomery, 20 Cal. App. 279, 128 Pac. 790.

It is contended that the evidence does not support the finding as to damages to the plaintiffs. Without reciting the evidence on this, it may be said that there was an abundance of testimony showing a greater amount of damages than the trial court awarded.

[9] Lastly, the defendant claims that the finding of an absolute refusal on its part to include the portion of the roof over Welsh's saloon would not justify a rescission of the whole contract, because the breach of such a condition is readily compensable in damages. There is nothing in this point. The defendant entered into an agreement to lease this real property. This agreement contained an important stipulation which it refused to fulfill. The plaintiffs were not compelled to take such portion of the building as the defendant might be willing to let to them, and sue for damages for refusal to include the remainder of the building in the lease. Besides, we cannot say for what sign purposes the plaintiffs wished to use the roof. It may have been that they desired to use it for the advertising of the business which they were to conduct in the portion of the building which they were to occupy, and as such they might have considered it a vital part of their leasehold.

The judgment and order refusing a new trial in the case under consideration are affirmed.

[10] The case of Osborn against the same defendant rests mainly upon the same facts as that of Long and Wobber. Osborn is the assignee of Newell-Murdoch Company, who as real estate brokers brought Long and Wobber and the defendant together in this transaction. Simultaneously with the execution of the agreement of the defendant to lease the property to Long and Wobber defendant entered into an agreement with Newell-Murdoch Company, by which it agreed to pay these brokers the sum of $3,500 upon the execution of a lease satisfactory to the defendant of the building involved in the agreement with Long and Wobber. Having broken its agreement to enter into a lease in accordance with the terms of its contract, the defendant may not now be heard to say in an action

by the real estate brokers for their commission, either that Long and Wobber were not able to perform their contract, or that a satisfactory lease was not executed in the premises, because a satisfactory lease would have been executed had not the defendant refused to carry out its obligation to execute it, and it was because of the fault of the defendant alone that such lease was not entered into. We have already seen that it was not the duty of Long and Wobber to furnish their sureties so long as the defendant was unwilling to carry out its agreement. Phelan v. Gardner, 43 Cal. 311.

The judgment and order are also affirmed in this case.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

(37 Cal. App. 87)

CRANE CO. v. MARYLAND CASUALTY CO. (Civ. 2224.)

(District Court of Appeal, First District, California. April 29, 1918.)

Mechanics' Liens ⟹128—Recovery on Contractor's Bond—Necessity of Notice.

The filing, by one furnishing material, of a claim of lien pursuant to the provisions of a mechanic's lien law, is a condition precedent to recovery upon the statutory bond furnished by contractor under Code Civ. Proc. 1183.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Crane Company against the Maryland Casualty Company. Judgment for plaintiff, and defendant appeals. Reversed.

John Ralph Wilson and Charles B. Morris, both of San Francisco, for appellant. Milton Newmark, of San Francisco, for respondent. A. A. Moore and Stanley Moore, both of San Francisco, and L. R. Weimann, of Alameda, amici curiæ.

BEASLY, Judge pro tem. The defendant, Maryland Casualty Company, appeals from a judgment in favor of plaintiff upon a statutory bond furnished pursuant to section 1183 of the Code of Civil Procedure by the defendant to the owner of the building that was being erected by Siebert & Co. as contractors and for which the plaintiff, Crane Company, furnished materials.

The sole question in the case is whether or not it was a condition precedent to the recovery by the respondents in this action against appellants upon their bond that the respondent file a claim of lien pursuant to the provisions of the Mechanics' Lien Law. The trial court decided this question in the negative, and in accordance with this answer gave judgment for plaintiff, although plaintiff had filed no such claim. The answer given by the trial court to the question was incorrect, and the judgment must therefore be reversed; and it is so ordered. Hubbard v. Jurian, 170 Pac. 1093.

We concur: LENNON, P. J.; KERRIGAN, J.

(36 Cal. App. 604)

KALISH v. WHITE et al. (Civ. 2323.)

(District Court of Appeal, First District, California. March 28, 1918. Rehearing Denied by Supreme Court May 27, 1918.)

1. False Imprisonment ⟹7(3)—Liability of Officer Making Arrest.

Where complaint was made against one person, but another person of the same name was actually indicted and warrant issued, the officer serving the warrant is not liable, even though he doubted whether such person was the one that committed the crime.

2. False Imprisonment ⟹8—Liability of Officer.

Where an officer made an arrest under a warrant and delivered accused to his superior officer in charge of a city prison, he was not liable for his further detention nor delay in the proceedings against him.

3. Trial ⟹139(1)—Directing Verdict.

A directed verdict is proper whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by the evidence.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Samuel Kalish against D. A. White and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Devoto, Richardson & Devoto, of San Francisco, for appellant. C. M. Fickert, Dist. Atty., and Aylett R. Cotton, Deputy Dist. Atty., both of San Francisco, for respondents.

KERRIGAN, J. This is an action for damages for false imprisonment, brought by the plaintiff against D. A. White, chief of the police department of San Francisco, and William Minahan, a detective sergeant in the department. Upon plaintiff resting his case a motion for a nonsuit as to defendant White was granted; and at the conclusion of the testimony of both sides the court of its own motion instructed the jury to return a verdict for defendant Minahan, which the jury did. This is an appeal by plaintiff from the judgment entered on the instructed verdict.

The circumstances of the plaintiff's arrest and imprisonment were as follows: One Samuel Kalish, a person other than plaintiff, had embezzled the sum of $800 belonging to one Mrs. Lydia McCarthy, and shortly thereafter disappeared, whereupon Mrs. McCarthy reported the matter to the police department of San Francisco, with the result that a warrant was issued for the arrest of the offender. About ten months prior to the embezzlement Minahan had known the plaintiff in San Francisco, and the execution of the process was placed in his hands. He made a diligent search for the plaintiff, and learned that he had recently vacated his room, leaving some of his clothes behind, and that prior to leaving it had been his custom to get his mail at the post office. The search in San Francisco proving fruitless, and it having been learned from the complaining witness that the accused had brothers in New York and Chicago, Minahan advised her to write decoy letters addressed to Samuel Kalish at both those cities. This she did, and received a reply from the plaintiff signed "Sam Kalish." Thereupon the case was presented to the grand jury, and an indictment was returned against the plaintiff, charging him with embezzlement; extradition proceedings were inaugurated, and Minahan proceeded to New York, where he found the plaintiff in the custody of the police department, awaiting process for his removal to California. Plaintiff protested his innocence, but Minahan proceeded to execute his process. It is also to be noted that the record discloses that while plaintiff did not precisely answer the description furnished by the complaining witness of the man who had embezzled her money as to age or as to a noticeable scar on one of his hands, still by inference it appears that he measured up to the furnished description as far as build, weight, complexion, and nativity were concerned. Upon arriving in San Francisco Minahan immediately made his return on the warrant, and plaintiff was incarcerated. Still protesting his innocence, he was confronted by the complaining witness who, after two visits to the prison, refused to identify him as the thief. Notwithstanding this the plaintiff was kept in confinement for a period of ten days, when he was arraigned on the indictment, at which time, the complaining witness not appearing, the court received evidence as to the identity of the plaintiff, and ordered his release from custody.

[1] When a warrant, valid in form and issued by a court of competent jurisdiction, is placed in the hands of an officer for execution, it is his duty without delay to carry out its commands; and the law is well settled that for the proper execution of such process the officer incurs no liability however disastrous may be the effect of its execution upon the person against whom it is issued. Newell on Malicious Prosecution, § 70; 11 R. C. L. 795. The authority, however, derived from the warrant justifies the officer in arresting no one but the person named therein against whom it is issued; and any interference, therefore, with the liberty of a person other than the one named in the writ renders the officer liable in trespass, unless such interference is caused by the act of the person himself. Newell on Malicious Prosecution, § 74. Accordingly, it has been held that an officer will not be justified in arresting a person other than the one named in the warrant even if he is the one intended. 11 R. C. L. § 12, p. 799; Newell on Malicious Prosecution, § 73. Likewise, that a warrant is no defense to an officer who arrests and refuses to release the wrong person, although bearing the same name, where an investigation would have disclosed the fact of his innocence. 11 R. C. L. 220; Clark v. Winn, 19 Tex. Civ. App. 223, 46 S. W. 915.

Here, however, it appears that the process, which was regular in form and legally issued, described the plaintiff by his name, which is the usual way (11 R. C. L. § 12, p. 799), and that he was in fact the person for whom it was intended. Under such circumstances, even if Minahan had been in doubt as to whether or not the plaintiff was the person who committed the crime, he was not bound to decide that question; and he was certainly acting within his duty when he took the plaintiff into custody, and thus permitted the question of identity to be ultimately decided. Under the undisputed facts of the case the warrant is a complete defense to this action against the office. Cox v. Durham, 128 Fed. 870, 63 C. C. A. 338; Madden v. Meehan, 153 Ky. 648, 156 S. W. 116.

[2] In view of the innocence of plaintiff his confinement and restraint for ten days are unfortunate, but for this the defendants are not responsible. Minahan discharged his duty as an agent of the state when he delivered him to the city prison in San Francisco. He then, it appears, in his capacity as a police officer, took plaintiff into custody under a bench warrant issued by the superior court, and delivered him to his superior officer, who was in charge of the city prison, and from then on neither of these defendants was responsible for the plaintiff's detention nor for any delay in the proceedings against him.

[3] From the evidence it appears that the prima facie case made out by the plaintiff was overcome by the evidence justifying Officer Minahan's acts respecting the arrest and imprisonment of plaintiff, and that such evidence in justification was not at all, or at least substantially, rebutted. The action of the trial court in instructing the jury to return a verdict in favor of Minahan, therefore, cannot be disturbed. The authorities so hold. "A directed verdict is proper whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by the evidence." Estate of Baldwin, 162 Cal. 471, 123 Pac. 267. To the same effect, see Davis v. Cal. St. R. R. Co., 105 Cal. 131, 38 Pac. 647; Perera v. P. P. I. E. Co. (No. 7815), 175 Pac. 454. In Lacey v. Porter, 103 Cal. 597, 37 Pac. 635, the court says:

> "It is further insisted that the court erred in taking from the jury the question of the credibility of witnesses, malice, motives, intention, and belief of respondent, and what facts the evidence established. The general rule undoubtedly is that these questions should be submitted to the jury where the evidence is conflicting; but it is equally well settled that the court may, within certain limits, control the verdict, either

by such an instruction as was here given, or by setting it aside and granting a new trial, either upon motion of the defeated party or upon its own motion. To justify the court in directing a verdict it is not necessary that there should be no conflict in the evidence; but where the evidence is such that it is clearly insufficient to support a verdict in favor of the party against whom the direction is given, the instruction is proper, unless the circumstances of the case indicate that upon another trial" a different verdict "may be had. But in either case the decision of the court below will be sustained, unless the appellate court can clearly see that its conclusion is wrong upon the facts."

Assuming that White is a party to this appeal, although not named in the verdict or judgment, as to him it is sufficient to say that, while he has grounds of defense other than those herein discussed, it follows under the circumstances of the case that what we have said concerning his codefendant disposes of the case as to him.

The judgment is affirmed.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

(178 Cal. 380)

JAMESON v. TULLY. (Sac. 2590.)

(Supreme Court of California. June 4, 1918. Rehearing Denied July 2, 1918.)

1. WITNESSES 🔑188(2)—HUSBAND AND WIFE—PRIVILEGED COMMUNICATIONS.

By Code Civ. Proc. § 1881, communications between husband and wife are excepted from the class of privileged communications in an action brought by husband or wife against another person for alienation of the affections of the other spouse, or in an action for damages against another person for adultery committed by either the husband or wife.

2. EVIDENCE 🔑271(14), 317(3)—HEARSAY—ALIENATION OF AFFECTIONS.

In a husband's action for alienation of his wife's affections, the relations between husband and wife being a proper subject of inquiry, the declarations of the wife, contained in her letters to the husband during temporary absences, showing the state of her feelings prior to the alienation, were admissible, and were not hearsay and self-serving.

3. EVIDENCE 🔑317(8)—ALIENATION—HEARSAY.

In such action, statements of the wife in her letters, written to her husband after her enticement and seduction, and her oral statements, all constituting confessions of her guilty relations with defendant some months before their date, not having been written or spoken with defendant's consent or in his presence, were inadmissible as hearsay, not being res gestæ.

4. TRIAL 🔑412—OBJECTION TO EVIDENCE—WAIVER—CROSS-EXAMINATION.

Such statements were not rendered admissible because defendant, after the admission in evidence of the husband's testimony as to such matters over his objection, undertook to cross-examine thereon, for waiver of objection to evidence and of right on appeal to complain of error in its admission is only effected by the later introduction by the objecting party of independent evidence to the same point and effect as that to which the evidence objected to related.

5. APPEAL AND ERROR 🔑1170(7)—HARMLESS ERROR—EVIDENCE.

In a husband's action for alienation, error in admitting the husband's evidence as to his wife's confession of her own and defendant's guilty conduct was not ground for reversal of judgment for the husband, the error being disregarded under Const. art. 6, § 4½, where, in the face of defendant's admissions, and the fact that neither he nor the wife took the stand to make any denial of them, no other conclusion could have been reached by a fair-minded jury.

6. DEPOSITIONS 🔑90—DEPONENT WITHIN JURISDICTION—STATUTE.

Under Code Civ. Proc. § 2021, subd. 6, as to when depositions may be taken in the state, where plaintiff's wife was present in the town during trial up to within an hour of the time when the offer of her deposition was made, but no subpœna was issued or other effort made to secure her presence as a witness, though she had been in consultation with defendant's counsel just before the court convened and had then taken a train, leaving town with their consent and with no effort to detain her, the court properly refused to allow defendant to read her deposition in evidence.

Department 1. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Charles M. Jameson against Ernest R. Tully. From a judgment for plaintiff, defendant appeals. Affirmed.

Wise & O'Connor, of San Francisco, for appellant. Peck, Bunker & Cole, of Oakland, and Frank R. Wehe, of San Francisco, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment in favor of the plaintiff for $10,000 damages in an action charging the defendant with enticing away and seducing the plaintiff's wife. The complaint is in two counts, one for the enticement and alienation of the plaintiff's wife, and the other for her seduction. There is no merit in the appellant's contention that the complaint on each of these counts did not state a cause of action.

[1] The main points upon this appeal arise out of alleged errors of the trial court in the admission of evidence and in the giving of certain instructions to the jury. During the course of the trial the plaintiff offered in evidence certain letters written to him by his wife during her temporary absences from their home. The purpose for which most of these letters were offered was that of showing the affectionate relations between the plaintiff and his wife prior to the exercise of the alleged arts of enticement on the part of the defendant which alienated the wife's affections from her husband. The objection was that they were privileged communications, and as such inadmissible in the absence of consent on the part of the wife. The case of Humphrey v. Pope, 1 Cal. App. 374, 82 Pac. 223, was cited by the appellant in support of this contention. That case, however, arose and was decided prior to the amendment of section 1881, Code of Civil Procedure, effected in the year 1911, by which communications between husband and wife were excepted from the class of privileged communications "in an action brought by husband or wife against another person for the alienation of the affections of either husband or wife or in an action for damages against another person for adultery committed by either husband or wife." That case is therefore no longer authority for this contention.

[2] The appellant further insists, however, that the statement contained in these letters from the wife to the plaintiff, her husband, were inadmissible as hearsay and as self-serving declarations. This contention is answered by the case of Cripe v. Cripe, 170 Cal. 91, 148 Pac. 520, in which this court, citing numerous cases, declares the rule to be that when in an action for alienation the relations between the husband and wife are a proper subject of inquiry, the declarations of the person whose affections have been alienated showing the state of her feeling prior to such alienation, are admissible. This rule applies to the letters written by the wife to the plaintiff during the year when they were living happily together before the enticements of the defendant began and

the objection to some of these letters on the ground of their remoteness goes merely to the weight and not to the competency of these letters.

[3] A more serious objection, however, is made to the action of the court in admitting in evidence several letters written by the wife to the plaintiff after her enticement and seduction, and after the suspicions of her husband had been aroused as to her relations with the defendant. These letters could not have had for their purpose that of showing that the former feelings of affections between husband and wife continued notwithstanding the defendant's acts, injuries, and damages of which the plaintiff complains. Had these letters been couched in terms showing an altered state of affection on the part of the wife for her husband, they would doubtless be admissible under the former rule, but an examination of these latter letters will serve to clearly show that, notwithstanding the statement of counsel for plaintiff at the time of their offer, to the effect that they were offered for the purpose of showing the feelings between husband and wife at the time they were written, the real scope and purpose of the offer of these letters was to introduce in evidence the confessions of her guilty relations with the defendant some months before their date. They are thus to be considered in the same category with certain oral statements made by the wife to her husband about the same time that these letters were written in which she confessed in detail as to her illicit relations with the defendant. The plaintiff undertook as a witness to testify to these oral statements on the part of his wife made several months after the consummation of the arts of enticement and acts of seduction and adultery of which the plaintiff complains, and they were admitted by the trial court in evidence over the defendant's objection. There is little room for argument that the trial court was not in error in the admission of these latter letters and oral statements and confessions of the wife. They cannot be held to be res gestæ under the utmost extension of that limited rule of evidence. They are hearsay pure and simple, and, having been written or spoken without the defendant's consent or presence, could upon no theory of the law or the case be binding upon him or admissible in evidence against him.

[4] The respondent does not, in fact, attempt to justify the admission in evidence of these written and oral statements of the wife, implicating the defendant in her transgression, except upon the utterly untenable ground that the defendant, having, after the admission in evidence of the plaintiff's testimony as to these matters over his objection, undertaken to cross-examine the plaintiff thereon, in so doing waived his objection to their admissibility and his right on appeal to complain of the court's error in their admission. The authorities cited by counsel for the respondent in support of this contention do not sustain it. The cases cited all refer to the later introduction by the objecting party of independent evidence to the same point and effect as that to which the evidence objected to related. By the presentation on his own part of such independent proofs the objecting party, of course, waives his objection and point upon appeal; not so, however, when the objecting party undertakes to exercise his right to cross-examine a witness as to statements to which he has erroneously been permitted to testify. Were it otherwise, one of the main functions of cross-examination would be most seriously impaired; for a party, after rightfully objecting to the admission of evidence, may, by his cross-examination, lay the foundation for an obviously proper motion to strike it out, or may compel its contradiction or withdrawal, or may utterly destroy its effect, and thus render unnecessary his remedy by appeal from the court's erroneous action.

[5] In the instant case the defendant did not waive his objection to the evidence thus offered and admitted on the plaintiff's behalf. That such evidence would ordinarily be prejudicial does not admit of dispute, but the question whether the judgment should be reversed upon that ground should be determined by certain other considerations in the case. Aside from the confessions of his wife, the plaintiff's case in support of the averments of his complaint rested upon inferences to be drawn from proof of certain acts, and conduct of the defendant, showing a guilty relation with the plaintiff's wife. This proof was mainly drawn from the deposition of the defendant himself, which was taken by the plaintiff and was offered as a part of his case. It appeared therefrom that, following a period of increase in social intimacy between the families of plaintiff and defendant, the latter and the plaintiff's wife, in the month of August, 1915, had met clandestinely in the town of Newman, about 20 miles from the then home of both of them, and spent several hours together in a room at a hotel there; that early in the following month the pair met in San Francisco upon at least two occasions, and, after going to various places together, went to a hotel, late at night, and there registered as husband and wife under an assumed name, and were assigned to and occupied the same bedroom, part of two days and all of two nights, upon each occasion. Coupled with these admissions were the defendant's evasive answers while under examination as to the details of these episodes, which rendered his denial of any acts of adultery with the plaintiff's wife inconclusive if not inconceivable. In the face of these admissions, and of the fact that neither the defendant, nor the plaintiff's wife, took the witness stand to make any denial of them, no other conclusion could be

reached by a fair-minded jury than that arrived at in this case. This being so, the error of the court in admitting the plaintiff's statement of his wife's confession or her own and the defendant's guilty conduct cannot be said to have affected the verdict. It must therefore be disregarded under section 4½ of article 6 of the Constitution.

[6] The final contention of the appellant is that the trial court erred in its refusal to permit the deposition of the plaintiff's wife to be offered and read in evidence on behalf of the defendant. The record discloses that the offer of the deposition was made at the close of a several days' trial, during which the plaintiff's wife was present in Merced, where the trial was being held, up to within an hour of the time when the offer of her deposition was made; that no subpœna was issued, or other effort made to secure her presence as a witness; that she had been in consultation with defendant's counsel just before court convened; that she had then taken a train, leaving town with their consent and with no effort to detain her. These facts being shown, the court properly refused to allow her deposition to be read in evidence. Code Civ. Proc. § 2021, subd. 6.

No other points in the record require discussion.

Judgment affirmed.

We concur: SHAW, J.; SLOSS, J.

(178 Cal. 359)

BANCROFT v. BANCROFT. (L. A. 5451.)

(Supreme Court of California. June 3, 1918.)

1. DIVORCE 🔑167—DECREE—SETTING ASIDE —COLLUSION OR CONNIVANCE.

Where a wife has consented to an interlocutory divorce decree by her husband on the represented grounds of desertion of which the wife was not in fact guilty, equity will not thereafter set aside such decree and enjoin the entry of a final decree.

2. DIVORCE 🔑167—SUITS TO SET ASIDE DECREE—GROUNDS—STATUTES.

Where a party who has consented to the entry of a collusive interlocutory divorce decree fails to apply for relief within six months and within the time for appeal, Code Civ. Proc. § 473, empowering the court to relieve against judgments or orders, does not apply, and to set aside such decree in another suit thereafter an independent showing of some equitable consideration or reason of public policy is necessary to justify the interference of equity.

In Bank. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Suit by Ethel W. Bancroft against Griffing Bancroft to set aside an interlocutory divorce decree. From a judgment dismissing the action on demurrer to plaintiff's complaint, plaintiff appeals. Affirmed.

See, also, 173 Pac. 582, 585.

Luce & Luce, of San Diego, and Joseph L. Lewinsohn, of Los Angeles, for appellant. Sweet, Stearns & Forward and Ward, Ward & Ward, all of San Diego, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment of dismissal of this action after an order sustaining the defendant's demurrer to the plaintiff's complaint. The action was brought by the plaintiff to have set aside an interlocutory decree in the case of Griffing Bancroft v. Ethel Bancroft, L. A. No. 5419, 173 Pac. 582, upon the ground that such decree was procured by collusion between the parties to that action, who are also the parties to this one. The facts out of which this action arose as set forth in the complaint herein are as follows: The parties were married on or about October 30, 1901. Three children were born of this marriage, a daughter named Barbara, now of the age of 14 years, and two sons, Griffing, Jr., and Hubert Howe, whose ages are now respectively 11 and 8 years. On October 30, 1914, the plaintiff left the home of the defendant and herself in or near San Diego with the defendant's knowledge and consent for the purpose of paying a visit to her parents in Washington, D. C., intending and expecting to return to her said home in about 2 months, and without any intention of deserting the defendant. That in the month of January, 1915, the plaintiff received a letter from the defendant informing her that the defendant had decided that they could no longer live together as husband and wife, and directing her not to return to their home, and agreeing and promising that he would pay her the sum of $125 as a monthly allowance, and permit her to have the custody and care of their daughter Barbara, and to see and visit their two sons upon some satisfactory arrangement. That the plaintiff upon receipt of this letter did not return to the home of herself and defendant on account of such direction and arrangement, but went to reside in the city of New York. During the month of May, 1916, the defendant wrote to plaintiff informing her that he desired and intended to secure a divorce from her, and desired and requested her to consent to such divorce action, and to refrain from contesting his application for a decree therein. That the plaintiff thereupon agreed with the defendant not to institute a contest, nor offer any objection to his proceeding for a divorce, nor to file any answer or offer any testimony therein, provided the defendant would make provision in the decree therein regarding the custody of their children. That thereafter the defendant arranged with an attorney to represent this plaintiff in said action, and caused this plaintiff to instruct said attorney to enter her appearance therein as her attorney of record, but to offer no objection to the entry of a decree therein dissolving the bonds of matrimony between the parties thereto. That thereafter and on June 5, 1916, the defendant herein commenced such action for divorce in the county of San Diego against this plaintiff, alleging willful desertion as the ground of divorce. That in accordance with their aforesaid understanding this plaintiff's attorney so provided entered her appearance therein, but offered no objection to the proceedings therein, but facilitated the same in every way possible to the end that the defendant herein should secure an interlocutory decree in his favor in said action. That when said cause came on for trial the defendant herein as plaintiff therein testified falsely that this plaintiff had willfully deserted him, and that such desertion had continued for more than a year prior to the inception of said action. That no objection was made by or on behalf of this plaintiff to such testimony, or to any of the proceedings in said action, or to the granting of the interlocutory decree therein, and such interlocutory decree was accordingly granted and duly entered on June 22, 1916, notwithstanding the fact that the plaintiff herein had a good and valid defense to said action which she did not present on account of the prior agreement and understanding between herself and the plaintiff therein. That thereafter and in the month of May, 1917, the defendant herein informed the plaintiff herein that he would not permit her to see or visit their two sons, and did thereafter so refuse to permit this plaintiff to see or visit her two children, and also failed and refused and still refuses to longer pay this plaintiff her agreed allowance of $125 a month. That this plaintiff thereupon came to San Diego and took steps to procure counsel and to assert her rights in the premises, and was informed by her said attorneys that said divorce decree was invalid, and was also advised that the defendant herein was about to apply for a final decree in said action, whereupon she instituted this action, setting forth the foregoing facts, and praying that said interlocutory decree be set aside, and that the defendant herein be enjoined from procuring a final decree. The defendant demurred to this complaint upon several grounds, but chiefly that the same did not state facts sufficient to constitute a cause of action. The court sustained the demurrer without leave to amend, and entered judgment accordingly, dismissing the action, and from such order and judgment the plaintiff prosecutes this appeal.

The appellant herein contends that the trial court, sitting as a court of equity, had power, and that it was its duty to entertain this action and to set aside the interlocutory decree of divorce given and made in the defendant's favor in said action wherein he was plaintiff, upon the facts recited in her complaint herein, showing that said interlocutory decree had been obtained by a collusive agreement between herself and the defendant herein, by which a fraud had been practiced upon the court.

[1] We are unable to give our support to this contention upon the facts set forth in the appellant's complaint. It is practically conceded by the appellant herein that as a general rule courts of equity will not interfere to relieve a party to an action from a judgment which has been procured through a collusive agreement between the parties to the action to the effect that either of said parties shall commence the action and obtain by the connivance or consent of the other a judgment to which he would not otherwise be entitled. This rule has been uniformly adhered to in this state. Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; Fealey v. Fealey, 104 Cal. 354, 38 Pac. 49, 43 Am. St. Rep. 111; Sohler v. Sohler, 135 Cal. 323, 67 Pac. 282, 87 Am. St. Rep. 98; Hanley v. Hanley, 114 Cal. 690, 46 Pac. 736; Civil Code, §§ 3515, 3517, 3524. The appellant, however, contends that however correct in principle and policy this rule may be in its general application, an exception should be made in its application to divorce cases, for the reason that in this class of cases it is to the public interest not only that the courts should not be imposed upon in the commencement and prosecution of divorce cases, but also that the marriage relation should be maintained and not be permitted to be sundered for light or trivial causes, or through the collusion or consent of the parties to it. While the cases cited by counsel for the appellant make application of the foregoing rule to the facts of such cases, they are not to be understood as insisting upon its universal application to every action brought to have a decree of divorce set aside upon the ground of collusion between the parties thereto, but that being an exception to the otherwise general rule above stated, it is to be confined in its application to those cases where, in the action itself, the court has full control over its own orders and decrees. The cases of Mulkey v. Mulkey, 100 Cal. 91, 34 Pac. 621, and Rehfuss v. Rehfuss, 169 Cal. 86, 145 Pac. 1020, may be referred to as illustrating the class of cases to which application of the exception to the general rule may be given. In each of these cases the application for relief was made under section 473 of the Code of Civil Procedure. In the former of these cases the record discloses that in entering into the collusive agreement for the divorce the party seeking to avoid it had been grossly deceived and misled by her husband and by means thereof had been induced to enter into the collusive agreement. In the case of Rehfuss v. Rehfuss, supra, the party seeking to set aside the interlocutory decree also made her motion under said section of the Code of Civil Procedure, basing the same upon a showing that her consent to the granting of the decree had been induced by fear occasioned by the threat of her husband that if she defended the action her infant child would be taken from her and placed in a public institution.

[2] There is a distinction to be drawn, however, between cases where the application for relief from a decree collusively obtained is made in the action itself and within the time prescribed by section 473 of the Code of Civil Procedure or before the period passes within which the interlocutory decree may be assailed upon appeal and cases where relief is sought in an independent action. For the period of six months the trial court has full control over the case, and may grant relief within the action itself to either party; but after the expiration of that period the rights of the parties have become fixed beyond the power of the court to grant relief under section 473 of the Code of Civil Procedure, and also beyond remedy by appeal; and the party who has allowed this period to expire without any effort to obtain relief within the action itself and who thereafter seeks the aid of another tribunal in an independent action should be required to make an affirmative showing of some equitable consideration, or of some good reason sounding in public policy sufficient to justify the interference of equity with the crystallized status of the parties in the particular case. On the other hand, the authorities are numerous to the effect that in the absence of such equitable considerations or of any showing that the public interest or policy in preserving the marriage relation in the particular case would be subserved, the general rule will prevail in divorce as in other cases, and courts of equity will not interfere with judgments in such cases obtained solely through the collusive connivance of the parties to the proceeding. The following authorities fully sustain this view: Hubbard v. Hubbard, 19 Colo. 13, 34 Pac. 170; Robinson v. Robinson, 77 Wash. 663, 138 Pac. 288, 51 L. R. A. (N. S.) 534; Whittley v. Whittley, 60 Misc. Rep. 201, 111 N. Y. Supp. 1078; Newman v. Newman, 27 Okl. 381, 112 Pac. 1007; Karren v. Karren, 25 Utah, 87, 69 Pac. 465, 60 L. R. A. 294, 95 Am. St. Rep. 815; Smith v. Smith, 48 Mo. App. 612; Nichols v. Nichols, 25 N. J. Eq. 60; Simons v. Simons, 47 Mich. 253, 645, 10 N. W. 360. We are satisfied that the rule of noninterference adopted in the foregoing cases should be applied to the case at bar. A review of the facts and circumstances of the case in detail justifying this conclusion would subserve no useful purpose.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.

MELVIN, J. (concurring). I concur in the judgment and in everything written by Mr. Justice RICHARDS in the opinion, and I do so the more readily because I have never believed in the soundness of the doctrine announced in such cases as Deyoe v. Superior Court, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73, and Grannis v. Superior Court, 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23, that the state is a party interested in every divorce case. I do not believe that in any logical sense the state should be considered a party to a divorce proceeding any more than it is a party to any other suit to terminate a status fixed by contract. Heretofore the doctrine of the state's being a party interested in such an action has been useful only to save the procedure prescribed by statutes which would be otherwise vulnerable to the charge of unconstitutionality. Perhaps the end justified the fiction; but if it were more than a fiction of very limited applicability, the supposed standing of the state as a party in interest in every action for divorce might be invoked, with reason, it seems to me, as giving to a court of equity jurisdiction of an action to set aside an interlocutory decree obtained by collusion of husband and wife.

SHAW, J. (concurring). I concur in the judgment, on the ground that, while it is to the interest of the state that divorces shall not be obtained by collusion between the parties, that interest does not extend so far as to prevent the operation of the doctrine that equity will not relieve a party from an improper judgment rendered upon his own invitation, upon full knowledge of the facts and without coercion, imposition, or fraud upon him. I am not ready to approve the opinions in Mulkey v. Mulkey, 100 Cal. 91, 34 Pac. 621, and Rehfuss v. Rehfuss, 169 Cal. 86, 145 Pac. 1020, in so far as they appear to intimate that the superior court, in a proceeding ostensibly under section 473, Code of Civil Procedure, may set aside a judgment of divorce, in the absence of any showing of mistake, inadvertence, surprise, or excusable neglect on the part of the party applying for relief. The intimations to that effect were not necessary to the decision of either case. Section 473 does not give such power. I see no sound reasons for holding that the court has any greater power to set aside a judgment for fraud or mistake within the period of six months after it is rendered than it would have at any time within the statutory period of limitation for such actions.

In view of the concurring opinion of Justice MELVIN, I wish to add that I do not understand that this court, either in Deyoe v. Superior Court, or Grannis v. Superior Court, has announced the doctrine that the state is a party interested in every divorce case. The cases, as I understand them, merely say that the state is interested in the matter of granting of divorces, not that it is a party to the action in any ordinary sense of the word.

(173 Cal. 367)

BANCROFT v. BANCROFT. (L. A. 5457.)

(Supreme Court of California. June 3, 1918.)

DIVORCE 🔑164, 165(1)—VACATION OF DECREE—TIME.

An interlocutory decree of divorce is only subject to attack in the proceeding in which it is entered on appeal, or by proceedings under Code Civ. Proc. § 473, empowering the court to grant relief against judgments or orders made through surprise or excusable neglect within six months after the entry of the decree, after which time the trial court is without jurisdiction to alter or set the decree aside, regardless of whether a final decree has been entered.

In Bank. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Suit for divorce by Griffing Bancroft against Ethel W. Bancroft. From an order dismissing defendant's application for an order setting aside an interlocutory divorce decree after an order sustaining without leave to amend plaintiff's demurrer, defendant appeals. Affirmed.

See, also, 173 Pac. 579, 582, 585.

Luce & Luce, of San Diego, and Joseph L. Lewinsohn, of Los Angeles, for appellant. Ward, Ward & Ward and Sweet, Stearns & Forward, all of San Diego, for respondent.

RICHARDS, Judge pro tem. This is an appeal from an order dismissing the defendant's application for an order setting aside the interlocutory decree herein after an order sustaining, without leave to amend, the plaintiff's demurrer to said application. The facts of the entire case embracing the particular grounds upon which said application was made and upon which it was demurred to and dismissed are set forth in the decision of the case of Bancroft v. Bancroft (L. A. No. 5451) 173 Pac. 579, this day decided by this court. The main contention of the appellant upon this appeal is that the trial court has power, upon the motion of either party, to set aside the interlocutory decree in a divorce case at any time prior to the entry of the final decree. This contention cannot be sustained. It is well settled that an interlocutory decree of divorce is only subject to attack in the proceeding in which it is entered upon appeal, or by proceedings under section 473 of the Code of Civil Procedure, within six months after the entry of such decree, and that after the expiration of the period within which either of these forms of attack may be made, the trial court is without jurisdiction to alter or set aside its interlocutory decree. Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897; Suttman v. Superior Court, 162 Pac. 1032; Newell v. Superior Court, 27 Cal. App. 343, 149 Pac. 998; Reed v. Reed, 9 Cal. App. 748, 100 Pac. 897.

It follows that the appellant's contention cannot be upheld, and hence that the order must be and is hereby affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; SHAW, J.

MELVIN, J. (concurring). I concur because the law is and has long been settled just as Mr. Justice RICHARDS indicates. I do not wish to be understood, however, as approving Claudius v. Melvin, cited in the main opinion, except that part of the decision in which this court held that as judge of the superior court I properly decided that a final decree might not be entered until one year after the entry of an interlocutory decree. I have never felt satisfied with this court's ruling that a decree final in form and intended to be a final decree was in reality an interlocutory judgment.

(173 Cal. 352)

BANCROFT v. BANCROFT. (L. A. 5419.)

(Supreme Court of California. June 3, 1918. Rehearing Denied July 2, 1918.)

1. DIVORCE 🔑303(2)—CUSTODY OF CHILDREN—MODIFICATION OF DECREE.

Where a divorce has been obtained by a husband in collusion with his wife who did not testify, and the children were awarded to the father, it was no abuse of discretion for the trial court to modify the decree as to the custody of the children, where it appeared that one of them had been in the mother's actual custody since the original decree, and that the husband had but recently denied the wife the privilege of seeing the others in violation of an agreement prior to the decree, and that two of the children had been in charge of others than the husband, who was about to marry again; there being no contradictory evidence offered by the husband.

2. DIVORCE 🔑289, 312 — CUSTODY OF CHILDREN—DISCRETION OF COURT.

The trial court in divorce proceedings has jurisdiction to determine to which of the spouses the custody of the children shall be assigned, and it retains such jurisdiction during the pendency of the case; their welfare being of paramount interest, and the discretion of the court not being subject to interference, except for manifest abuse.

3. DIVORCE 🔑309—CUSTODY OF CHILDREN—ALLOWANCES.

The making and modification of orders for the payment of money in divorce proceedings for the support and education of children committed to the care of one of the spouses, being a mere incident to the order of their custody, it was not an abuse of discretion for the court to allow a wife $200 a month for maintenance of her children, and to allow $100 for the expense of bringing one of them from New York to Los Angeles.

4. DIVORCE 🔑303(3) — MODIFICATION OF DECREE—COUNSEL FEES.

Upon motions to modify decrees in divorce cases, counsel fees may be allowed.

In Bank. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Suit by Griffing Bancroft against Ethel Bancroft for divorce. From an order of the superior court modifying an interlocutory decree and from the final decree, plaintiff appeals. Affirmed.

See, also, 173 Pac. 579, 582, 585.

Ward, Ward & Ward and Sweet, Stearns & Forward, all of San Diego, for appellant. Luce & Luce, of San Diego, and Joseph L. Lewinsohn, of Los Angeles, for respondent.

RICHARDS, Judge pro tem. This is an appeal from an order of the superior court modifying an interlocutory decree of divorce, and also from such portions of the final decree as embody the modifications of the interlocutory decree embraced in the said order appealed from. The facts of this case essential to the determination of this and also of the several other pending appeals of the parties hereto may be briefly summarized as follows: The parties hereto were married in the year 1901. Three children were born to them—Barbara, a daughter, now of the age of 14 years, and Griffing and Hubert Howe, sons, now, respectively, 11 and 8 years old. Prior to the year 1914 discords had arisen between the parties hereto, due in a large measure to conduct of the defendant which would have constituted cause for a divorce upon other grounds than desertion. In the year 1914 the wife went East on a visit to relatives there, with her husband's concurrence and consent, and with no intent of desertion on her part. A short time thereafter plaintiff wrote a letter to her to the effect that they could no longer live together as man and wife, and informed her that he would pay her the sum of $125 monthly for her support and permit her to have the custody and care of the daughter Barbara, with permission to see and visit their two sons. The defendant acquiesced in this condition. A few months later plaintiff informed the defendant that he desired and intended to secure a divorce from her on the ground of desertion, and that he also desired and requested her consent to such divorce and her agreement to refrain from contesting the same. This the defendant agreed to, and the plaintiff thereupon commenced this action, and in the course thereof, and with the defendant's consent, procured an attorney to represent and appear for her in the action, but not to make any contest or opposition thereto. In pursuance of this arrangement, the defendant appeared by such attorney, but filed no answer or other objection to the granting of the divorce; and the plaintiff upon the hearing testified to the defendant's willful desertion. An interlocutory decree upon such evidence was entered on the 22d of June, 1916. By such decree it was provided that the plaintiff should have the care and custody of the three children of the parties to the action. Matters remained in this condition until the month of May, 1917, the defendant in the meantime having the actual custody of the daughter Barbara, and the plaintiff retaining the custody of the two boys, and sending to the defendant in the East, where up to this time she remained, a monthly allowance of $125. At this time, however, according to the defendant's story, the plaintiff informed her that he would not permit her to see or visit their two sons, and he also ceased to pay her said allowance. Whereupon the defendant came to California and consulted counsel as to her rights in the premises, with the result that on June 4, 1917, she filed herein an application to have the interlocutory decree amended so as to give her the custody of the children, with an allowance for their support, and the final decree stayed until such amendment could be made. To this application the plaintiff presented a demurrer upon the ground that the court had no jurisdiction to grant such application, and that the same did not state facts sufficient to constitute a cause of action; and also filed an answer thereto denying all of the material averments thereof. Thereafter and on July 27, 1917, the defendant filed an application to have the interlocutory decree set aside on the ground that it was procured by collusion. To this application the plaintiff also demurred, upon the ground of lack of jurisdiction in the court to entertain or act upon the same, and on the further ground that it did not state facts sufficient to constitute a cause of action. The court, on August 7, 1917, sustained this demurrer without leave to amend, and from its order made in that behalf the defendant has taken an appeal. On August 27, 1917, the trial court proceeded to hear evidence upon the defendant's first application for a modification of the interlocutory decree as to the custody and support of the children, and on August 29, 1917, made its order modifying the interlocutory decree so as to award the custody of the children to the defendant until they should reach the age of majority, or until further order of the court, with leave to the plaintiff to visit them and for their temporary custody at certain intervals; and further amended said interlocutory decree by requiring plaintiff to pay to the defendant $200 monthly for the support, education, custody, care, and maintenance of said children, $100 for the cost of bringing Barbara from New York to Los Angeles, $200 counsel fee for the prosecution of the motion and her costs incurred therein. On the same day the court made and entered its final decree granting the plaintiff a divorce, but embodying in said final decree the modifications made on that day in the interlocutory decree. Thereupon the plaintiff took this appeal from the order modifying the interlocutory decree and from that portion of the final decree embodying such modifications. The defendant also took an appeal from that portion of the final decree granting plaintiff a divorce. In the meantime, and on June 21, 1917, the defendant herein had commenced action against the plaintiff herein to have set aside the interlocutory decree in this action, upon the ground of collusion, setting up in her complaint substantially the same facts as those averred in her application to have said decree set aside. The plaintiff herein and defendant in said last-named action demurred to said complaint upon the same grounds as those urged against said former application. The court sustained said demurrer without leave to amend and dismissed said action, and from its order and judgment so made the plaintiff in that action has taken an appeal. These four several appeals are now before this court for determination, but the only one herein to be considered is the appeal of the plaintiff from the order modifying the interlocutory decree as to the custody and support of the children and from the portions of the final decree which embody such modification, and also from so much of said order and decree as purports to allow to the defendant counsel fees and costs.

[1, 2] The first contention of the appellant herein is that it was an abuse of legal discretion on the part of the trial court to modify its interlocutory decree so as to transfer the custody of the children from the father, to whom they had been awarded by said decree, to the mother, in the absence of any showing of new facts and circumstances arising since the making of said decree and justifying the change in the children's custody. It is unnecessary to consider whether or not the authorities cited by counsel for the appellant correctly state the law in this respect, for the reason that an inspection of the record satisfies us that there was not only presented to the trial court upon the motion for modification of the decree a different state of facts than those considered by it in making the original decree, but that there was also presented it a different status of the parties arising since the entry of such decree sufficient to justify the exercise of its discretion in modifying its terms. Upon the original trial of the cause the defendant did not appear in person, and the decree was made upon the formal hearing following her prearranged default. No evidence was taken upon the question as to which of the parties was the most suitable person to be given the custody of the children, but they were awarded to the father upon his request for such an order. Upon the hearing of the motion to modify this award the defendant herself appeared and testified fully as to her qualifications to be their custodian, and was supported in such testimony by a number of other witnesses. From this evidence it appeared that the daughter Barbara had been in the actual custody of the defendant ever since the making of the original decree; that the plaintiff had but recently denied her the privilege of seeing the two boys, in violation of his agreement in that regard made prior to the making of said decree; that the two boys had been much of the intervening time in charge of others than the plaintiff; that the plaintiff was about to marry again. Upon the hearing upon the motion to modify the decree the plaintiff did not take the witness stand to refute the testimony given by the defendant or the other witnesses in her behalf. Under such conditions there was clearly no abuse of discretion on the part of the trial judge in assuming to modify the former decree in respect to the custody of the children. It is conceded that in respect to the children of a marriage which is being dissolved at the suit of either or both of the parties to it the court becomes invested with jurisdiction to determine to which of the spouses the custody of the children shall be assigned, and that it retains such jurisdiction during the pendency of the case before it, and that the welfare of the children is the paramount interest before the court in determining who shall be their custodian, and that in the exercise of this jurisdiction the trial court is invested with a very large measure of power, which will not be interfered with upon appeal except in the clearest instance of its manifest abuse. No such case is presented by the record before us.

The appellant's next contention is that the evidence presented before the court was insufficient to justify the making of its order modifying the interlocutory decree in respect to the custody of the children. It would serve no useful purpose to enter into a detailed review or discussion of the evidence upon which the modifying order of the trial court was predicated. We deem it sufficient to say that after a careful consideration of the entire record we are satisfied that there was a sufficient showing made on behalf of the defendant to justify the court in making the order appealed from, and to repeat that, in the absence of any showing of an abuse of its discretion in the premises, such order will not be interfered with upon appeal.

[3] The appellant's next contention is that the trial court was in error in modifying the interlocutory decree so as to allow the defendant the sum of $200 a month for the support, education, and maintenance of the children awarded to her custody. The making and modifying of orders for the payment of money for the support, education, and maintenance of children committed to the care of one of the spouses is a mere incident to the order for their custody, and may, of course, be made to suit the changed conditions created by such order. This the appellant does not dispute, but he contends that the sum awarded was in part given for the support of the defendant herself, and to that extent was alimony given to the offending and defaulting spouse, which, appellant insists, it was beyond the power of the court to award. The record does not bear out this contention. The order itself confines the expenditure of the sum awarded to the care, support, education, and maintenance of the children themselves. The evidence does not show that the sum awarded was disproportionate to that required for these purposes, nor to the plaintiff's means or station in life. This court will not assume upon this appeal that the court intended its award to be applied to

any other purposes than those specified in its order, or that it will be so applied. The discretion of the court in this respect was not abused, nor was its action error.

[4] The final contention of the appellant is that the order of the court was erroneous in its allowance of the sum of $100 for the expense of bringing the daughter Barbara from New York to Los Angeles, and the further allowance of the sum of $200 as counsel fees to the defendant upon her motion for the modification of the interlocutory decree. As to the first of these allowances it was merely an additional award on account of the care and maintenance of this one of the children, and was within the discretion of the court. As to the allowance of counsel fees upon motions to modify decrees in divorce cases, such orders have heretofore been upheld by this court. Grannis v. Superior Court, 143 Cal. 630, 77 Pac. 647; Bohnert v. Bohnert, 91 Cal. 431, 27 Pac. 732; Bruce v. Bruce, 160 Cal. 28, 116 Pac. 66. The order in the instant case is not assailed as disproportionate to the plaintiff's financial ability to respond to it.

No error appearing in the record, the order is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; WILBUR, J.; SHAW, J.

(178 Cal. 366)

BANCROFT v. BANCROFT. (L. A. 5411.)

(Supreme Court of California. June 3, 1918.)

DIVORCE 🔑184(1) — REVIEW — GROUNDS FOR REVERSAL.

Where a final decree in divorce has been entered, such decree will not be reversed for matters occurring prior to the inception of the action, which were subject to review on appeal from the interlocutory decree, had such appeal been taken.

In Bank. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Suit by Griffing Bancroft against Ethel W. Bancroft for divorce. From a final decree, defendant appeals. Affirmed.

See, also, 173 Pac. 579, 582.

Luce & Luce, of San Diego, and Joseph L. Lewinsohn, of Los Angeles, for appellant. Ward, Ward & Ward and Sweet, Stearns & Forward, all of San Diego, for respondent.

PER CURIAM. This is an appeal from that portion of a final judgment decreeing a divorce between the parties to this action. The facts of the case are fully set forth in the case of Bancroft v. Bancroft (L. A. No. 5419) 173 Pac. 582, this day decided by this court. The matters upon which the appellant predicates her right to a reversal herein occurred prior to the inception of the action, and were therefore the subject of review upon an appeal from the interlocutory decree had such appeal been taken, and hence cannot be made the subject of review upon an appeal from the final decree. Code Civ. Proc. § 956; Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897; Suttman v. Sup. Ct., 174 Cal. 243, 162 Pac. 1032; Newell v. Sup. Ct., 27 Cal. App. 343, 149 Pac. 998; Reed v. Reed, 9 Cal. App. 748, 100 Pac. 897. In addition to this, however, the points discussed upon this appeal have been decided adversely to the appellant's contention in the case of Bancroft v. Bancroft, L. A. No. 5451, 173 Pac. 579, also this day decided by this court, and upon the conclusions arrived at in that decision the portion of the judgment herein appealed from is affirmed.

(178 Cal. 394)

PARSONS et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 8652.)

(Supreme Court of California. June 6, 1918.)

MASTER AND SERVANT 🔑367 — WORKMEN'S COMPENSATION—"EMPLOYÉ."

One employed to cut with his own tools such timber as in his judgment was best suited to his purpose in converting it into units for which he was to be paid and over which the employer exercised no control was an "independent contractor," and not an "employé."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

In Bank. Proceedings under the Workmen's Compensation Act by William Huddle to obtain compensation for personal injuries, opposed by W. B. Parsons, employer, and the Employer's Liability Assurance Corporation, Limited, of London, England. Compensation was awarded, and employer and insurer applied for a writ of review, and certiorari was issued. Award annulled.

Redman & Alexander, of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

VICTOR E. SHAW, Judge pro tem. Certiorari to review an award made by the Industrial Accident Commission. The admitted facts disclose that petitioner, W. B. Parsons, as owner of certain wooded land, made a contract with William Huddle, the sole and only provisions of which were that the latter was to cut firewood from said land for which Parsons agreed to pay him for each cord of three 14-inch tiers the sum of $4.50. Parsons exercised no control over Huddle, who, with his own tools and as a free agent working when and as he pleased, cut such timber as in his judgment was best suited to his purpose in converting it into units for each of which he was to be paid. The sole question for determination is whether upon this statement of facts, as to which there is no dispute, the status of Huddle was that of an independent contractor or an employé of Parsons as found by the commission.

We are unable to distinguish the facts in the case from those presented in that of

Donlon Bros. v. Industrial Accident Commission, 173 Cal. 250, 159 Pac. 715, the decision in which was approved in Fidelity & Trust Co. v. Brush, 168 Pac. 890, in both of which it was held that the status of the injured party under a like contract for cutting cordwood was that of an independent contractor. In the Donlon Case the contract to cut wood at $4.50 per cord was let to Katioaka, whose subcontractor's subcontractor was injured, and the award made to him was set aside upon the ground that the relation of Katioaka to Donlon was that of an independent contractor, who, by reason of such status, could not recover for injuries, and since the relationship extended to the subcontractor injured, he likewise was not entitled to compensation for the injury sustained. While Katioaka, whose status as to Donlon was precisely the same as that of Huddle to Parsons, was not an applicant for an award for injuries received, nevertheless, it appears from the opinion that the decision was based upon principles which if applicable are determinative of the case at bar. In the Brush Case, as in this, respondent sought to distinguish it from the Donlon Case, but the court upon facts substantially the same as those here involved held, as in the Donlon Case, that one who agrees with the owner of land to cut wood thereon at a stipulated price per cord without any agreement as to the hours of work nor the methods to be pursued in performing the work is an independent contractor. There is nothing said by respondent justifying a departure from the principles enunciated in these cases. We are unable to perceive any distinction between the status of one who upon an agreement for a stipulated price per unit and out of raw materials furnished by the owner builds one or more houses of a specified character and that of one who for a specified price per cord converts standing timber into one or more cords of wood. The contract in each case without regard to the means employed therefor contemplates the result to be accomplished. In each case the contractor is performing a service in the course of an employment conducted free of control or supervision of the owner whose will he represents only as to the result and not as to the means whereby it is accomplished. The fact that the contract was indefinite in specifying the number of cords to be cut, or that the employment might be terminated at the will of either party, in which event Huddle would be entitled to the agreed price per cord for each cord of wood cut, made the engagement none the less an independent contract.

The award is annulled.

We concur: MELVIN, J.; SLOSS, J.; WILBUR, J.; RICHARDS, Judge pro tem.

(173 Cal. 375)

JONES v. TITLE GUARANTEE & TRUST CO. (L. A. 4237.)

(Supreme Court of California. June 3, 1918. Rehearing Denied July 2, 1918.)

1. APPEAL AND ERROR 🔑511(2)—BILL OF EXCEPTIONS—SERVICE.

A bill of exceptions, though not served in time, will be considered, where plaintiff, upon serving his proposed bill, served and filed a notice of intention to move to be relieved from default, under Code Civ. Proc. § 473, and the court granted the motion and settled the bill after considering affidavits supporting motion and opposing motion; there being no abuse of discretion.

2. PARTNERSHIP 🔑11—WHAT CONSTITUTES.

An agreement between plaintiff and real estate brokers that plaintiff was to pay the amount necessary for the purchase of a lease, and that the profits remaining after repayment to plaintiff of all advances were to be divided equally, did not constitute plaintiff and the brokers partners; there being no arrangement for sharing losses.

3. BROKERS 🔑106—AUTHORITY TO CHANGE ESCROW AGREEMENT—EVIDENCE.

In an action against defendant trust company for its alleged disregard of instructions, under which there had been deposited with it as escrow holder plaintiff's check and certain notes, signed by him and two real estate brokers, *held*, under the evidence, that broker who signed escrow instructions had no authority, actual or ostensible, to change the instructions; the agency being special.

4. ESCROWS 🔑14(1)—UNAUTHORIZED DELIVERY—DAMAGES.

Where plaintiff's property, deposited with defendant in escrow, was disposed of without compliance with the instructions given, plaintiff was entitled to recover such damages as he suffered through defendant's unwarranted act.

Department 1. Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by E. Conde Jones against the Title Guarantee & Trust Company. Judgment for defendant, and plaintiff appeals. Reversed.

W. G. Van Pelt and Wilbur Bassett, both of Los Angeles, for appellant. E. W. Sargent, W. G. Cooke, and Tanner, Odell, Odell & Taft, all of Los Angeles, for respondent.

SLOSS, J. The plaintiff appeals from a judgment in favor of the defendant. The purpose of the action was to recover damages from the defendant, a trust company, for its alleged disregard of certain instructions under which there had been deposited with it, as escrow holder, a check for $2,000 and three promissory notes. The appellant contends that the evidence does not support the findings upon which the court gave its judgment against him.

[1] The respondent makes a preliminary objection to the consideration of the bill of exceptions upon the ground that the proposed bill was not served in time. That there was a delay beyond the period specified in the Code is conceded. But the plaintiff, upon serving his proposed bill, served and filed a

notice of intention to move to be relieved from his default under section 473 of the Code of Civil Procedure. Affidavits supporting and opposing the application were presented and considered, and the court granted the motion, and settled the bill. That relief may be granted from delay of this kind is well settled. Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332; Banta v. Siller, 121 Cal. 414, 53 Pac. 935. This court has always looked with favor upon orders excusing defaults and permitting controversies to be heard upon their merits. Such orders are rarely reversed, and never "unless it clearly appears that there has been a plain abuse of discretion." O'Brien v. Leach, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105. It cannot be said that there was an abuse of discretion here, and we proceed therefore, to a consideration of the merits of the appeal.

The transaction in controversy arose out of negotiations for the acquisition by the plaintiff of the unexpired term of a lease on certain real property in the city of Los Angeles. R. L. Tatum and H. C. Wood were real estate agents. They had brought to Jones, the plaintiff, a proposition for acquiring the lease, which was owned by the Spring Street Investment Company. The understanding, as between Jones, Tatum, and Wood, was that Jones was to pay the amounts necessary for the purchase of the lease, and that any profits remaining after the repayment to Jones of all advances made by him were to be divided equally between Jones, Tatum, and Wood. Brown Bros. Company were the brokers representing Spring Street Investment Company. The purchase price, consisting of plaintiff's check for $2,000 and promissory notes for $5,000 additional, signed by plaintiff, Wood, and Tatum, were deposited with the defendant, a trust company, on August 27, 1913, under written instructions. The escrow instructions accompanying the deposit were signed in the name of "Frances Griffes, by H. C. Wood." Miss Griffes was not really a party to the transaction, but it was understood that her name should be used, and that it should be signed by Wood. The instructions declared that the signer handed the check, etc., to the defendant to be subject to the order of Brown Bros. Company on the following conditions: Brown Bros. Company were to secure the contemplated lease on given terms; to secure for the signer a reliable tenant for the north 16 feet of the property for five years at a given rental; and also to secure a reliable tenant for the balance of the property for three or five years at a prescribed rental. The form of the lease was to be subject to the approval of E. Conde Jones, the plaintiff, who was also to pass upon the title to the property. A few days later Wood handed to the defendant an amended letter of instructions, which eliminated the conditions requiring Brown Bros. Company to procure subtenants for the proposed purchaser of the lease, and provided that the form of the lease and the title to the property were to be subject to the approval of Frances Griffes. This second paper, like the first, was signed by Wood in the name of Frances Griffes.

The conditions of the amended instructions were performed, and the defendant delivered the check and notes to Brown Bros. Company. There was, however, no compliance with the provisions of the original instructions requiring the lease to be approved by Jones, nor, apparently, with the requirement that subtenants should be obtained. The real controversy, therefore, narrows itself down to the question whether the plaintiff was bound by the amended instructions, or whether, as he claims, he was entitled to stand upon the instructions as originally given. The court found that the plaintiff and Tatum and Wood delivered to the defendant the original instructions, and that afterwards, and within ten days, they also delivered to the defendant the amended instructions; such delivery being made through Wood acting as agent for the plaintiff and Tatum. The appellant disputes the sufficiency of the evidence to support the findings.

[2] The evidence shows that the plaintiff was present with Tatum and Wood in the office of the defendant when the first paper of instructions was signed and turned over to the defendant by Wood. He was not present when the amended instructions were given, and there is no evidence to show that he had any knowledge of them. He was not bound by the alteration in the terms of the escrow deposit, unless he conferred actual or ostensible authority upon Wood to make the change. We think the evidence was not such as to support the claim, which is one of those made by the respondent, that Jones, Tatum, and Wood were partners in the transaction, and that each therefore had authority to bind the others. The uncontradicted evidence shows that the deal was being made by Jones; that he was furnishing all the money; and that there was no arrangement for a sharing of the losses. Tatum and Wood were merely rendering services as real estate agents or brokers, and for these services they were to receive a compensation measured by a proportion of such profits as might be realized. Such a venture does not constitute a partnership (Coward v. Clanton, 122 Cal. 451, 55 Pac. 147), and there was certainly nothing in the facts of which defendant had cognizance to make it appear that such a relation existed.

[3] Apart from the question of partnership, there can be no ground for a claim that Jones in fact authorized Wood to modify the terms of the first escrow paper. Nor, we think, did the evidence warrant an inference of ostensible authority to make the change. Both papers were signed by Wood. It is conceded on all sides that Miss Griffes, in whose name he signed, had no real connection with the transaction. So far as the

questions here arising are concerned, the situation is the same as if Wood had signed the papers in his own name. The testimony on behalf of the plaintiff tended to show that the defendant was informed, at the time of the deposit, that Jones was the real party in interest, and that the obtaining of the subleases was a material part of the consideration upon which he agreed to pay for the lease. There was, to be sure, a conflict on this point. L. W. McAtee, escrow clerk of the defendant, who handled the transaction in its behalf, testified that Jones said nothing regarding his being principal in the deal. But all the testimony is to the effect that Jones, Wood, and Tatum came to the office of the defendant together, and that the original instructions were signed and presented in the presence of all three. That Jones was in some way interested in the deal was apparent to McAtee, not only from this circumstance, but from the fact that Jones was the maker of the check deposited, and was also one of the signers of the promissory notes. The court was, no doubt, authorized to infer that the conduct of the plaintiff was such as to bind him to the terms of the original deposit. For the purposes of this transaction Jones made Wood at least his ostensible agent. But the agency was a special one, and there was nothing to justify an assumption on the part of the defendant that Wood's authority went any further than to make and consummate the contract by which the papers were first deposited. "Presumptively an agent is employed to make contracts, not to rescind or modify them, to acquire interests, not to give them up, and no power to cancel or vary an agreement is to be inferred from a general power to make it, nor has the agent any implied power to waive or give up rights or interests for his principal, nor to increase his obligations and liabilities for the mere benefit of third persons, unless the principal knew or approved of such modifications by the agent." 31 Cyc. 1387, 1388, and cases cited. When Jones authorized Wood to make a certain contract for him, and deposited his check and notes to be turned over in accordance with such contract, he did not thereby authorize Wood or the defendant to dispose of the check and notes under a different and less favorable contract. Certainly it would not be contended that Wood had ostensible authority to so change the terms of the deposit as to substitute for the lease originally contemplated a lease of other property upon other terms. No more can it be said that Wood had ostensible authority to alter the material provision regarding the obtaining of subleases. If these views be correct, the finding that the delivery of the amended instructions was made through Wood "acting as agent for the plaintiff" has no support in the evidence.

[4] If plaintiff's property, deposited with the defendant upon certain conditions, was disposed of without compliance with those conditions, the plaintiff was, of course, entitled to recover such damages as he may have suffered through defendant's unwarranted act. The defendant contends that the plaintiff showed no damage. But this claim is obviously without merit. There is evidence that plaintiff's check for $2,000 was cashed, and the money paid out by the defendant under the amended instructions. Apart from any question of the notes, it needs no argument to show that the plaintiff suffered damage by being deprived, without his authority or consent, of the money represented by his check.

The judgment is reversed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

(178 Cal. 369)

PALADINI et al. v. SUPERIOR COURT et al. (S. F. 8697.)

(Supreme Court of California. June 3, 1918.)

1. FISH 🔑9 — REGULATION — VALIDITY OF STATUTES.

St. 1917, p. 1673, § 26, providing for the licensing of fishermen and those who sell fish, and authorizing the state market director to fix wholesale and retail prices of fish, is not in violation of Const. art. 1, § 25, providing that the people shall have the right to fish upon and from the public lands of the state and in the waters thereof, and that no land owned by the state shall ever be sold without reserving in the people absolute right to fish thereon, provided that the Legislature may provide for the season when, and the conditions under which, the different species of fish may be taken; the legislative power of the state to alienate what it owns on such terms as it chooses to impose not being modified by the constitutional provision.

2. FISH 🔑9—STATE REGULATION—CONSTITUTIONAL PROVISIONS.

Const. art. 4, § 25½, authorizing the Legislature to divide the state into fish and game districts and to enact such laws for the protection of fish and game as it may deem appropriate to the respective districts, being intended to remove the restriction of article 4, § 25, subd. 33, prohibiting the enactment of a local law where a general law can be made applicable, in no wise limits the sovereign power of the state over fish and game or of the Legislature to legislate concerning it.

3. FISH 🔑9—NATURE OF PRIVILEGE TO FISH —CONSTITUTIONAL RIGHTS.

The right to fish is a privilege granted by the state, and may be taken away in the exercise of its police power, and a proceeding in deprivation of such right is not in its nature criminal, so as to make an order to produce papers against the owner thereof unconstitutional.

4. SEARCHES AND SEIZURES 🔑7 — REGULATION OF FISH — UNREASONABLE SEARCHES AND SEIZURES.

An order by the superior court to fish sellers to produce their records of the purchase and sale of fish before the state market director does not violate Const. art. 1, § 19, Const. U. S. Amend. 4, prohibiting unreasonable searches and seizures, such records not being private since St. 1917, p. 1673, § 26, providing for the licensing of fishermen and fish sellers, and authorizing the state market director to fix prices; the obtaining of a license and engaging in the business by fish sellers being a consent to the inspection of their books.

5. FISH 🔑11—REGULATION OF PRICE—PRODUCTION OF RECORDS.

An order by the superior court to fish dealers to produce their books before the state market director under St. 1917, p. 1673, § 26, empowering him to fix the price of fish and to investigate concerning all matters relating to the act, does not require any proceeding for the revocation of the dealer's license in order to give him jurisdiction.

6. STATUTES 🔑64(2)—PARTIAL INVALIDITY—EFFECT—REGULATION OF FISH.

St. 1917, p. 1673, § 8, authorizing the state market director to reduce the price of fish if in his judgment the supply is excessive or abnormal, if unconstitutional, does not render the whole law unconstitutional; the provision merely recognizing the well-known law of supply and demand.

7. FISH 🔑11—REGULATION OF PRICE—PRODUCTION OF BOOKS.

An order by the superior court to fish dealers who are engaged in selling fish at wholesale and licensed to do so and are also licensed to fish, to produce before the state market director "the sales records and ledger accounts with your customers, covering the period from the 20th of February to the 28th of February, 1918," is too broad, and beyond the jurisdiction of the market director and the superior court; it not being confined to the production of books and documents relating to the fish business.

In Bank. Proceedings for writ of prohibition by A. Paladini and another against the Superior Court of the State of California, etc., Hon. George A. Sturtevant presiding, and Harris Weinstock, State Market Director, to prevent the execution of an order for the production of books, and to prohibit the superior court from punishing the petitioners for contempt in failing to comply with the order. Writ issued.

H. I. Stafford, W. E. Stafford, and James A. Devoto, all of San Francisco, for petitioners. Sapiro, Neylan & Ehrlich, of San Francisco, for respondents. Milton Marks, of San Francisco, amicus curiæ.

WILBUR, J. Petitioners seek a writ of prohibition to prevent the carrying out of an order of the superior court, requiring them to produce before the respondent, Harris Weinstock, state market director, their ledger and sale account for the week February 20 to 28, 1918, and to prohibit the superior court from punishing petitioners for contempt of court in failing to comply with said order.

The respondent, Harris Weinstock, as state market director, is attempting to carry out the procedure provided in the law enacted by the Legislature of this state in 1917 (chapter 803, p. 1673, § 26), providing for the licensing of fishermen and those who sell fish, and authorizing the state market director to fix wholesale and retail prices of fish. It is first contended that the statute is unconstitutional and void as being in violation of section 25, article 1, of the Constitution. This section reads as follows:

> "The people shall have the right to fish upon and from the public lands of the state and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the state shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon the public lands within this state for the purpose of fishing in any water containing fish that have been planted therein by the state; provided, that the Legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken."

[1] The petitioners claim that by this section "the people are given the constitutional right to fish in the navigable waters of the state." If there were no such constitutional provision, petitioners state the rule thus:

> "The fish belong to the people of the state of California. This is conceded. It must be so, that what they own, they may give away absolutely, or conditionally, with or without reservation."

The rule with reference to the private ownership of fish and game is thus stated in the late case of Frank Phœdovius, 170 Pac. 412:

> Fish and game "can only become the subject of ownership in a qualified way, and which can never be the subject of commerce except with the consent of the state and subject to conditions which it may deem best to impose for the public good."

See, also, Ex parte Bailey, 155 Cal. 472, 101 Pac. 441, 31 L. R. A. (N. S.) 534, 132 Am. St. Rep. 95; Ex parte Fritz, 86 Miss. 210, 38 South. 722, 109 Am. St. Rep. 700; Ex parte Kenneke, 136 Cal. 527, 69 Pac. 261, 89 Am. St. Rep. 177. It is therefore evident that what the people of the state own they can alienate on such terms as they choose to impose, and that this power of regulation continues so long as such fish or game are the subject of trade or transfer. This legislative power was in no wise modified by the addition of section 25, article 1, supra, to the Constitution. It is apparent that the principal purpose of this amendment, as stated in the Matter of Application of Parra, 24 Cal. App. 339, 141 Pac. 393, "was to preserve to the people the right to fish upon the public lands of the state, and to require that grants of land by the state should not be made 'without reserving to the people the absolute right to fish thereon.'" The proviso in the section authorizing the Legislature to fix "the season when and the conditions under which the different species of fish may be taken" was evidently intended to leave the matter exactly as it was before the adoption of this amendment in November, 1910, except as it restricted the power to alienate public land without such reservation, or to create private fisheries thereon. This section gave no right to the people which they did not already have. We conclude, therefore, that the Leg-

islature had the right to provide a system for fixing the wholesale and retail prices for the sale of fresh fish, allowing "a reasonable compensation or profit to those engaged in the catching or selling of fish," as in the act provided.

[2] Amicus curiæ calls attention to the new section of the Constitution (section 25½, art. 4) adopted in November, 1902, to wit:

> "The Legislature may provide for the division of the state into fish and game districts, and may enact such laws for the protection of fish and game therein as it may deem appropriate to the respective districts"

—and claim that the effect of this provision is to limit the power of the Legislature to the "protection of fish and game." The obvious purpose of this amendment was to remove the former restriction of article 4, § 25, subd. 33, which prohibited the enactment of a local law "where a general law can be made applicable," and in no wise limits the sovereign power of the state over fish and game, or of the Legislature to legislate concerning the same. On the contrary, it increases the legislative discretion by authorizing local laws on the subject.

[3] Petitioners claim that the right to fish is a property right, granted by license; that to take away such license is to deprive the petitioners of a property right, and therefore a proceeding looking to that end is in its nature criminal, and that to require the petitioners to produce papers containing evidence against themselves in such a criminal action is unconstitutional. It is sufficient to say that the license to fish is a privilege granted by the state, and may be taken away in the exercise of its police power. See Hevren v. Reed, 126 Cal. 219, 222, 58 Pac. 536; Littleton v. Burgess, 14 Wyo. 173, 82 Pac. 864, 2 L. R. A. (N. S.) 631. See, also, Lanterman v. Anderson, 172 Pac. 625, wherein a petition for a hearing in this court was denied. The proceeding before the state market director is not criminal in its nature, and the order compelling the petitioners to produce their books before the state market director was not in violation of the constitutional provision, which prohibits a court or officer from requiring a defendant in a criminal case to furnish evidence against himself.

[4, 5] It is also claimed that the order to produce petitioners' books violates the constitutional provision prohibiting unreasonable searches and seizures. Article 1, § 19, Const. of Cal.; Fourth Amendment, U. S. Const. Books and papers containing a record of the purchase and sale of fish, made since the above law of 1917 went into effect, are no longer private. They contain a record of the purchase and sale of the property of the state, by those having a qualified or conditional interest therein. By engaging in the fish business and applying for a license therefor petitioners, in effect, consented to the inspection of their books as in the law provided. To require the production of such books is not a violation of the constitutional provision in question. It is next claimed that before the state market director can take evidence on the question of the revocation of the petitioners' license to fish it was essential that some proceeding should be pending before him for the revocation of such license, and that it should be alleged in some such petition so filed that the petitioners herein had violated the law in regard to the sale of fish at prices not authorized, and that until some such proceeding is filed the state market director had no jurisdiction to proceed, and that therefore the subsequent procedure by application to the superior court falls for lack of jurisdiction in the first instance. The law purports to give the state market director the right to inspect the books of all persons engaged in the business in which the petitioners are engaged. It also provides for the production of such books by subpœna. The purpose of such procedure is to enable the defendant Weinstock, as state market director, representing the people of the state of California, to ascertain the conditions under which fish are being sold, not only for the purpose of determining whether or not there have been violations of his orders fixing the price of fish, but also to ascertain what prices should be fixed.

[6] As already stated, the petitioners, by engaging in the business of dealing in fish caught in the waters of the state, in effect consented to the inspection of their books by the state market director, as in the law provided, and the procedure here adopted for securing the presence of said books at the time of the examination of the question as to whether or not the petitioners had violated the provisions of the law with relation to the prices at which fish were sold was in strict accordance with the letter of the law, and there is no reason for interpolating into the law by construction provisions not found therein. Petitioners also claim that "too much power is delegated to this state market director, and a power which cannot be delegated," but the only specific power pointed out under this head is that "section 8 provides that if the supply of fish in the judgment of the state market director is excessive or abnormal, the state market director may reduce the price of fish." This section seems merely to recognize the well-known law of commerce, the law of supply and demand, by which, in theory, at least, all prices are fixed. This provision, however, would not, in any event, render the whole law unconstitutional, and therefore it is unnecessary to pass on this point.

[7] Petitioners claim that the order to produce is not sufficiently definite, and is too broad in its terms. It is alleged by petitioner A. Paladini that he is engaged in the business of selling fish at wholesale in Cali-

fornia, and licensed so to do, and also that he is licensed to fish. If the order and subpœna to produce books complained of had been confined to books containing record of transactions in such fish business, between the dates specified, the same would have been sufficiently definite and certain, and in full compliance with the law. The order and subpœna, however, directs the petitioners herein to produce "the sales records and ledger accounts with your customers covering the period from the 20th of February, 1918, to February 28, 1918." The order and subpœna are therefore entirely too broad, and beyond the jurisdiction of the state market director and of the superior court. The order should have been confined to the production of books and documents relating to such fish business.

Let the writ issue.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; SHAW, J.; MELVIN, J.; RICHARDS, Judge pro tem.

(178 Cal. 303)

WAITE v. SAN FERNANDO PUB. CO. et al.

(L. A. 4231.)

(Supreme Court of California. May 24, 1918.)

1. LIBEL AND SLANDER 🔑88—PLEADING — SUFFICIENCY.

Complaint alleging malicious publication of false and defamatory articles to plaintiff's injury stated cause of action notwithstanding further allegation that plaintiff "has had and now has a wide circle of business, financial, social, and political friends"; the last allegation not being sufficient to establish that plaintiff was not damaged.

2. LIBEL AND SLANDER 🔑107(1)—EVIDENCE —ADMISSIBILITY.

In action for libel, plaintiff could say what was the age and sex of his children, as bearing on the mental suffering which might be increased by plaintiff's consciousness of the fact that the members of his family would suffer by reason of the disgrace.

3. LIBEL AND SLANDER 🔑104(1)—EVIDENCE —ADMISSIBILITY.

In action for libel, conversation after publication of article with certain defendants concerning the article and the defense they meant to interpose was admissible to show actual knowledge of the article and approval of its publication.

4. LIBEL AND SLANDER 🔑6(1)—QUALIFIED STATEMENTS.

A defamatory article which would be libelous per se, if its matter were directly stated, does not lose such quality because it is couched in form of an interview with another person or because it states that the defamatory matter is reported, or asserted, or believed to be true.

5. APPEAL AND ERROR 🔑996—SCOPE OF REVIEW.

Arguments on appeal as to the evidence and deductions to be drawn therefrom will not be considered; such matters being for the jury.

6. LIBEL AND SLANDER 🔑88—DAMAGES — EXEMPLARY DAMAGES.

In action for libel, where plaintiff asked $20,000 damages without expressly praying for exemplary damages, an award of $1,000 exemplary damages was not erroneous, if supported by the evidence.

Department 1. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by George E. Waite against the San Fernando Publishing Company and others. Judgment on verdict for plaintiff, and defendants appeal. Affirmed.

Hass & Dunnigan, of Los Angeles, and J. J. Wilson, for appellants. Spencer Thorpe and Erwin W. Widney, both of Los Angeles, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment in plaintiff's favor in an action for libel, alleged to have consisted in the publication in a certain newspaper owned and controlled by the defendants of a certain article defamatory of the plaintiff's character. The jury returned a general verdict of $3,000 damages against the defendants, and in response to special interrogatories found compensatory damages in the sum of $2,000 and exemplary damages in the sum of $1,000. From the judgment entered upon such verdict the defendants prosecute this appeal.

[1] The appellants' first contention is that the complaint does not state facts sufficient to constitute a cause of action. This claim is predicated upon that portion of the complaint in which the plaintiff avers:

> That he "was at all the times herein mentioned, and now is, a citizen of the state of California of good name and reputation," and that "he has had and now has a wide circle of business, financial, social, and political friends, and was at all the times herein mentioned, and now is, engaged in conducting his private business affairs and in building up his personal reputation and business standing in the community in which he lives."

The appellants urge that these averments of the plaintiff's complaint show that he was in no way damaged by the publication complained of, and hence had no cause of action. But the complaint goes much further in its averments as to the plaintiff's injury than the foregoing excerpts would show. It sets forth in terms a publication which, both directly and inferentially, charges that the plaintiff deliberately took advantage of and overreached a widow recently bereaved and in ill health in a business transaction involving the sale of a crop of olives, and then proceeds to state that such a person is unworthy to be elected to an office of public honor and trust, to which he aspires. The article was clearly and unmistakably libelous per se. The complaint proceeds to allege:

> "That the publication of said article has caused, and does now cause, plaintiff great humiliation, pain and suffering, has injured and is injuring plaintiff's reputation in the community where he lives and throughout the territory covered by the circulation of said newspaper, and has injured, and is injuring, plaintiff personally, financially, politically, and socially throughout said territory, and tended to, and tends to, de-

stroy plaintiff's personal, financial, political, and social standing throughout said territory."

It requires no argument to show that the complaint read as a whole, constitutes a cause of action.

[2] The next contention of the appellants is that the trial court erred in overruling an objection to the following question asked plaintiff while testifying as a witness in support of the averments of his complaint: "Q. What is the age of your children and the sex of each?" A similar inquiry was held proper in the earlier cases of Rhodes v. Naglee, 66 Cal. 677, 6 Pac. 863, and Dixon v. Allen, 69 Cal. 527, 11 Pac. 179, while the question in almost its precise form was held to be permissible in the case of Cahill v. Murphy, 94 Cal. 29, 30 Pac. 195, 28 Am. St. Rep. 88, wherein the court, after citing the foregoing cases, stated that the rule rests upon the principle that, as mental suffering entitles a plaintiff to compensation in cases of this character, such suffering may be increased and the damages consequently enhanced by his consciousness of the fact that members of the plaintiff's family would suffer by reason of the disgrace visited upon him by the slanderous charge. It follows that the trial court was not in error in its ruling in the instant case.

[3] The next contention of the appellants is that the court erred in permitting one of plaintiff's witnesses to testify to a certain conversation after the publication of the article, had with the defendants Wilson, Hille, and Eigholz, concerning the publication of the article and the defense they meant to interpose in the action. The purpose of this inquiry was that of showing that these defendants had each actual knowledge of the fact and contents of the published article, and that, after such notice, they not only took no steps to have its charges withdrawn, but expressly approved its publication. This was for the purpose of showing actual malice on the part of these defendants in making and persisting in the defamatory charges which the article contained. The conversation sought to be elicited was entirely competent and proper for these purposes. Preston v. Frey, 91 Cal. 107, 27 Pac. 533.

[4] The next several contentions of the appellants have reference to a number of instructions which the court gave, or which it refused to give at the defendant's request. Some of these contentions are predicated upon the assumption that the article in question was not libelous per se. This contention has already been disposed of, but it might be added that a defamatory article which would be libelous per se, if its matter was directly stated, does not lose its quality in this regard because it is couched in the form of an interview with another person, or because it seeks to avoid its otherwise obvious character as a libel per se by the statement that it is reported or asserted or believed to be true. Gilman v. McClatchy, 111 Cal. 606, 44 Pac. 241; Edwards v. San Jose, etc., Soc., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70; Wilson v. Fitch, 41 Cal. 363.

The appellants' criticism of the other instructions given or refused have not sufficient merit to require separate consideration. The instructions of the trial court, taken as a whole, very fully and fairly stated the law of libel applicable to the case at bar.

[5, 6] The appellants' final contention is that the verdict of the jury was contrary to law, in so far as it undertook to assess punitive damages against the defendants for being actuated by actual malice in making the publication complained of. Much of the argument addressed to this point is occupied with a discussion of the evidence and the deductions to be drawn therefrom, but these were matters for the jury. The complaint charged the defendants with express malice and with the malicious intent of injuring plaintiff's reputation. There is sufficient evidence in the record to have justified the jury in finding these averments to be true. The plaintiff, it is true, did not expressly pray for punitive damages in so many words, but he did ask for a general verdict for damages in the sum of $20,000. This was sufficient to have justified the jury in making its award of the sum allowed for exemplary damages. We find no merit, therefore, in the appellants' contention in this regard.

No error appearing in the record, the judgment is affirmed.

We concur: SLOSS, J.; SHAW, J.

(178 Cal. 347)

BRICKER v. ROLLINS & JARECKI et al.

(L. A. 4154.)

(Supreme Court of California. May 31, 1918.)

1. Highways 🔑113(5)—Contracts—Bonds—"Supplies."

Rentals for use of horses and tools used in highway construction are "supplies," if not "materials," within St. 1897, p. 201, requiring contractors on county projects to give bond to pay for materials and supplies furnished for the performance of the work.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Supply.]

2. Highways 🔑113(5)—Contracts—Bonds—"Supplies."

Flour, meat, butter, barley, hay, and like articles, consumed by the men and horses, and powder, caps, and fuse, all actually used in advancing highway work, were "supplies" within St. 1897, p. 201, requiring county contractors to furnish bond to pay for supplies.

3. Highways 🔑113(5)—Contracts—Bonds—Appointment of Receiver—Liability of Surety.

Since a receiver appointed by the court to take charge of the affairs of a county contractor is the official representative of such contractor, a surety on the contractor's bond under St. 1897,

p. 201, is responsible for his obligations in purchasing materials and supplies.

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by W. J. Bricker against Rollins & Jarecki and others, the County of Los Angeles, a municipal corporation, and the American Surety Company of New York, a corporation; also consolidated causes. Judgments for plaintiffs against the Surety Company, and the latter appeals. Affirmed.

Bicksler & Smith, of Los Angeles, for appellant. M. M. Meyers, J. C. Craig, Walton J. Wood, and W. W. Clary, all of Los Angeles, for respondents.

RICHARDS, Judge pro tem. This was an action arising out of a contract entered into between the defendants Rollins & Jarecki and the county of Los Angeles for the furnishing of the materials and performing the work necessary to the proper construction of the Santa Susanna Pass highway in said county. The defendant and appellant American Surety Company of New York furnished the bond of said contractor for the due performance of the terms of said contract. After the work had proceeded for some time the members of the firm of contractors became involved in disputes among themselves, as a result of which Jarecki brought an action against Rollins, and in said action caused a receiver to be appointed, who took charge of the affairs of the partnership and attempted to proceed with said work, but after a few months abandoned it, and the county of Los Angeles completed the work. Several suits were filed by various persons to recover upon claims for materials and supplies furnished in the earlier stages of said work to the contractors and to the receiver, the American Surety Company of New York being made a party to these suits, and recovery being brought against it upon its bond. In these suits there were a number of interventions on the part of other claimants, but the suits were finally consolidated and tried together. The court rendered judgment against the said American Surety Company of New York upon certain of these claims, and from such judgment it prosecutes this appeal. Before considering the nature of the several claims involved in this appeal it would be well to notice the language of the statute providing for such work and of the bond required by it upon which the rights of the several claimants to recover must be predicated. The statute provides that every contractor to whom is awarded a contract for doing any mechanical work by a county shall give a bond conditioned that, if the contractor "fails to pay for any materials or supplies furnished for the performance of the work contracted to be done, or for any work or labor done thereon of any kind, that the sureties will pay," etc., and further provides that "any materialman, person, company, or corporation, furnishing materials or supplies used in the performance of the work," etc., whose claim has not been paid by the contractor, must file his claim within 90 days with the governing body by whom the contract was awarded, and must begin his action upon the bond within 6 months thereafter. St. 1897, pp. 201, 202, §§ 1, 2. The bond in the cases before us was conditioned that:

> "If said principals as contractors in said contract fail to pay for any materials or supplies furnished for the performance of the work contracted to be done in and by said contract, or for any work or labor done thereon of any kind, said surety will pay the same," etc.

[1] The first contention urged by the appellant, American Surety Company of New York, is that the trial court was in error in rendering any judgment against it and in favor of several of said claimants for the hiring of mule teams let by them to the contractor or to the receiver for use by either of them in connection with the work. In making this contention the appellant chiefly relies upon the case of Wood, Curtis & Co. v. El Dorado Lumber Co., 153 Cal. 231, 94 Pac. 877, 16 L. R. A. (N. S.) 585, 126 Am. St. Rep. 80, 15 Ann. Cas. 382. That case, however, arose out of an attempt to enforce a mechanic's lien claimed to have been created under section 1183 of the Code of Civil Procedure as it read prior to its amendment in 1911, when it did not by its terms provide for liens in favor of teamsters or draymen, but was limited in its application to mechanics, materialmen, and all other persons and laborers performing labor or furnishing materials to be used or consumed in the structure. The court in that case held that the plaintiff by letting his horses to the contractor at a stipulated price per month could not be held to have bestowed labor upon the structure so as to entitle him to a lien for the rental of such horses under the terms of section 1183 of the Code of Civil Procedure as it then read. On the other hand, respondent insists that this case is to be governed by the doctrine announced in the case of French v. Powell, 135 Cal. 636, 68 Pac. 92, which involved an action upon a bond given under the provisions of the act of 1897 as was the bond in this case, and in which this court held that a plaintiff had furnished the contractor, a teamster, two horses and a scraper at an agreed price per day for the doing of the work to be performed under his contract. The court there held the rental of the team to be a proper charge to be recovered in an action on the bond. In its most recent rulings as to the construction to be placed upon the above-quoted terms of the statute under which the public work involved in the instant case was to be done the courts have adopted the views expressed in the case of French v. Powell, supra, and have amplified somewhat upon the reasoning which sustains these views. In the case of Associated Oil Co. v. Commary-Peterson Co., Inc., 32 Cal.

App. 582, 163 Pac. 702, in which a rehearing has been denied by this court, it was held that a plaintiff furnishing gasoline to a contractor for the doing of certain construction work upon the state highway under the provisions of the act of 1897, for the price of which he brought an action upon the bond, which was in the precise form of the bond involved in the instant case, was entitled to recover therefor. The court in that case held the motive power applied by the use of gasoline in the operation of the trucks which hauled the gravel, cement, etc., to be used in the construction of the highway was thus inseparably connected with and used in the performance of the work provided by the contract to be done and by the bond to be paid for; and the court cites numerous other cases arising under similar statutes where action for the recovery of the price of various forms of motive power and energy expended in the performance of like work have been upheld. The court also differentiates between cases brought under the mechanic's lien law prior to the amendment of the statute of 1897. We are unable to perceive any distinction in principle between the case at bar and the foregoing cases of French v. Powell, supra, and Associated Oil Co. v. Commary-Peterson Co., supra. In the case of the rental of animals or of machinery applying motive power to the performance of the work to be done under the contract it is the energy of the instrumentality for which the price is paid, and that energy, whether in vital or mechanical or fluid form, is the thing which is supplied for and used in the work. It may not, in the strict sense, be embraced in the definition of the word "materials," but we think it may fairly be included within the meaning of the more comprehensive word "supplies." In the adoption of these views we are not without persuasive authority from other jurisdictions. These cases are referred to and discussed in the case of Sherman v. American Surety (L. A. 4167) 173 Pac. 161, filed May 15, 1918, and the conclusions in that case arrived at are hereby approved. The foregoing reasoning applies also to the rental of tools, the use of which contributed to the performance of the work. It was the use of the tool, and not the tool itself, which formed the basis for the claim of recompense. Our conclusion is, therefore, that the appellant's contention as to those claims which involve the rental of mules or tools for use in the performance of the work cannot be sustained.

[2] The next contention of appellant has reference to the alleged error of the trial court in giving judgment in favor of those claimants who furnished provisions and merchandise, such as flour, meat, butter, barley, hay, and like articles sold to the receiver and consumed by the men or teams during the progress of the work, and also for powder, caps, and fuse used by them in connection with said work. As to this class of claims a less difficult question is presented, arising out of the broader meaning to be given to the word "supplies," as used in the statute and bond. The ordinary meaning of this term in its general and accepted use is such as to include goods, wares, and merchandise of almost every kind and nature, whether used in the household or on the farm, or in any sort of productive or constructive work requiring the labor or service of men or animals or machinery. In the instant case they were furnished to be used and were actually used in advancing the work to be done under this contract, and in that sense entered into and became a component part of it and of the thing produced by it. This being so, we are of the opinion that as to the above classes of claims the trial court was correct in their allowance. Brogan v. National Surety Co., 246 U. S. 257, 38 Sup. Ct. 250, 62 L. Ed. —; People v. Pullman Car Co., 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366; Wright v. Walton, 56 Miss. 1; Gibbons v. The Fanny Barker, 40 Mo. 253; Conner Co. v. Littlefield, 79 Tex. 76, 15 S. W. 217.

[3] The appellant, however, contends that, even if it be conceded that the appellant would be liable upon its bond for supplies furnished for the work and labor performed for the contractor, it is not to be held liable for either or any of these things furnished to the receiver of the contracting firm. There is no merit in this contention. The receiver appointed by the court to take charge of the property and affairs of the firm and to carry on the work which was required to be done in the performance of said contract was the official agent and representative of the firm in all that he did in these respects, and his acts and obligations in so doing were the acts and obligations of the principals upon this bond, and for these the surety on the bond is as much responsible as though the principals had themselves incurred these liabilities in the performance of the work. A case very much in point upon this subject is that of Abbott v. Morrissette, 46 Minn. 10, 48 N. W. 416.

The contention of appellant that certain of the claims upon which some of the suits were brought were not filed in time is without merit. The time for filing such claims prior to the institution of actions thereon under the original act of 1897 providing for public work of this character was enlarged by the amendment of the statute in 1911, and under the terms of said amendment all of the claims for which these suits were brought were filed in time.

It follows that the judgment should be affirmed; and it is so ordered.

We concur: SLOSS, J.; SHAW, J.

(37 Cal. App. 214)

FLEISHHACKER v. MORAN et al.

(Civ. 1850.)

(District Court of Appeal, First District, California. May 13, 1918. Rehearing Denied by Supreme Court July 11, 1918.)

LANDLORD AND TENANT ⟹152(4)—LEASES—REPAIRS—CONSTRUCTION.

A stipulation in a lease that the premises are in good condition and to be kept so by the lessee is binding on the tenant as respects a latent defect, in the absence of showing that such defect might not have been discovered before making the stipulation.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by M. Fleishhacker against James Moran and another, individually and as copartners, and August F. Meyer and another, individually and as copartners, under the firm name of the Anchor Brewing Company. From a judgment for plaintiff, defendants appeal. Affirmed.

Leon Samuels and Joseph L. Taaffe, both of San Francisco, for appellants. Lilienthal, McKinstry & Raymond, of San Francisco, for respondent.

PER CURIAM. In this action for rent, plaintiff leased certain premises to the defendants, Moran and Nelson, to be used as a saloon, defendant brewing company being surety on the lease. One of the clauses of the lease reads as follows:

> "It is further agreed that the premises are now in a tenantable and good condition, and are fit for the purposes for which they are hereby leased, and that they shall be kept in good condition by and at the expense of the lessees, during the term of this lease. * * *"

The answer did not deny that the rent sued for was due, but alleged the existence of a latent defect in the premises which was not known to the defendants at the time that the property was leased. There is absolutely no showing in the answer that the defect referred to might not have been discovered prior to the making of the stipulation above quoted, and there is no attempt in the pleadings to reframe the lease on the ground of mistake or fraud. Under these circumstances it is clear that the defendants are bound by their stipulation, and that the lower court properly gave its judgment for plaintiff on the pleadings.

Judgment affirmed.

(36 Cal. App. 803)

CRITTENDEN et al. v. MURPHY et al.

(Civ. 2327.)

(District Court of Appeal, First District, California. April 16, 1918.)

PARENT AND CHILD ⟹13(1)—DRIVING AUTOMOBILE—LIABILITY OF PARENT.

Under Motor Vehicle Act of 1915 (St. 1915, p. 406) § 19, providing that no person shall allow a motor vehicle owned by him or under his control to be operated by any person "in violation of the terms of this act," where a minor son, driving his parent's automobile with their permission, drove it so recklessly as to strike plaintiff, standing on the sidewalk, the parents were liable for injuries so caused.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Fanny Crittenden and husband against Joseph A. Murphy and Kate J. Murphy. From a judgment for defendants, plaintiffs appeal. Reversed, with directions.

Julian H. Biddle, of San Francisco, for appellants. Wm. A. Kelly, of San Francisco, for respondents. Jesse H. Steinhart, of San Francisco, and Lawrence L. Levy, of New York City, amici curiæ.

ZOOK, Judge pro tem. Plaintiffs appeal from a judgment for defendants after demurrer sustained to their amended complaint. The action is one for damages for personal injuries suffered by Mrs. Crittenden as a result of her being struck by an automobile driven by Thomas C. Murphy, the minor son of defendants. The negligent driving of the automobile by the son, the happening of the accident, and the consequent injury to plaintiff are properly alleged in the complaint, and the sole question on this appeal is the sufficiency of the complaint to charge the parents with liability for the son's tort. These allegations are in substance as follows: That defendants are the owners of the automobile in question; that the same was purchased for the pleasure, comfort, and enjoyment of defendants and their said minor son, and not for business purposes; that the son was at all times authorized and permitted by defendants to drive the automobile for himself and for defendants; and that at and immediately prior to the time of the accident the son was driving the automobile with the consent, knowledge, and permission of defendants, and was "acting in furtherance of, and not apart from, the service and control of these defendants, and within the purposes for which said automobile was purchased."

The question whether or not under the facts above set forth the parents are to be held liable for the negligence of their minor son has never been decided in California, although there have been a number of decisions upon the subject in other jurisdictions. See note to Griffin v. Russell, L. R. A. 1916F, 223. It is conceded in all of the cases that, under our system of jurisprudence, the mere fact of parentage alone does not render a parent liable for the torts of his minor child, unauthorized and unratified by the parent, and that the liability, if any, must rest upon a showing of agency and the doctrine of respondeat superior. In those cases in which it appeared that at the time of the accident the son was engaged in carrying the parents or other members of the family in the machine the courts are practically unanimous in holding that the son was the agent of the parent; but, where the son was alone in the machine, and not engaged in performing some act expressly for the parent, the courts have divided on the question. The reasoning of those cases which hold the parent liable is well expressed by the following quotation from the case of Birch v. Abercrombie, 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59:

> "The daughter was using the machine for the very purpose for which the father owned it, kept it, and intended that it should be used. It was being used in furtherance of the very purpose of his ownership, and by one of the persons by whom he intended that purpose should be carried out. It was in every just sense being used in his business by his agent. There is no possible distinction, either in sound reason, sound morals, or sound law, between her legal relation to the parent and that of a chauffeur employed by him for the same purpose. The fact that the agency was not a business agency, nor the service a remunerative service, has no bearing upon the question of liability. * * * In running his vehicle, she was carrying out the general purpose for which he owned it and kept it. No other element is essential to invoke the rule respondeat superior. * * * It seems too plain for cavil that a father who furnishes a vehicle for the customary conveyance of the members of his family makes their conveyance by that vehicle his affair, that is, his business, and any one driving the vehicle for that purpose with his consent, express or implied, whether a member of his family or another, is his agent. The fact that only one member of the family was in the vehicle at the time is in no sound sense a differentiating circumstance abrogating the agency. It was within the general purpose of the ownership that any member of the family should use it, and the agency is present in the use of it by one as well as by all.
>
> "Any other view would set a premium upon the failure of the owner to employ a competent chauffeur to drive an automobile kept for the use of members of his family, even if he knew that they were grossly incompetent to operate it for themselves."

We are satisfied that the rule thus laid down is the correct one, not only because of the fact that the use of the machine by the son for his own pleasure was contemplated when it was purchased, but also because of the very nature of the automobile itself. While it is true that the automobile is not in itself a dangerous instrument, nevertheless it demands a very high decree of care and skill in its management upon the highway; and it must be recognized that, in the hands of an incompetent or reckless youth, it has immense potentiality for harm to others. Therefore the owner owes the duty to the traveling public to see to it that his car, when driven on the streets with his permission and for the purposes for which the car was purchased, should be driven carefully and with due consideration to their rights; and the owner should not in good conscience be allowed to disclaim his responsibility on the ground that the use thus contemplated and authorized by him is permissive only. When, as is alleged in the complaint in the case at bar, the son, with his parents' permission, takes the car out and drives it so recklessly as to cause it to run off the highway and to strike plaintiff, standing on the sidewalk, it is in effect the negligence of the parents in permitting the reckless son to drive that is the real cause of the injury. And we find this principle recognized in the statutes of California, for section 19 of the Motor Vehicle Act of 1915 (St. 1915, p. 406), which was in effect at the time of the accident, provides as follows:

> "No person shall allow a motor vehicle owned by him or under his control to be operated by any person who has no legal right to do so, or in violation of the provisions of this act."

The complaint in the case at bar certainly shows an utter disregard by defendants' son of the rules of the road laid down in the act in question. And in 1917 the Legislature went a step further, in an amendment to section 24 of the Motor Vehicle Act (St. 1917, p. 407, § 18), where it is provided that no minor shall in any event operate any automobile without a license, and that as a prerequisite to obtaining such license the parent or guardian of such minor must join in the application therefor; and it is there further provided "that any negligence of a minor, so licensed, in operating or driving a motor vehicle upon the public highway, whether as chaffeur or operator, shall be imputed to the person or persons who shall have signed the application of such minor for said license, which person or persons shall be jointly and severally liable with such minor" for any damages caused by such negligence. It may be noted that the provision just quoted makes the parent liable even though he neither owns nor controls the machine driven by the minor, and to that extent it creates a new liability; but, for the reasons above set forth, we are satisfied that under the law as it stood at the time of the accident in the case at bar the complaint herein stated a good cause of action against the defendants.

It is therefore ordered that the judgment be reversed, with directions to the lower court to overrule the demurrer to the complaint.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

(36 Cal. App. 819)

WALSH v. FLATLAND. (Civ. 2367.)

(District Court of Appeal, First District, California. April 16, 1918. Rehearing Denied by Supreme Court June 14, 1918.)

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Patrick J. Walsh against M. Flatland. From judgment for plaintiff, defendant appeals. Affirmed.

Peirce Coombes, of San Francisco, for appellant. W. F. Stafford and W. M. Stafford, both of San Francisco, for respondent.

PER CURIAM. This case presents the same question of law as was raised in Crittenden v. Murphy, 173 Pac. 595, this day decided by this court. The lower court took the same view of the law as did this court in Crittenden v. Murphy, and found on ample evidence that at the time of the injury the son was driving defendant's automobile with his father's implied consent, and further found that the son did not have the license to operate an automobile required by the Motor Vehicle Act of 1913 (St. 1913, p. 638), which act contained a provision identical with that quoted in Crittenden v. Murphy. Accordingly the court gave judgment for the plaintiff.

Judgment affirmed.

(37 Cal. App. 248)

WHITCOMB v. HUSE et al.

SAME v. MIDDLETON et al.

(Civ. 2157, 2158.)

(District Court of Appeal, Second District, California. May 15, 1918. Rehearing Denied by Supreme Court July 11, 1918.)

1. Bills and Notes ⚿410—Protest—Certificates of Protest.

Certificate of protest and certificate of notice of protest are to be considered together in determining whether protest is so complete, under Pol. Code, § 795, as to make it prima facie evidence of certain matters.

2. Bills and Notes ⚿410—Protest—Admissibility of Certificates.

Where notice of protest is given by mail only, certificate, to be admissible under Pol. Code, § 795, must contain reputed place of residence of party notified and post office nearest thereto, in view of Civ. Code, § 3144, subd. 3.

3. Bills and Notes ⚿410 — Protest — Admissibility of Certificate.

Pol. Code, § 795, making certificates of protest of notes prima facie evidence of certain matters, allows departure from usual rules of evidence, and certificate, to be admissible, must be clearly within its terms.

Appeals from Superior Court, Los Angeles County; G. W. Nicol, Judge.

Actions by T. C. Whitcomb against W. O. Huse and George H. Woodruff, and against C. O. Middleton and George H. Woodruff. Judgments for plaintiff, and George H. Woodruff appeals. Reversed.

Clyde C. Shoemaker and George H. Woodruff, both of Los Angeles, for appellant. Valentine & Newby, and Nathan Newby, all of Los Angeles, and Hugh A. McNary, of Los Angeles, for respondent.

WORKS, Judge pro tem. The questions arising on these two appeals are identical. References to the facts and to the parties will be according to the record in Whitcomb v. Huse, Civ. No. 2157. The action was brought to recover on two promissory notes, Huse being sued as a maker and Woodruff as an indorser. Judgment went for the plaintiff, and Woodruff appeals.

[1] It is contended by the appellant, among other things, that the trial court erred in admitting in evidence the notary's certificates of protest of the notes sued upon and also his certificates of notice of protest. The ground of the contention is that the documents failed to comply with the terms of section 795 of the Political Code, which provides that protests, stating certain facts, including "the reputed place of residence" of the party to a bill or note and of the party to whom it was given, "and the post office nearest thereto," are prima facie evidence of the matters stated in them. Both of the instruments which were received in evidence are to be considered together in determining whether the "protest" is so complete in its subject-matter, under section 795, as to make it prima facie evidence of the matters stated in it (Kellogg v. Pacific Box Factory, 57 Cal. 327, 329); although, strictly speaking, but one of those instruments was the protest. Taking them both together, however, they make no showing as to the reputed place of residence of either Huse, the maker of the paper, or of the appellant, the payee. They show, only, as far as address is concerned, the location of the "office" of Huse, except that they show that the notice of protest was mailed to Huse at that address and to the appellant at a certain designated room in the "Merchants' National Bank Bldg., Los Angeles, Cal." Notwithstanding this state of the "protest," the respondent insists that the documents were admissible in evidence upon the authority of Kellogg v. Pacific Box Factory, supra. In the opinion in that case it was said, at page 330:

> "It [the protest] does not state the place of residence of the party to the note, nor the post office nearest thereto; and, because it does not, the respondents contend that it was inadmissible as evidence. It does, however, state that everything which is certified to have been done and served was done and served at San Francisco. The letters containing notice of the protest of the note were delivered at the respective places of business of the respondents, and in each instance to a person of discretion having charge thereof. As that was done at San Francisco, the respondents' places of business must have been there, and it was not necessary to state that the San Francisco post office was nearer than any other post office to San Francisco. A delivery of the notice at each of respondents' places of business to some person of discretion in charge thereof obviated the necessity of delivering it at or sending it by mail to the respective residences of the respondents; and therefore it was unnecessary to state where said residences were, or the post office nearest thereto."

In order properly to determine the applicability of the Kellogg Case to the present question, it is necessary to refer to section 3144 of the Civil Code, which was, at the time that case was decided, and now is, in the following language:

> "A notice of dishonor may be given: (1) By delivering it to the party to be charged, personally, at any place; or (2) by delivering it to some person of discretion at the place of residence or business of such party, apparently acting for him; or (3) by properly folding the notice, directing it to the party to be charged, at his place of residence, according to the best information that the person giving the notice can obtain, depositing it in the post office most conveniently accessible from the place where the

presentment was made, and paying the postage thereon."

[2, 3] It will be noted from the text of the Kellogg Case that notice of dishonor was there given, under the alternative allowed by the second subdivision of section 3144, by a delivery at the places of business of the indorsers; and that the doctrine of the case is really based upon that fact. The ruling amounts to nothing more than a statement that the language of section 795 of the Political Code requiring a statement of the reputed place of residence and of the post office nearest thereto need not be followed where notice of dishonor is given by delivery of the notice at the place of business. Here, however, the situation is quite different. Notice of protest was given by mail, and notice may be given in that manner only pursuant to the provisions of the third subdivision of section 3144, which permits a mailing to residence alone. In such a case the statement of reputed residence and of the nearest post office is most material, and such a statement is of the very essence of the "protest." It is our opinion that a "protest" is prima facie evidence of the matters stated in it only when it contains a recital of all the facts material to the case in which it is offered in evidence and which are mentioned in section 795. The section makes the "protest" prima facie evidence of things of which it ordinarily would be no evidence at all. It allows a departure from the usual rules of evidence, and those who would avail themselves of its provisions must therefore bring themselves clearly within its terms.

The judgments are reversed.

We concur: CONREY, P. J.; JAMES, J.

(37 Cal. App. 199)

PITT v. PENSINGER. (Civ. 2267.)

(District Court of Appeal, Second District, California. May 10, 1918.)

APPEAL AND ERROR ⟹757(1)—BRIEFS—SUFFICIENCY.

On appeal by the alternative method, part of record not printed in the brief, as required by Code Civ. Proc. § 953c, will not be considered.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by Nellie Pitt against J. H. Pensinger. Judgment for plaintiff, and defendant appeals. Affirmed.

E. J. Emmons and H. E. Johnstone, both of Bakersfield, for appellant. T. F. Allen, of Bakersfield, for respondent.

PER CURIAM. The appeal in this case is taken from a judgment entered in favor of the plaintiff. The appellant in the preparation of his record on appeal has made use of what is known as the alternative method. However, in the preparation of the brief of appellant the provisions of section 953c, Code of Civil Procedure, have not been observed. By that statute it is required that the parties shall print in their briefs such portions of the record as they desire to call to the attention of the appellate court. Where they fail to do this it follows that the appellate tribunal will not look into the typewritten transcript to ascertain whether the points urged as ground for reversal are well made. The brief here presented on behalf of appellant does not contain sufficient of the record in printed form to enable us to say that there is any merit in the appeal. This same question has been considered in a number of cases which are cited in Barker Bros. v. Joos et al., 171 Pac. 1085. For want of any showing of error, it follows that the judgment appealed from should be affirmed.

The judgment appealed from is affirmed.

(37 Cal. App. 91)

CATLETT v. BENNETT et al. (Civ. 1842.)

(District Court of Appeal, Third District, California. April 29, 1918.)

1. WATERS AND WATER COURSES ⟹262 — OVERFLOW—DAMAGE TO LEVEE—LIABILITY.

If reclamation district trustees altered canal so as to throw waters against levee which gave way and their negligence contributed in any way to the damage, it was immaterial what portion of the water thrown on the levee was so thrown by the change in the canal due to their negligence.

2. WATERS AND WATER COURSES ⟹263 — OVERFLOW — MEASURE OF DAMAGES — LOSS OF CROPS.

Where plaintiff's crops were damaged by negligence of reclamation district trustees causing overflow, the measure of his damages was to be determined by finding value of the probable yield and the market value of the crop had it not been damaged, less the cost of producing and marketing the crop.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by J. R. Catlett against F. H. Bennett and others, Trustees of Reclamation District 1000. Judgment for plaintiff, and defendants appeal. Affirmed.

W. H. Carlin, of Marysville, for appellants. M. E. Sanborn and Laurence Schillig, both of Yuba City, for respondent.

BURNETT, J. The action was for damages to crops caused by the flooding of plaintiff's land in January, 1914. The gist of the complaint is shown by these allegations:

"That defendants did, during the early part of the year 1913, excavate and cut a canal and build a levee (describing it). That said canal and said levee cut through a high ridge running in an easterly and westerly direction. That said high ridge had always heretofore protected the lands and crops of plaintiff from the overflow waters of Pleasant Grove creek and from the flow of waters on the southeasterly side of said high ridge. That plaintiff is informed and believes, and upon such information and belief states, that said canal and levee was a part of a scheme of the defendants to build a system of levees and canals for the purpose of constructing a by-pass between reclamation district 1000 and reclamation district 1001 for carrying off the drainage and overflow waters of the adjacent country and the overflow from Pleasant Grove creek." (It may be stated here that defendants were and are the trustees of said reclamation district No. 1000.)

"That when defendants had excavated said canal and built said levee between the points aforesaid they ceased and abandoned their work on their said scheme to construct the by-pass and did not complete their plan and failed to complete the canal and levee in question or to build other canals or levees to take care of the overflow waters of Pleasant Grove creek and the country lying on the southeast side of said high ridge. That the canal so constructed by defendants was constructed with a pitch that caused the waters from the overflow of Pleasant Grove creek and the waters from the country on the southeast side of said high ridge to flow directly towards and against the lands and levees of plaintiff in addition to the waters that usually flowed against said levees; and that the levee so built by defendants helped to divert and cause to flow into said canal as aforesaid the overflow waters from Pleasant Grove creek and the waters from country on the southeast side of said high ridge. That defendants left said canal and levee incomplete, and said canal open and unobstructed. That by reason of the foregoing acts of defendants the overflow waters from Pleasant Grove creek and the waters from the vicinity lying southeast of said high ridge did, on or about the 1st day of January, 1914, flow through the said canal and against the levee surrounding the land of plaintiff and augmented the water ordinarily flowing against said levees to such an extent that said levees were broken down and destroyed. That if said canal had never been excavated, or said levee never been built, or if said scheme of defendants had been completed, said overflow waters from Pleasant Grove creek and from the vicinity lying northeast of said high ridge would never have been added to the waters ordinarily flowing against the levees surrounding plaintiff's lands and caused them to break down to his damage as aforesaid."

Appellants in their brief contend for three propositions:

"(1) The evidence is insufficient to prove that the damage to plaintiff's crop was caused by any of the acts of defendants or for that matter from any waters coming thereto from the south of plaintiff's land; that is to say, from the direction of reclamation district 1000. (2) There is no evidence to prove any loss of plaintiff in connection with his levees. (3) Errors of law committed by the lower court in adopting what we claim to have been an incorrect method of computation."

Of these contentions, the only one concerning which there can be any serious controversy is the first one. As to this, from a reading of the entire record, the conviction arises that the evidence is not very persuasive. However, we think it cannot be said that the finding adverse to appellants is entirely unsupported. The only particular omission urged by appellants is that the evidence does not show that the levee protecting plaintiff's land was broken by the waters flowing from the south in the canal constructed by the defendants.

As to the construction of the canal itself by defendants, its condition as described in the complaint, and the fact that it caused a large volume of flood water to be thrown against the land of plaintiff, there is no serious controversy, and these considerations need receive no further attention. The other point is not so clear by reason of the fact that quite a volume of flood water was precipitated against plaintiff's said levee through a waterway called King creek coming from the north, with which, admittedly, appellants had no connection. As to this appellants claim:

"There is no dispute whatever in the testimony that the waters of King creek alone would have done all the damage claimed to have been suffered by plaintiff; and, while there is some evidence to the effect that where these breaks occurred certain waters from the south and east passed through these breaks commingling with the waters of King creek, yet we claim that the damage had been done independent of any action of these waters, and that even as to those a large portion came from the east and only a relatively small portion of the waters from the south ever reached either of these breaks. We claim there is no evidence in the record which tends to show by anything which may be called substantive proof that these breaks were not caused solely by the action of the waters of King creek, and then, after these breaks had thus been caused, the amount of contribution to any possible damage by waters which reached plaintiff's land from and through this intercepting canal to the south was so insignificant as not to amount to a material contributory cause."

[1] In reference to this contention, however, it may be said that, if the levee had held, no damage would have been done to the land. This appears clear enough from the testimony. We think, also, that it is not an unreasonable inference that the levee would not have given way if the additional water had not been projected against it by reason of the negligence of appellants in constructing said incomplete canal. This is not a matter capable of demonstration. It rests somewhat on opinion based upon a consideration of the surrounding circumstances. There was no attempt at a technical exposition of the strength of said levee or of the pressure upon it caused by the waters coming from the north or from the south; but witnesses testified substantially that it had before withstood the impact of a larger volume of water from said King creek, and that when the break occurred more water was being thrown against it through the said canal constructed by defendants than through said creek, and hence we may say it was not an unreasonable deduction drawn by the trial judge "that the negligence of defendants was a proximate contributory cause of the injury." If the negligence of defendants contributed to the breaking of the levee, then, manifestly, it would be unimportant what part of the water that overflowed the land came from said King creek and what part from the canal. However, as to this there is testimony that the larger part came from the canal.

Of the $832.15 awarded as damages, the court allowed the sum of $100 for the destruction of the levee. There is direct testimony that it would cost that amount to repair it, and therefore it cannot be said that the finding in that particular is unsupported.

[2] The third objection of appellants is based upon the fact that the court in determining the damage to the crops adopted the rule of ascertaining the probable yield and market value of the crop had it not been damaged, deducting therefrom the cost of producing and marketing the same. It is admitted by appellants that the course was sanctioned by the Supreme Court in Teller v. Bay & River Dredging Co., 151 Cal. 209, 90 Pac. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779, and by this court in Dennis v. Crocker-Huffman, etc., Co., 6 Cal. App. 58, 91 Pac. 425. They claim, however, that the rule is not correct and think those cases should be overruled. We are, however, entirely satisfied with those decisions and desire to add nothing to the consideration therein advanced.

Under the familiar rule as to the province of appellate courts, we think the judgment should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

(37 Cal. App. 88)

MERCHANTS' COLLECTION AGENCY v. ROANTREE et ux. (Civ. 2317.)

(District Court of Appeal, First District, California. April 29, 1918.)

BILLS AND NOTES ⚷104—EXECUTION—"MENACE."

Under Civ. Code, § 1569, defining duress, and section 1570, defining "menace," where defendant executed with his wife a promissory note to his employer to cover alleged overdraft of salary because of threats by the employer's attorney that the employer would have defendant arrested for embezzlement if he did not pay the sum claimed, the note could not be enforced, since its execution was obtained by means of menace.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Menace.]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by the Merchants' Collection Agency, a corporation, against James D. Roantree and wife. From a judgment for plaintiff, and a denial of new trial, defendants appeal. Reversed.

Leon Samuels and Jos. L. Taaffe, both of San Francisco, for appellants. E. H. Wakeman, of San Francisco, for respondent.

BEASLY, Judge pro tem. This action was brought to recover the balance due on a promissory note in the sum of $3,950, executed by the defendants in favor of Gilmartin Company, a corporation, plaintiff's assignor, upon which the amount of $1,125 had been paid. The defense offered by both defendants was lack of consideration for the note and duress in obtaining it. The trial court found against these defenses, and awarded plaintiff judgment as prayed. This appeal is from the judgment and an order denying defendants' motion for a new trial.

James Roantree was employed before the San Francisco fire of April 18, 1906, as bookkeeper for the Gilmartin Company, a printing concern, and received for his services $125 a month. The printing establishment was totally destroyed in that fire, and in the month of July thereafter the company undertook to re-establish its business. Roantree was reemployed, and acted in the various capacities of bookkeeper, salesman, solicitor, assistant manager, and at times sole manager, and as such devoted more time and was burdened with more arduous and responsible duties than formerly. No salary was formally fixed for him by the officers of the company, but he drew from time to time during each month as he needed it sums which at the end of 4½ years aggregated an amount which would represent payments to him of $290 a month. These sums so received by Roantree were drawn openly, and were all duly entered upon the books of the concern, either by himself or an assistant bookkeeper. In December, 1910, Roantree, having accepted a position with another printing establishment, gave notice of his intended resignation from the Gilmartin Company, and asked the president, James Gilmartin, for an adjustment of certain money invested by him in the company. Gilmartin then charged Roantree with having drawn from the funds of the company some $5,000 more than he was entitled to, and demanded restitution thereof. Roantree denied that he owed anything, claiming that all moneys drawn by him were in payment of salary. The matter was placed in the hands of the company's attorney, and a demand made upon Roantree for the sum of $4,100, this amount being arrived at as a balance claimed to be due from Roantree for money drawn as above stated after crediting him with $150 a month as salary for the first six months after his re-employment, and $200 a month for the remainder of the period down to December, 1910.

The evidence showed that the attorney for Gilmartin Company threatened that the company would have Roantree arrested for embezzlement if he did not pay the sum which they claimed Roantree had overdrawn his salary. In their answer the defendants alleged that Roantree was not indebted to the Gilmartin Company in any sum of money whatsoever, and that the execution of the note was obtained by duress, in that the Gilmartin Company threatened to institute criminal proceedings against Roantree unless himself and his wife executed the note, and that by reason of these threats, and to avoid the threatened criminal proceedings, they did execute it. The court found against defendants on these issues of their answer. The only real question here is whether the finding of the court that the note was not executed because of these threats is sustained by the evidence.

Mrs. Roantree testified that she signed the note only because of the threats. Roantree's testimony as to the reason for his signing the note was the same. That the attorney for the Gilmartin Company had threatened Roantree with criminal proceedings unless he signed the note is admitted by him.

The facts of this case bring it fairly within the rule declared in the case of Morrill v. Nightingale, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. Rep. 207, where it is said:

> "The consent of a party to a contract must be free, and it is not free when obtained through duress or menace. Section 1569 of the Civil Code declares duress to consist in the 'unlawful confinement of the person of the party' or 'of the husband or wife of such party,' etc., or 'the confinement of such person, lawful in form, but fraudulently obtained.' Section 1570 provides menace consists in a threat of the duress above specified, or of a threat of injury to the character of any such person. In this case there was no arrest and confinement; hence no duress; but the history of the transaction, as disclosed by the findings, clearly indicates threats of imprisonment upon a charge of embezzlement, which, in effect, necessarily were threats of injury to the character of defendant Nightingale, and consequently a menace."

The doctrine of the case just quoted has been very recently reiterated and affirmed by the Supreme Court in the case of People v. Beggs, 172 Pac. 152, in support of the declaration that:

> "The law does not contemplate the use of criminal process as a means of collecting a debt. To invoke such process for the purpose named is, as held by all authorities, contrary to public policy"

—and by way of emphasis the Supreme Court in the case of Beggs supposes a situation based upon circumstances which are not materially different from the facts in the instant case, thus:

> "If, instead of paying the $2,000, Da Rosa [the complaining witness in the Beggs Case], under the circumstances shown to exist, had given his note and a mortgage securing the same, then, under the authority of the case cited (Morrill v. Nightingale, supra) payment thereof could not have been enforced, the reason therefor being that the execution of the security was procured by the wrongful use of fear, induced by the threat to prosecute him for the crime out of which the indebtedness arose."

Upon the authority of that case it is clear that the execution of the note in suit was obtained from the defendant by means of menace, and therefore no recovery should be had thereon.

Pursuant to the reason and authority of these cases it must be held that the finding of the court above referred to, to the effect that this note was not obtained by the threats of criminal prosecution, was not sustained by the evidence, and, as the finding was vital to the judgment, the case must be reversed; and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

(37 Cal. App. 109)

HURT et al. v. BAUER. (Civ. 2174.)

(District Court of Appeal, Second District, California. April 30, 1918.)

APPEAL AND ERROR ⟹158(1)—DISMISSAL OF APPEAL—MOOT QUESTIONS.

Where judgment went for plaintiff and defendant appealed, questions became moot, where defendant paid the judgment.

Appeal from Superior Court, Los Angeles County; H. T. Dewhirst, Judge.

Action by Charles E. Hurt and another against F. J. Bauer. Judgment for plaintiffs, and defendant appeals. Appeal dismissed.

C. Franklin Baxter, of Los Angeles, for appellant. Wm. M. Bowen, Benjamin E. Page, and Arthur C. Hurt, all of Los Angeles, for respondents.

PER CURIAM. This is an action for the recovery of money, judgment having gone for the plaintiffs, and the defendant having appealed. At the time set for the oral argument, the respondent was granted leave to file a certified copy of a satisfaction of judgment said to have been filed in the action in the office of the clerk of the trial court. The certified copy has been filed since, and it shows a satisfaction of the judgment in full. By the payment of the judgment the questions presented upon the appeal have become moot.

The appeal is dismissed.

(37 Cal. App. 139)

COLLINS v. BELLAND. (Civ. 2262.)

(District Court of Appeal, Second District, California. May 2, 1918.)

COSTS ⟹199 — ENTRY ON MINUTES AFTER "DECISION."

Where findings of fact are waived, an entry on the minutes of the court, directing judgment for one or the other of the parties, constitutes the "decision" of the court, and the time for serving and filing memorandum of costs commences from the minute entry date, or the date of notice, to the party claiming costs, of such minute entry.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Decision.]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by F. D. Collins against R. O. Belland. From an order striking out the cost bill filed by him, defendant appeals. Order reversed.

Waldo, Root & Dysert, of Los Angeles (Floyd L. Anderson, of Los Angeles, of counsel), for appellant. A. P. Michael Narlian, of Los Angeles, for respondent.

JAMES, J. The defendant, being the successful party at the trial had herein, appeals from an order of the superior court striking out the cost bill filed by him. The ground of the motion to strike out the bill was that it had been filed before decision had been made by the court. It is shown by the minutes of the superior court that trial of this action was had on July 20, 1916. The concluding portions of the minutes of the court are as follows:

> "Cause submitted without argument. Thereupon it is ordered that judgment be ordered for defendant. Findings were waived."

It is made further to appear by the record that on the day following the defendant served and filed his memorandum of costs and disbursements. It further appears that on the 26th day of July a form of judgment was presented to the judge, who signed the same, and the clerk filed and entered the judgment so made, leaving blank that portion of it which provided for the recovery of costs to the defendant. On the 27th day of July, five days having elapsed after the filing and serving of the memorandum of costs, and no objections having been made thereto, the clerk filled in the blank, inserting the total of defendant's costs as shown by his memorandum. The sole question presented is as to whether the entry on the minutes of the court, findings being waived, directing judgment for the defendant, constituted a decision of the court in the case. Section 1033, Code of Civil Procedure, provides that the party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk and serve upon the adverse party, within five days "after the verdict, or notice of the decision of the court or referee" a memorandum of the items of his costs and disbursements. The section in conclusion provides:

> "By the decision of the court, or referee, herein referred to, is meant the signing and filing of the findings of fact and conclusions of law."

No question is made but that the plaintiff had actual notice and legal notice of the making of the minute order directing judgment for the defendant. The question is: Under section 1033, Code of Civil Procedure, which provides that the memorandum of costs and disbursements must be filed within five days after the signing and filing of findings of fact and conclusions of law, does the time for the filing of such memorandum, where no findings of fact are made, commence to run before the entering of judgment? If it may be said that there is no decision in such a case until the judgment has been entered, then the position of respondent must be sustained. If, on the other hand, where findings of fact and conclusions of law are waived, a minute entry, directing judgment for one or the other of the parties constitutes the decision, then the time for the serving and filing of the memorandum of costs would commence from the minute entry date or the date of notice to the party claiming costs of such minute entry. In Crim v. Kessing, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491, it is said:

> "But under the provisions of the Code of Civil Procedure, whenever findings are required, there can be no 'rendition of the judgment' until they are made and filed with the clerk. Findings of fact, however, are required only 'upon the trial of a question of fact,' and they may in all instances be waived. Whenever they are waived or are not required, the entry of its decision in the minutes of the court constitutes the 'rendition of the judgment' in the same manner as it did under the former system."

And in San Joaquin L. & W. Co. v. West, 99 Cal. 345, 33 Pac. 928, it is said:

> "The decision of the court referred to in these sections, when filed, amounts in law to a rendition of the judgment."

We think that where the findings of fact are waived, as they were in this case, an entry on the minutes of the court, directing judgment for one or the other of the parties, constitutes the decision of the court. The opinions which hold that the oral views of the court as expressed from the bench do not constitute a decision in any case are not in point.

The order appealed from is reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

(37 Cal. App. 110)

FLINN et al. v. ZION. (Civ. 2340.)

(District Court of Appeal, First District, California. April 30, 1918.)

1. LIMITATION OF ACTIONS ⚷65(1) — GRADING STREETS—ACCRUAL OF CAUSE OF ACTION.
Under San Francisco City Charter, art. 6, c. 1, § 22, and chapter 2, § 9, subds. 9 and 10, providing that private contracts for street grading shall be under the direction and to the satisfaction of the board of public works, and that such satisfaction shall be declared by resolution, limitation does not start to run against the contractor until the board of public works adopts such work and shows its satisfaction by resolution.

2. LIMITATION OF ACTIONS ⚷65(1) — GRADING STREET—ACCRUAL OF CAUSE OF ACTION.
The requirement of article 6, c. 1, § 22, of such charter, that private contracts for grading streets must contain a "provision" to the effect that materials, etc., must be to the satisfaction of the board of public works, applies to oral contracts as well as written contracts, as far as the question of accrual of such cause of action is concerned.

3. MUNICIPAL CORPORATIONS ⚷281(1) — GRADING STREETS—PERMITS.
Under San Francisco City Charter, art. 5, person actually performing work under a private contract for grading streets need not have a permit; it being sufficient if a permit has been issued to some one.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by James J. Flinn and others against Edwin R. Zion. Judgment for plaintiffs, and defendant appeals. Affirmed.

H. M. Anthony, of San Francisco, for appellant. Fabius T. Finch and Paul F. Fratessa, both of San Francisco, for respondents.

KERRIGAN, J. This is an action brought to recover the sum of $341 for grading and sewering Forty-Ninth avenue, San Francisco, in front of the defendant's property. The contracting firm of Raish & Clark had a private contract for doing this work signed by all the property owners except defendant. This firm assigned its contract to plaintiffs herein to do the work, and defendant contracted with the assignees for his frontage. Judgment was rendered against the defendant for the sum sued for, and defendant appeals.

Two grounds are urged for reversal: First, that the action is barred by the statute of limitations; second, that the contract is unlawful for the reason, it is claimed, that the work was done without a permit from the board of public works. We do not consider there is merit in either contention.

[1, 2] With reference to the first, while it appears that the physical work was completed on March 11, 1914, it was not until April 13th following that a resolution was adopted by the board of public works accepting the work. Suit was filed March 24, 1916, which was in ample time. The claim of appellant that the statute commenced to run from the actual completion of the work and not from the date of the acceptance cannot be maintained. This contention is based upon the assumption that the contract being a private one, no acceptance of the work was required; the charter containing no provision for the acceptance of such contracts. We do not so read the act. Its provisions with reference to street work are to be found in article 6 thereof. Subdivisions 9 and 10 of section 9, chapter 2, of that article deal with the performance of private contracts for grading and other characters of street work. It is true that nowhere in these subdivisions is there any express provision made for acceptance by the board for work done thereunder. Section 22 of chapter 1, however, provides that all work performed under article 6 must be done under the direction and to the satisfaction of the board of public works, and that the materials used must be in accordance with specifications, and also to the satisfaction of the board, and that all contracts provided for under article 6 must contain a provision to that effect. The section further provides that when work shall have been completed to the satisfaction and acceptance of the board it shall so declare by resolution, and thereupon deliver to the contractor a certificate of acceptance.

Counsel for the appellant seeks to avoid the force of this section by claiming that it applies only to public written contracts where an assessment is made, and that his contract being a private and oral one the section does not apply to it. In this behalf it is argued that the section, by requiring that contracts contain a provision that the work be done under the direction and to the satisfaction of the board, indicates by the use of the word "provision" that a written contract was intended. The section does not admit of such a construction. By the adoption of this section the manifest intention of the framers of the charter was to have the charter provisions in relation to street work form a part of all contracts for street work, public as well as private, and to place the performance of such contracts under the supervision and control of the board of public works. The contract under which the work in question was performed is not before us, but appellant agreed with the contractor to pay for his proportion of the same, and the work having been performed, upon its acceptance by the board a right of action accrued against him, and he became liable for the amount agreed upon.

[3] The claim that the contract is unlawful is based upon the assumption that no permit to perform the work was ever obtained from the board. The record shows that a permit was obtained by Raish and Clark before the work commenced, and thereafter and before its completion a renewal in modified form was had. The charter nowhere provides that the person actually performing the work must himself obtain a permit, the only requirement being that such permit be obtained. This was done.

From what we have said, it follows that the judgment should be and it is hereby affirmed.

We concur: ZOOK, Judge pro tem.; BEASLY, Judge pro tem.

(36 Cal. App. 751)

HARDING v. DAM et al. (Civ. 2388.)

(District Court of Appeal, First District, California. April 10, 1918. Rehearing Denied by Supreme Court June 6, 1918.)*

1. PRINCIPAL AND AGENT 🔑14(3)—MORTGAGOR'S DELIVERY OF NOTE AND MORTGAGE TO MORTGAGEE'S ATTORNEY ON CONDITION.

Where a mortgagor delivered a new note and mortgage to the mortgagee's attorney with instructions to deliver them to mortgagee upon receipt of old note and acknowledged satisfaction of outstanding mortgage, the attorney was mortgagor's agent for their delivery, and mortgagor cannot, in a foreclosure suit upon the new mortgage, complain of his failure to require the condition.

2. MORTGAGES 🔑307—RENEWAL.

Where new note and mortgage were delivered without surrender of old note and acknowledged satisfaction of outstanding mortgage, the mortgagee's acceptance of the new note and mortgage amounted to an extinguishment of the prior mortgage as a valuable consideration for the new one.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*See opinion following case No. 2406, pages 605, 606, post.

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by Sherman Harding against F. H. Dam and another. Judgment for plaintiff, and defendants appeal. Affirmed.

F. H. Dam, of San Francisco, for appellants. Richard Belcher, of Marysville, for respondent.

KERRIGAN, J. This is an appeal from a judgment of foreclosure of a mortgage dated June 27, 1913, alleged to have been executed by the defendant F. H. Dam in favor of the plaintiff to secure payment of a promissory note of the same date for $8,507.68, payable to the plaintiff on or before two years thereafter, and alleged to have been made by both of the defendants.

The conclusion we have reached on the merits of the case renders a consideration of the preliminary motion made by plaintiff to dismiss the appeal unnecessary.

Briefly stated, the history of the case is this: In the year 1904 defendant F. H. Dam purchased a parcel of real property from the plaintiff, giving in payment therefor his promissory note for $5,200 secured by mortgage on the property. Three years later, Dam having failed to pay any portion of the principal thereof or interest thereon, he gave to plaintiff a new note for $6,074 and a new mortgage. Six years later, Dam still having paid nothing on his said indebtedness, plaintiff demanded payment, and notified him that unless a settlement was made foreclosure proceedings would be commenced. Thereupon Dam sent to the plaintiff a new note and mortgage in the amount of the principal and interest then due. This note was unsatisfactory to the plaintiff and he refused to accept it. Later, after considerable negotiation, plaintiff agreed with Dam that he would accept a note executed by him and his mother, secured by a mortgage on the property described in the complaint. Thereafter, having secured the signature of his mother to such a note, Dam sent it together with the mortgage to one Ray Manwell, who was the attorney for plaintiff, with instructions to deliver them to the plaintiff upon receipt by him for Dam of the outstanding note and a duly acknowledged satisfaction of the mortgage which had been given to secure the same. These instructions, however, it seems were not strictly carried out by Manwell, with the result that while plaintiff received the present note and mortgage Dam has never received back the prior note, nor was the satisfaction of mortgage which he did receive acknowledged.

Upon these facts the defendants allege in their answer, and now contend, that there was no delivery of the note and mortgage in suit, and that the same are wholly without consideration.

[1, 2] While it appears, as just stated, that Manwell was the attorney for plaintiff, nevertheless it must be held upon the facts related that he was also in effect the agent of the defendants for the purpose of making delivery of the note and mortgage; and the record failing, as it does, to show that plaintiff ever knew or was advised of the condition under which Manwell was to make delivery of the documents, we entertain no doubt that the breach of the condition by Manwell, defendants' agent, is no defense to the action under the circumstances of this case. The record is silent as to why the previous note was not returned, and no reason or object has been suggested why plaintiff should have retained it. Its retention was probably an inadvertence, as doubtless was a clerical error in the satisfaction of mortgage, and the failure to acknowledge the same. Moreover, although Dam must have known that the present note and mortgage had been delivered, it appears that he made no serious complaint concerning the failure of the plaintiff to return the prior instruments until the present note became due and this action was commenced. We are of the opinion that the delivery of the documents was valid, and, taken with the acceptance thereof by the plaintiff, amounted under the attending circumstances to an extinguishment of the prior obligation for which they were given in renewal, and that such extinguishment constituted a valuable consideration for the present note and mortgage.

There is no merit in defendants' position that plaintiff obtained these instruments through fraud or deceit, or in the claim that the findings of the court do not respond to the issues framed by the pleadings.

The judgment is affirmed.

We concur: ZOOK, Judge pro tem.; BEASLY, Judge pro tem.

(36 Cal. App. 748)

HARDING v. DAM et al. (Civ. 2406.)

(District Court of Appeal, First District, California. April 10, 1918. Opinion of Supreme Court Denying Rehearing June 8, 1918.)

1. STIPULATIONS 🔑14(12)—SALE OF PROPERTY—AGREEMENT OF COUNSEL.

Correspondence between defendant and counsel for plaintiff in a mortgage foreclosure action *held* to constitute an agreement to refrain from proceeding with the sale of property only pending the necessary steps to perfect defendant's appeal, and the fixing of stay bond, and not to stay execution for a period longer than necessary therefor.

2. MORTGAGES 🔑529(10) — FORECLOSURE — SALE OF PROPERTY — ADEQUACY OF PRICE — EVIDENCE.

Notwithstanding the testimony of one witness that the mortgaged property was sold at an inadequate price, evidence including the fact that it was sold at a public and advertised execution sale *held* sufficient proof that the sale was for a fair and adequate price.

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by Sherman Harding against F. H. Dam and another. Judgment for plaintiff, and from an order denying a motion to set aside a sale of the mortgaged premises, and the deficiency judgment, defendants appeal. Order affirmed.

F. H. Dam, of San Francisco, for appellants. Richard Belcher, of Marysville, for respondent.

KERRIGAN, J. This is an appeal by defendants from an order refusing to vacate a sale of mortgaged premises and a deficiency judgment, and to recall a certificate of sale and an execution, in a foreclosure suit.

Prior to April 29, 1916, a judgment of foreclosure had been entered against the defendants, and on that date defendant F. H. Dam, contemplating an appeal, and being himself an attorney, wrote on that day to Richard Belcher, attorney for the plaintiff, advising him of his intention to take an appeal from such judgment, and added:

> "I expect to file my stay bond at the same time that I file my notice of appeal, and in the meantime to bring on a hearing to fix the amount of the stay bond. My understanding is that it was verbally stipulated between us that execution pending the foregoing proceedings will be stayed."

This letter was answered by Belcher on May 1, 1916, as follows:

> "I am in receipt of yours of the 29th, inclosing a copy of order extending time and notice requesting the preparation of transcript of the record. It would be useless of course for me to advertise a sale while these matters were pending, and I shall not do so."

On this same day, May 1st, Dam, evidently not having received this reply to his letter of April 29th, wrote Belcher as follows:

> "From our verbal understanding in court on the day of the hearing of a motion for a new trial I have been assuming that there is no notice of sale now running in the case of Harding v. Dam, but it just occurs to me that I had better ascertain definitely if such is the fact. If notice of sale is now being published, please wire me to-morrow, at my expense, the name of the newspaper and date noticed for the sale, and also please mail me a printed slip containing copy of the notice."

To this letter no reply was deemed necessary, nor was any made, and at the time no notice of sale was being published. Thereafter, on June 2, 1916, upon notice and hearing the court fixed the amount of the undertaking staying execution at $2,000. Twenty-eight days later, on June 30th, no undertaking having been filed by the defendants, the commissioner theretofore appointed by the court commenced the publication of notice of sale, and made a sale of the property on the 25th day of July, 1916. Plaintiff was the only bidder at the sale, and purchased the property for the sum of $9,500. This being $2,000 less than the amount of the judgment against the defendants, a deficiency judgment for $2,000 was entered at once, whereupon execution was issued and levied upon certain property belonging to the defendants. On August 3d the defendants filed an undertaking on appeal in the amount specified by the court in its order of June 2d. Thereafter, on the 14th day of August, 1916, defendants filed an application to set aside the sale of the mortgaged premises and the deficiency judgment, and to recall the certificate of sale and execution. This application was heard, and on the 14th day of September the court made an order staying the execution of the judgment, but denying the motion to set aside the sale of the mortgaged premises and the deficiency judgment.

On this appeal the defendants contend that under the facts narrated they were lulled into a sense of false security by the letter from Belcher, and that the plaintiff bought the property at a grossly inadequate price.

[1] Assuming that the application was properly made, it appears plain from the correspondence referred to, we think, that all that Belcher agreed to do at the most was to refrain from proceeding with a sale of the property pending the taking by defendants of the necessary steps to perfect their appeal and the fixing by the court of the amount of a stay bond. Therefore, when, 28 days after the amount of the stay bond had been fixed by the court, no such bond had been filed, and the indebtedness upon which the suit was brought having accumulated during a period of 12 years, during which time no payment by defendants of any kind had been made, the latter were entirely without grounds for anticipating that the plaintiff would voluntarily and without request extend any further courtesy. However that may be, it is certain that plaintiff proceeded strictly within his rights, and the situation of defendants is due entirely to their own inadvertence.

[2] With respect to the claimed inadequacy of price for which the property was sold, it is true that their contention in this behalf is sustained by the testimony of one of their witnesses; but it is clear that the court did not follow the opinion of this witness, but upon consideration of the facts appearing in the case, among which was the pertinent one that upon a public, advertised sale of the property it brought only the sum of $9,500, reached the conclusion that this price was fair and adequate. Its conclusion in this regard is based upon ample evidence, and with it we have no power or disposition to interfere.

The order is affirmed.

We concur: ZOOK, Judge pro tem.; BEASLY, Judge pro tem.

Opinion of Supreme Court Denying Rehearing.

PER CURIAM. In denying the petition for transfer we wish also to express our surprise and our disapprobation of some of the language used by appellants' counsel in his reference to the learned author of the opinion. He refers to the "so-called history of the case thrust to the front" by the justice who wrote the opinion, and characterizes that history as being "quite as unjust as it is irrelevant." In another part of his petition counsel asserts that "the case narrated" by the learned author of the opinion "is not the case which arose between the parties," and he concludes the petition with the sentence: "Are we not entitled to have the truth told about our case?"

Even the zeal of advocacy can scarcely excuse such language, yet we are unwilling to believe that counsel intended to reflect upon the sincerity and integrity of a member of the District Court of Appeal. For this reason we are not citing counsel for contempt, but are recording and reprehending his indiscretion as a warning to him and to others of the profession who, in the disappointment of defeat, may be tempted to forget the proprieties and the decencies of practice and to give vent to unjust reflections which in calmer moments they should not think of harboring or uttering.

(37 Cal. App. 27)

KELSEY CO. v. SPEARS et al. (Civ. 1844.)

(District Court of Appeal, Third District, California. April 22, 1918.)

1. Judgment ⚷386(8)—Vacation—Time.

Where defendants appeared in court and formally made their motion to set aside judgment within six months after rendition, as required by Code Civ. Proc. § 473, that the further consideration of the motion was postponed until after expiration of six months would not deprive the court of jurisdiction or defendants of any rights.

2. Judgment ⚷388—Order to Show Cause —Notice.

Where adverse party made his appearance in court at time fixed for hearing motion to set aside judgment and had an opportunity to do all that he could do under any circumstances, whether there was a formal order to show cause or notice of the order was not material.

3. Judgment ⚷346 — Setting Aside — Mistake.

Although defendants' attorney was vested with general authority in the action, and defendants agreed to a compromise judgment, and authorized him to prepare a judgment according to the terms and conditions of the compromise, defendants to be permitted to examine judgment before it should be entered, where defendants did not understand or appreciate the effect or significance of the compromise judgment as explained to them by their attorney, and were not permitted to examine the judgment before it was entered, the trial court did not abuse its discretion in granting motion to set aside.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by the Kelsey Company against Mrs. Miriam Spears and others. From an order granting defendants' motion to set aside a judgment and decree, plaintiff appeals. Order affirmed.

F. W. Henderson and H. K. Landram, both of Merced, for appellant. F. W. Reeder, of Oakdale, for respondents.

HART, J. The appeal is by the plaintiff from an order of the superior court of Merced county entered on the 17th day of March, 1916, granting defendants' motion to set aside a judgment and decree entered on the 10th day of May, 1915. The proceeding is founded on section 473 of the Code of Civil Procedure.

The controversy arose over rights of the respective parties to the use of water for domestic and irrigation purposes. It appears from an affidavit of defendant Mrs. Spears, sworn to on November 3, 1915, that the complaint in the action was filed on September 4, 1912; that she employed F. G. Ostrander as her attorney, and an answer to the complaint was filed; that, on May 10, 1915, a decree and judgment was filed in said action, wherein it was set forth that "the parties to the foregoing action have in open court stipulated that findings of fact be waived in the foregoing action, and that judgment in said action be made and entered as herein provided"; that said defendant never at any time or place gave to said Ostrander, or any other person, authority to waive findings or stipulate to have judgment entered; that said Ostrander exceeded his authority and acted without deponent's consent in so stipulating; "that deponent did agree with F. G. Ostrander that judgment might be entered on certain conditions, that is to say, before judgment was entered a copy of said judgment was to be submitted to defendant for her approval and if not satisfactory to her the judgment was not to be filed but the trial of the case was to proceed under the pleadings; that defendant instructed F. G. Ostrander that the judgment must provide for water for domestic use at all times, also that deponent was to have all necessary water for the irrigation of all vegetables or small fruits that might be raised on deponent's said land whenever she wished to use same, also that the water flowing in the irrigation ditches of plaintiff's lands was to be allowed to flow to defendant's land when the same was not being used by plaintiff; that said decree does not provide for either or any of the above stipulations and conditions; that deponent is taken by surprise, and a great wrong and irreparable injury will result to deponent if said decree is permitted to stand; that no copy of said decree was ever submitted to deponent by her attorney or any other person until after said decree had been filed; that deponent has made repeated efforts to have her attorney, F. G. Ostrander, amend said decree to conform to deponent's stipulations and conditions," but that said Ostrander has failed and refused so to amend said decree.

On the 4th of November, 1915, the present attorney for defendants served and filed a notice of motion to set aside said judgment and decree, said notice specifying the 15th day of November, 1915, as the date upon which said motion would be made. The motion was duly made on the ground that F. G. Ostrander "exceeded his authority in having said decree entered, and that defendants are taken by surprise."

At the hearing of the motion the foregoing affidavit of Mrs. Spears, and also an affidavit of defendant Leonard Spears, containing substantially the same matters, were presented. Counter affidavits were filed, and also oral testimony presented in opposition to the motion. Among the facts brought out by the plaintiff was that, after Mrs. Spears registered her objection to the decree with her attorney, Judge Ostrander, the latter and the attorney for the plaintiff entered into a stipulation agreeing to an amendment of the decree in such manner and to such extent as that Mrs. Spears would be entitled to the use of a certain specifically named number of inches of water during the time that the decree awarded to the plaintiff the "exclusive use of the said water in said north or main ditch."

Appellant first insists that the court was without jurisdiction to set aside the decree for the reason that the application was not made within six months after the rendition of the decree, as required by section 473 of the Code of Civil Procedure. The record discloses that the decree was entered on the 10th day of May, 1915, and, on November 4, 1915, defendants filed and served their notice of motion. Thus it will be noted that the notice was filed and served six days before the expiration of the six-month period within which, under the statute, such a motion must be made. It is the contention, however, that the notice stated that the motion itself would be made on November 15, 1915, five days after the six-month period elapsed, and it further appears that the motion was not in fact made or brought up for consideration by the court until said 15th day of November, 1915.

Counsel for the appellant contend: (1) That section 473 of the Code of Civil Procedure contemplates that a motion to set aside a judgment for any of the reasons set forth in said section must not only be filed and served within the period of six months after the rendition of such judgment, but that it must also be pressed to a hearing or made to the court within that period of time; (2) that the court must make an order on the adverse party to show cause on a day fixed why the motion should not be granted; (3) that the opposing party must be duly notified of such order. As to the merits of the controversy, it is contended that, under the general authority of an attorney, the attorney for the defendants was authorized to stipulate that judgment might be entered against his clients and to waive findings of fact; that an attorney is not precluded from consenting to the entry of a judgment against his client except in those cases where his authority is expressly limited by the client to do certain specific acts in the litigation; that there is no showing here that the attorney for the defendants was restricted by the latter to the performance of certain acts, or was without the general authority of an attorney in this action.

[1] 1. It is conceded by counsel for the appellant that the defendants appeared in court, and formally made their motion within the statutory time, but it appears that, after reading the motion, counsel asked that the further consideration thereof be postponed to a later date, to wit, the 15th day of November, 1915, which was after the expiration of the six-month period within which the defendants were authorized to make their application to be relieved from the consequences of the decree. The date for the hearing of the motion having accordingly been fixed for a date beyond the statutory period within which the relief sought might be asked for and granted, the result followed, so counsel for the appellant contends, that the court was divested of jurisdiction, and thus the defendants lost any right they otherwise might have had to be relieved. A sufficient and, indeed, a complete answer to this proposition may be found in the comparatively recent case of Brownell v. Superior Court, 157 Cal. 703, 709, et seq., 109 Pac. 91, 94. In that case, the motion was filed and served a few days prior to the expiration of the six-month limitation, and the court made an order that the motion be heard on October 4, 1909, which was some 12 or 13 days subsequent to the date of the expiration of the period of limitation. There, as here, it was contended that the court lost jurisdiction of the motion because it was not pressed to a hearing within the statutory period of six months after the entry of the order from the effect of which relief was therein sought. Through Mr. Justice Shaw, the court held that:

> "It is the application which is to be made within the six months. A motion is an application for an order. The letter as well as the spirit of the law is fulfilled where the party appears and moves the court for the relief within that period, and thereupon the court makes an order on the adverse parties to show cause on a day fixed why the motion should not be granted, and they are duly notified thereof."

[2] 2. Thus we are brought to the consideration of the second and third propositions, as above stated, and which also involve the challenging of the authority of the court to make the order appealed from. There is, it is true, no showing in the record that the court, upon the presentation of the motion, made an order requiring the appellant to show cause, on the 15th day of November, 1913, which was the date fixed for the hearing of the motion, why said motion should not be granted, nor does the record show that a notice of any such order was served on the

appellant. But it seems to us that a sufficient reply to the point thus sought to be made lies in the fact that, on the 15th day of November, 1915, the date fixed by the court for the hearing of the motion, appellant and its counsel were in court and took part in the procedings upon the motion and resisted the allowance of the application by filing counter affidavits and introducing oral testimony tending to impeach the showing made by the defendants in support of the application. Obviously, the sole purpose of an order to show cause and notice thereof to the party adversely affected by the motion as to which such order is made is to inform such "adverse party" of the time and place of the hearing of the motion, and where, as here, the "adverse party" has made his appearance in court at the time fixed for hearing the motion, and has had an opportunity to do all that he could under any circumstances do to overcome the effect of the showing made in support of the motion, it would seem that whether the court did or did not make a formal order to show cause, or whether the adverse party was or was not formally notified of the order, becomes a matter of no material importance. While we do not hold that a formal order to show cause should not in such a case be made, yet it is in point of fact true in effect that the order fixing a date for the hearing of the motion is an order to the other party to show cause. Of course, it will not be contended that the failure formally to notify the appellant of the order to show cause, if any was formally made, is of any material importance, since it is true that it had ample opportunity to defend against the allowance of the motion, it having evidently before the date fixed for the hearing procured and prepared counter affidavits and subsequently filed the same, and it having been represented by counsel in court at the time of the hearing and introduced oral proof in opposition to the allowance of the motion.

[3] 3. As to the merits of the motion, we remark that, while the proofs seem to indicate that the attorney for the defendants was vested with general authority as such in the action out of which the present controversy arises, and probably, therefore, had the authority to consent to a judgment in said action, and while, furthermore, it appears that the defendants agreed to a compromise judgment and authorized their attorney, Judge Ostrander, to prepare a judgment according to the terms and conditions of the compromise, yet there are other considerations presented by the record upon which the court could justly have concluded that the interest of justice justified the order setting aside the decree.

It is clear that the court, if it believed the testimony presented by the defendants in support of the motion, as evidently it did, was justified in finding that the defendants did not understand or appreciate the scope and effect or significance, in its practical operation, of the compromise judgment as it was explained to them by their attorney. The latter undoubtedly acted in good faith with the defendants, and honestly advised them as to the extent to which they were, under the facts as he had learned them, entitled to the use of the water flowing in the main ditch; but the defendants, as the proofs clearly enough show, in good faith supposed or believed, from the explanation made to them by the lawyer, that they were, under the compromise, to be awarded a greater quantity of water or a greater use thereof than the decree as entered allowed them. It also appears that it was understood between the defendants and their attorney that the former should be shown the decree and permitted to examine it before it should be entered, and that this was not done. Under all these circumstances, we cannot say that the trial court abused its discretion in allowing the motion. We do not believe that a litigant should be bound by a compromise made by his attorney where, as here, the facts upon which the compromise was effected were not understood by the litigant, or where the latter obtained a misapprehension or an erroneous impression of the effect and scope of the compromise as the same was explained to him by his attorney. The court in this case, having examined and fully considered the testimony presented both for and against the motion, obviously reached the conclusion that the defendants did not in point of fact consent to the compromise of which the decree as entered stood as evidence; that the defendants were not given, but should have been given, an opportunity to examine the decree before it was entered, and so allowed an opportunity to determine for themselves whether the decree corresponded with the terms of the compromise as they understood and intended them; and that, therefore, in the interest of justice, the decree should be set aside and the defendants given an opportunity to have the respective rights of themselves and the plaintiff tried and adjudicated. We repeat that we can see no abuse of discretion in the action of the court in granting the motion.

It is true that the proofs show without conflict that, upon objection being made by the defendants to the decree as filed, respective counsel for the plaintiff and the defendants agreed to an amendment to the decree which it appears would make more specific and award to the defendants greater rights in the water involved in the controversy than did the original decree. But the defendants deny that they consented to the amendment, and declare that they do not now agree to it. It may be observed that the fact of the agreement to the amendment by the appellant is evidence of the fact that it conceded that the original decree failed to give the defendants their full rights in the use of the water, and in a measure supports the conclusion that the court below did not abuse its discretion in making the order appealed from.

The order is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(37 Cal. App. 215)

SKELLY et al. v. COWELL et al. (Civ. 2393.)

(District Court of Appeal, First District, California. May 13, 1918.)

1. WATERS AND WATER COURSES 🔑152(6) — RIGHTS IN WATER—PRESCRIPTION—BURDEN OF PROOF.

In action for admeasurement of waters of creek between riparian proprietors, burden to establish all elements of prescriptive right rests on defendants, claiming prescriptive title to water.

2. WATERS AND WATER COURSES 🔑137—PRESCRIPTIVE RIGHT—CHARACTER OF USER.

Where riparian owner used water of creek, or a large part of it, when he needed it, but not regularly, sometimes letting it go down the creek, his user was not such as to establish a prescriptive right.

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by James D. Skelly and others against S. H. Cowell and others and E. N. Torello. From the judgment, which was but partially in their favor, Cowell and others appeal. Affirmed.

Mastick & Partridge, Peter F. Dunne, and W. I. Brobeck, all of San Francisco, for appellants. H. A. Van C. Torchiana and Wm. A. Kelly, both of San Francisco, for plaintiffs-respondents. John F. Davis, of San Francisco, and Ross & Ross, of Redwood City, for defendant-respondent.

BEASLY, Judge pro tem. The parties to this action own lands riparian to Dennison creek, a small stream rising on the western front of the Santa Cruz mountains in San Mateo county, and flowing westward through the lands of the parties to the ocean. The appellants' lands—which we will call the Cowell properties—lie below those of the respondent Torello and above those of the plaintiffs on the stream. The action was begun by plaintiffs and respondents John D., A. G., and Edward D. Skelly, Mrs. Skelly Therkoff, Mrs. Josephine Valencia, Debenedetti, and Deneri against the defendants Torello and the Cowells to have the waters of Dennison creek admeasured between the parties according to their respective rights thereto as riparian proprietors. The parties stipulated that the minimum flow of the stream was 62 miners' inches, and the court, basing its decision upon the respective riparian acreage capable of irrigation owned by each of the parties, adjudged that the Cowells have 14 inches of this water, and divided the remaining 48 inches among the other parties.

[1] The Cowells claim all the water in their pleadings, basing their claim upon prescription arising out of an adverse user, which they are asserted to have exercised for a period of 15 years before the beginning of this action. The court found against this claim and determined that during three years only preceding the action had the Cowells diverted more than their legitimate respective part of said water onto their said riparian lands. The court also found against the claim of the Cowells that their user of the water was open, notorious, continuous, and adverse. The question whether these findings are sustained by the evidence is the only question in this case. A statement of the Cowells' present contention makes this clear. They now contend that they are entitled, first, to 11 inches of the water by reason of their riparian rights, and, second, to a prescriptive title to 20 inches additional. Their claim to 11 inches as riparian owners is not disputed, and the court awarded them this part of the water in the judgment. Their claims of a prescriptive title are disputed. The burden of establishing by evidence all the elements of a prescriptive right rests upon the Cowells, of course, and if they have not established such prescription by a preponderance of the evidence then these findings must stand.

[2] It is undisputed that during some 15 years preceding the beginning of this action the Cowells and Henry Cowell, their predecessor in interest, maintained a bedrock dam in Dennison creek by which water was diverted to the Cowell properties for use in irrigation. The witnesses on behalf of the Cowells testified varyingly that by means of this dam from one-half to three-quarters of the stream was taken out, and that the remainder of the water continued down the creek. One of them stated that at times all the water was taken. This water was not taken out continuously, but was used when needed. On the other hand, James D. Skelly testified that for 36 years himself and his family had been using the water, and that during the year immediately preceding the beginning of the action there was a shortage of water due to the people above, Torello and the Cowells, using nearly all of it. Mrs. J. A. Valencia testified that for 25 years she had used water from the creek to irrigate her land, and that during only the year or two before she gave her testimony was there a shortage of water for her use. Debenedetti testified that he had been deprived of the water for three or four years, and before that had always had plenty of water. Other witnesses for the plaintiffs gave similar testimony, and some of the Cowell witnesses testified under cross-examination that Cowell used some of the water pretty much every month but not regu-

larly; that sometimes he used it when he needed it, and sometimes he let it go down the creek. The fact seems to be that Henry Cowell used the water or a large part of it, when he needed it, but never in such a way as to deprive his neighbors lower on the stream of the use of it according to their rights.

These facts above recited show no necessary conflict of the evidence in this case. It may be possible to so construe it as to make it appear to be conflicting, but a fair interpretation of the evidence, reading the whole voluminous record with care, discloses nothing that to the open mind is a contradiction in the facts to which the witnesses testify; nor do these facts establish the elements necessary to support a prescriptive right to this water in accordance with the contention of the Cowells. There was nothing in the manner in which Henry Cowell used this water which would put his neighbors upon notice that he claimed to be using the water in such a way as to interfere with their rights. To be more specific, Cowell's conduct was not such as to indicate that he claimed all the water of this creek or 14 or 20 miners' inches of it, continuously, and adversely to the rights of his riparian neighbors.

The facts above set forth would not have sustained, in our view, findings other than the findings which the court made upon them. Indeed, it seems to us, from a review of the circumstances of this case, that the able and experienced trial judge who heard it could not have reached a more equitable and just conclusion than that set forth in the judgment.

The judgment is affirmed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

(37 Cal. App. 95)

FEST v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SONOMA COUNTY et al. (Civ. 1849.)

(District Court of Appeal, Third District, California. April 29, 1918. Rehearing Denied by Supreme Court June 27, 1918.)

1. Pleading ⇨11—Evidentiary Facts.

While some of the alleged facts may be evidentiary, it was proper for petitioner to state such facts as he deemed to constitute the waiver relied on in his petition.

2. Mandamus ⇨172—Parties—Misjoinder.

Misjoinder of justice's court and justice thereof and superior court and judge thereof need not be considered, where justice was not served and did not appeal, and the matter may properly be heard concerning only the superior court and judge thereof.

3. Mandamus ⇨57(2)—Acts and Proceedings of Courts.

Mandamus was available as one of the means of determining whether the superior court was justified in dismissing petitioner's appeal from justice court for failure of sureties on undertaking on appeal to justify as provided by Code Civ. Proc. § 978a.

4. Justices of the Peace ⇨159(13)—Undertaking on Appeal—Justification of Sureties—Waiver.

Where an undertaking on appeal from justice court was duly filed and notice thereof duly served, and plaintiff demanded that the sureties justify, but before day for justification stipulated that defendant appellant might justify at a time unauthorized by Code Civ. Proc. § 978a, requiring justification within five days after notice to justify, the superior court should have treated the stipulation as a waiver of justification and entertain the appeal on assumption that a sufficient undertaking had been filed.

Application for writ of mandate by Rubin Fest, prayed to be directed against the Superior Court of the State of California in and for the County of Sonoma, the Honorable Thomas C. Denny as Judge thereof, and the Justice's Court of Sonoma Township, and Joseph L. Small as Justice of the Peace of said Township. Granted.

W. F. Cowan, of Santa Rosa, for petitioner. C. C. Cowgill, of Sonoma, for respondents.

CHIPMAN, P. J. Mandamus. Alleging the official capacity of defendants, the petition sets forth the following facts: That on December 24, 1917, in the said justice's court of Sonoma township, Sonoma county, a judgment was made and entered in an action wherein J. H. Murray was plaintiff and Rubin Fest, petitioner herein, was defendant, in favor of said plaintiff Murray and against petitioner herein for the sum of $86, claimed by said Murray to be due him as costs in an action pending wherein he was performing the duties of constable. That on January 18, 1918, petitioner duly filed and served notice of appeal, together with a sufficient undertaking on appeal, and did duly perfect an appeal from said judgment to the superior court of said county. That on January 21, 1918, said judgment creditor served notice upon petitioner that the sureties on said bond would be required to justify before said justice, and immediately thereupon petitioner notified said judgment creditor that said sureties would justify before said justice, within five days after the receipt of said notice requiring justification, to wit, on the 26th day of January, 1918, at the hour of 11 o'clock a. m. That on January 22, 1918, and after service of notice requiring justification, C. C. Cowgill, Esq., attorney for said Murray in said action, "wrote to W. F. Cowan, attorney for petitioner, stating that he would be engaged in the trial of an action in San Francisco on the 25th day of January, 1918, and thereafter in a communication over the telephone, owing to the uncertainty of whether Mr. Cowgill would return to Sonoma on the 26th day of January, 1918, to attend said justification, Mr. Cowgill thereupon consented that said justification might be continued until January 30, 1918, and pursuant thereto, said Mr.

Cowgill on the 26th day of January, 1918, caused to be filed in said justice's court a stipulation extending the time for said justification to January 30, 1918, at 11 o'clock a. m. That pursuant to the provisions of section 978a of the Code of Civil Procedure of the state of California, justification by the sureties on such an appeal bond is required to be made within five days after the service of notice requiring such justification and this petitioner and said sureties, had not said stipulation been made, were ready, able, and willing to justify within the five days required, to wit, on January 26, 1918, at 11 o'clock a. m. in said court pursuant to the notice theretofore given to that effect, and would have so justified had not said stipulation been signed, and this petitioner alleges that by reason of the signing of said stipulation and the filing thereof by said judgment creditor, his right to require a justification of said sureties within said five days was waived." That petitioner did not justify at the time specified in said stipulation because said court would have no jurisdiction to entertain said matter after a period of five days had expired, "but petitioner, however, did in good faith and in an attempt to comply with said stipulation, file a bond on appeal executed by a reliable and solvent surety company" (this bond was filed January 28, 1918). That on or about February 11, 1918, said Murray moved the said superior court for an order dismissing said appeal "on the ground solely that the sureties on the original undertaking on appeal in said action had not justified within five days or within the time required by section 978a of the Code of Civil Procedure," and thereafter said Thos. C. Denny, judge of said superior court, made an order dismissing said appeal. That said court and said judge "do now refuse to proceed with the hearing of said trial or to hear or determine the same upon its merits."

There are averments in the petition to the effect that said justice of the peace threatens to issue execution on said judgment and cause the same to be levied on the property of petitioner. But the writ was not served upon said justice of the peace and he has not answered or appeared.

Respondent Judge Denny appeared and moved to strike out the averments of the petition relating to the filing of said stipulation on the ground that they are evidentiary and not ultimate facts. He also interposed a demurrer on the grounds: (1) That there is a misjoinder of parties; (2) that several causes of action have been improperly united; (3) that the petition is ambiguous; (4) that the petition does not state facts sufficient to constitute a cause of action.

In his answer, respondent Denny admits most of the averments of facts. As to the alleged stipulation, "alleges that C. C. Cowgill, attorney for plaintiff at the request of W. F. Cowan, attorney for defendant and not otherwise, signed said stipulation; but denies that by reason of said stipulation or otherwise or at all, plaintiff waived the justification of the sureties on said undertaking." On information and belief, denies the averments of the petition that said sureties were ready, able, and willing to justify as alleged in the petition and denied that they would have appeared and justified but for said stipulation; alleges "that on the 27th day of February, 1918, defendant Hon. Thos. C. Denny, as judge of said superior court, duly made an order dismissing defendant's appeal to said superior court in the case of J. B. Murray v. Rubin Fest, and said order has not been modified, set aside or repealed, but remains in full force and effect."

[1] The matters sought by the motion to be stricken from the petition were the averments of facts on account of which the waiver mentioned in the petition is claimed. While some of the alleged facts may be evidentiary, we think it was proper to state such as might in petitioner's view constitute a waiver.

[2, 3] The misjoinder of parties alleged as ground of demurrer need not be considered. The justice of the peace named as a defendant was not served with the writ and has not appeared. The matter may properly be heard as concerning only the superior court and the judge thereof. We think mandamus was available to petitioner as one of the means by which the question may be determined. Clay v. Superior Court, 32 Cal. App. 190, 162 Pac. 416.

The points urged by respondent, in support of his general demurrer, are so closely related to his argument upon the merits that we think it best to dispose of the case on its merits as disclosed by the facts.

[4] Did the stipulation to fix the date on which to justify on the bond have the effect to waive justification? The stipulation signed by the attorney of plaintiff in the action reads as follows:

> "It is hereby stipulated and agreed that the defendant and appellant herein may have until and including January 30, 1916, in which to justify on the bond on appeal given herein."

Section 978a of the Code of Civil Procedure provides that:

> "The undertaking on appeal must be filed within five days after the filing of the notice of appeal and notice of the appeal and notice of the filing of the undertaking must be given to the respondent."

Admittedly this was done. The section also provides that:

> "The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given."

It has been held that justification of the sureties must be made within five days after notice served, otherwise the superior court has no jurisdiction to entertain the appeal. Crowley v. Superior Court, 10 Cal. App. 342, 101 Pac. 935; Coker v. Superior Court, 58 Cal. 177. It has also been held that the party excepting to the sufficiency of the sureties may waive his objection, but the waiver must be made within the five days required for the justification. Crowley v. Superior Court, supra; Budd v. Superior Court, 14 Cal. App. 256, 111 Pac. 628; Fletcher Collection Agency v. Superior Court, 31 Cal. App. 193, 159 Pac. 1049; Clay v. Superior Court, 32 Cal. App. 189, 162 Pac. 416. As we understand the Crowley and Budd Cases, the justification must be made within five days after notice of exception to the sureties on appeal bond has been filed in the justice's court, but not within five days after notice of appeal and filing of the undertaking. In the present case, the notice excepting to sureties was filed December 21, 1916. December 26, 1916, was therefore the last day on which the sureties could justify. Justification was not effected on that day, and, the record so appearing when the motion to dismiss the appeal was made, the judge of the superior court granted the motion on the ground of lack of jurisdiction to try the case.

The contention of petitioner is that, in stipulating that the justification would be made at a date when it would have been futile and of no effect, plaintiff in the action waived justification. The argument is thus stated by petitioner:

> "It is apparent that appellant would have caused justification thereof to be made had not respondent consented that it be made at another time and place. Respondent was the only person who could require justification and he was the only person who could forego justification. Respondent in effect said to appellant, you must justify in the manner required by law, but before that time had expired, by virtue of his stipulation he in effect said, you need not justify in the manner required by law but you can justify at another time and place, to wit, a time and place over which the court had no jurisdiction. * * * At the time of filing the stipulation, respondent had the legal right to waive the justification and when he stated to appellant that he need not justify (which is the effect of the stipulation) it certainly must be construed as a waiver."

Respondent, quoting from volume 28, Am. & Eng. Ency. of Law, 526, says:

> "Waiver is usually a question of intent, and knowledge of the right and an intent to waive it must be made to appear plainly, and this is to be determined usually from the declarations and conduct of the parties."

It is quite likely that plaintiff's attorney did not intend to waive justification. His appearance at the office of the justice of the peace on December 30th, in accordance with the stipulation would seem to indicate such to be the fact. Still he was the moving party in the matter for whose convenience the delay was asked and it was upon his stipulation filed in the case that the date was fixed at a time when justification would have been a nugatory act and the superior court would have been authorized and it was its duty to disregard it and look only to the date when the bond was in fact filed and notice thereof given. The stipulation fixed a time when it was legally impossible to justify, and it seems to us was in legal effect a waiver and that defendant had the right to treat it as a waiver of plaintiff's right to require justification.

To put the matter briefly as it was before the superior court and as the record shows: An undertaking was filed on its face in due form and duly executed and notice thereof served; plaintiff demanded that the sureties justify; before the day arrived for justification, plaintiff filed a stipulation that defendant might justify at a time unauthorized by the statute. Such being the facts, the superior court could not do otherwise than to treat the stipulation as a waiver and entertain the appeal on the assumption that a sufficient undertaking had been filed.

Let the writ issue commanding the said superior court to set the said cause of Murray v. Fest for trial on its merits and proceed with the trial thereof.

We concur: HART, J.; BURNETT, J.

(37 Cal. App. 14)

PENRYN LAND CO. v. AKAHORI.

(Civ. 1835.)

(District Court of Appeal, Third District, California. April 19, 1918.)

1. Appeal and Error 🔑957(2)—Review of Order Vacating Default Judgment.

Appellate courts are strongly inclined to uphold an order of the trial court vacating its default judgment on the ground of mistake and excusable neglect of defendant if there be found in the record any legal justification for the action of the trial court.

2. Judgment 🔑143(1) — Vacation of Default—Innocent Purchaser.

When the orderly processes of law have been followed, and default judgment regularly obtained, there must be some substantial evidence received to excuse, in a legal sense, the inaction of defendant before the court will set it aside, especially where an innocent purchaser, relying on the judgment, has acquired the property involved for a valuable consideration.

3. Judgment 🔑143(3) — Vacation of Default—Mistake or Excusable Neglect.

Where defendant administrator, served with summons in an action to quiet title to his decedent's realty, being very busy, merely glanced at the paper, and, seeing that it pertained to decedent's estate, placed it on the desk of the attorney for the estate, there was no mistake or excusable neglect on the part of the administrator justifying vacation of default judgment against him.

4. Judgment 🔑143(10) — Vacation of Default—Mistake or Excusable Neglect of Attorney.

In the absence of showing of mistake or negligence, excusable or otherwise, on the part of the attorney for the estate, on whose desk the summons was left, the presumptions being that he was capable and honest, and gave his attention to the business, and after consultation with defendant administrator was convinced there was no valid defense to the action, there was no justification for setting aside default judgment against the administrator on the ground of the mistake or excusable neglect of the attorney.

5. JUDGMENT 🔑143(3) — VACATION OF DEFAULT—FAILURE TO STATE FACTS TO ATTORNEY.

Where an administrator was served with copy of the complaint and summons in an action to quiet title to his decedent's realty, and gave the papers to the attorney for the estate, but failed to state the facts to him, such failure was inexcusable negligence on the part of the administrator, in the absence of any satisfactory explanation of his conduct, though he never consented to entry of a default, and intrusted the entire matter to the attorney.

6. JUDGMENT 🔑143(10) — VACATION OF DEFAULT—MISTAKE.

That an attorney was mistaken in his judgment that it was useless to make a defense to the action is not the kind of a mistake for which a default judgment can be set aside under Code Civ. Proc. § 473, though it might be the basis for an independent action for damages against the attorney.

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by the Penryn Land Company, a corporation, against M. B. Akahori, as administrator of the estate of M. Mukai, deceased. From an order vacating default judgment for plaintiff, it appeals. Reversed.

Ben P. Tabor, of Auburn, for appellant.
Tuttle & Tuttle, of Auburn, for respondent.

BURNETT, J. [1, 2] The appeal is from an order vacating a judgment quieting plaintiff's title to certain real estate. The order was made upon the ground of "the mistake and excusable neglect" of the defendant. Appellate courts are strongly inclined to uphold such an order if there be found in the record any legal justification for the action of the lower court. It is desirable, of course, to have causes tried and determined upon their merits, and, no doubt, this consideration was the determining factor with the lower trial judge herein. However, when the orderly processes of law have been followed and a judgment regularly obtained, there must be some substantial evidence received to excuse, in a legal sense, the inaction of the defendant before the court will be justified in setting at naught its prior determination, especially in a case where, as here, an innocent purchaser, relying upon the validity of said judgment, has acquired the property for a valuable consideration.

We may say that the first application was denied, but respondent was allowed to renew it. The latter application was based largely upon the same evidence as the first. The two affidavits of respondent herein, however, differ somewhat. As the only evidence tending to show mistake or excusable neglect is found in said affidavits, we herewith set them out. The first is:

"I am and was at all times mentioned the duly appointed, qualified, and acting administrator of the estate of M. Mukai, deceased; that on or about the 2d day of December, 1915, I was served with a paper by the sheriff of Sacramento county; that I was in the courthouse in Sacramento at the time, and very busy; that I glanced at said paper, saw it was pertaining to the estate of M. Mukai, deceased, and took it to the attorney for said estate, Lee Gebhart, and, as he was very busy at the time, left it on his desk; that I did not open said paper or look at its contents, and did not know that it was a complaint to quiet title to the property of the estate of M. Mukai, deceased; that I never knew such an action was pending until Nakamoto, of Penryn, rang me up after the judgment was made and informed me of the fact; that I would have defended said action if I had known that it was pending."

Then follows the statement that he has a good defense to the action.

[3] It is quite apparent that the foregoing affords no legal justification for setting aside the default. Nothing in the nature of mistake or excusable neglect is disclosed. If either existed, it must have been on the part of the defendant or of his attorney. As to the former, the only semblance of mistake relates to his ignorance of the nature of the document placed in his hands and of the fact that a judgment was entered against him. But there is no contention that he did not understand English; and, if he failed to read the summons he cannot urge that as an excuse for his failure to defend the action. That circumstance would constitute negligence rather than mistake, and, assuming it to be negligence, it would be inexcusable, and no attempt was made to excuse it. In fact, however, he did what might be expected under the circumstances; he placed the papers in the hands of his attorney. This was, no doubt, because he had faith in his attorney, and that fact does not afford any evidence of mistake or negligence.

[4] Was there any mistake or negligence, excusable or otherwise, on the part of the attorney? There is no showing to that effect. To the contrary, the presumptions are all that the attorney was capable and honest; that he gave his attention to the business in hand, that after consultation with his client he was convinced that there was no valid defense to the action, and that no additional expense should be incurred. If there had been any showing that the client was deceived or defrauded by his attorney, or that the latter did not act in good faith, it might be that a court in a proceeding like this could nullify his action, but the case thus far is one entirely devoid of any element of fraud, mistake, negligence, or surprise in the legal sense, and we see no reason for the application of section 473 of the Code of Civil Procedure.

[5] Is the situation changed by virtue of the second affidavit of the respondent? The only additional averment contained therein bearing upon the question before us is:

> "That at all times since my appointment to said office Lee Gebhart has been my attorney and handled the legal matters pertaining to said estate; that I had the utmost confidence in said Lee Gebhart, and, not being versed in legal procedure in this country, intrusted all matters to him to handle as he deemed best; that I never did talk over the above case with Lee Gebhart as he deposes, and never consented to the entry of the default in said case, and as soon as I heard that a default had been entered in said case, I procured other counsel to move to have the default set aside."

In this there is no additional fact tending to show any mistake on the part of respondent or any negligence, except, possibly, in one respect to be hereafter noticed. Neither is there anything to disclose a mistake on the part of the attorney or any negligence that can be corrected in a proceeding like this. In fact, he exculpates himself on the ground that he intrusted the entire matter to his attorney. That circumstance, of course, does not evidence negligence or mistake on his part. It was, indeed, justified by his confidence in his attorney. And as far as the latter is concerned, there is nothing to indicate that he was unworthy of that confidence, unless it be implied in the statement in reference to the conversation with said attorney and as to the consent to have a default entered. As to the conversation, Mr. Gebhart deposes:

> "On or about the 2d day of December, 1915, and while acting as attorney for said Akahori in the matter of the estate of Mukai, said Akahori brought to my office a copy of the complaint and summons in the above-entitled action, which he said had been served upon him. I read the complaint and summons, talked with Akahori about the matter, and advised him, after learning the facts of the case, that in my opinion it was inadvisable to defend the action. Subsequently, and before default was entered in the case, Mr. Tabor, the attorney for plaintiff in said action, called at my office, and I informed him that no defense would be made to the action."

It is to be observed that respondent's denial of this is somewhat equivocal. He does not specifically aver that he had no conversation whatever about the case with his attorney, but that he did not have the conversation as Mr. Gebhart deposes. This denial would be consistent with the position that the conversation occurred *substantially* as stated by Mr. Gebhart. However, conceding full effect to the denial, and ignoring the improbability that a client, under such circumstances, would have no conversation with his attorney about the case, it must follow that the failure of respondent to state the facts was inexcusable negligence on his part, in the absence of any satisfactory explanation of his conduct.

The averment that "he never consented to the entry of a default" is of no avail in view of the fact that he admits that he intrusted the entire matter to his attorney, involving, as it would, the question of discretion as to whether any defense should be made.

We repeat, if there was any mistake or negligence in the case, it was that of the attorney, and not of the client, except as to the single fact of the failure to explain the defense, and this has not been excused.

[6] But there is nothing to show that the attorney did not have full information from other sources as to the alleged defense of respondent, or that he did not act with the utmost good faith for the advantage of his client. In fact, there is no averment from which the inference can be drawn that the attorney's conduct in the premises was the result of "mistake, inadvertence. surprise, or excusable neglect," as contemplated by said section 473 of the Code of Civil Procedure. At most, it may be implied that he was mistaken in his judgment that it was useless to make a defense to the action. This, however, is not the kind of a mistake for which a judgment can be set aside, although it might be the basis for an independent action for damages against the attorney. Lally v. Kuster, 171 Pac. 961.

To recapitulate, the whole showing made by respondent amounts to this: An action was brought against him to quiet title. He placed the matter in the hands of his attorney. There is nothing to impeach the character or ability of said attorney. There is no evidence that either he or his attorney was deceived or misled. The only circumstance of which complaint could be made by respondent is that his attorney's judgment was at fault in concluding that he had no valid defense. But this, manifestly, is not sufficient ground for setting aside the judgment. Otherwise, every suit that is lost through the error or mistake of an attorney would be subject to the operation of said section 473. For further elucidation of the legal principles involved, we may refer to Porter v. Anderson, 14 Cal. App. 716, 113 Pac. 345; Redding, etc., Min. Co. v. National Surety Co., 18 Cal. App. 488, 123 Pac. 544; Shearman v. Jorgensen, 106 Cal. 483, 39 Pac. 863; Alferitz v. Cahen, 145 Cal. 397, 79 Pac. 878.

If we look into the showing made by appellant we find additional reasons for upholding the judgment. Not only is the theory of the application of said section of the Code strongly combated, but it is shown, as before indicated, that the rights of an innocent purchaser, who relied upon the integrity of said judgment, would be jeopardized if the order is allowed to stand.

Respondent may have a remedy if he has been wronged, but it does not appear that he is entitled to the one which he has invoked.

The order is reversed.

We concur: CHIPMAN, P. J.; HART, J.

(37 Cal. App. 112)

PARK et al. v. PACIFIC FIRE EXTINGUISHER CO. et al. (Civ. 2329.)

(District Court of Appeal, First District, California. May 1, 1918. Rehearing Denied June 27, 1918; Denied by Supreme Court June 27, 1918.)

1. STATUTES ⟹123(3)—TITLES OF ACTS—SUBJECTS EMBRACED—"WORK."

Const. art. 4, § 24, providing that every act shall embrace but one subject which shall be embraced in its title, is not violated by St. 1911, p. 730, entitled an act to provide for work upon streets, where section 79, subd. 2 thereof, defines "work" as including all work mentioned in the act and it was intended to include street lighting systems.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Work.]

2. MUNICIPAL CORPORATIONS ⟹266 — IMPROVEMENT ACTS—REPEAL BY IMPLICATION.

The Improvement Act (St. 1911, p. 730), relating alone to improvement of streets and places within incorporated cities, was not repealed by implication by Public Utilities Act (St. 1913, pp. 421, 429), covering the acquisition of public utilities.

3. MUNICIPAL CORPORATIONS ⟹272—STREETS —LIGHTING SYSTEMS—PROCEDURE.

Where a city has not provided a complete procedure for the creation of a street lighting system as empowered to do by its charter, it may proceed under Improvement Act (St. 1911, p. 730), providing for street improvements.

4. CONSTITUTIONAL LAW ⟹289—DUE PROCESS—TAKING PRIVATE PROPERTY FOR PUBLIC USE.

A local improvement for installation of electroliers and a conduit system for the purpose of lighting, cost to be charged on property within district, providing for temporary physical connection with a public utility company's lines, does not violate Const. U. S. Amend. 14, § 1; it not becoming the property of the utility company.

5. MUNICIPAL CORPORATIONS ⟹293(2) — STREETS — IMPROVEMENTS — RESOLUTIONS — SUFFICIENCY.

A resolution of intention for improvement not naming the streets to be improved, providing work to be done according to certain designated specifications which do not name such street but refer to plans attached thereto which bear a legend designating colors by which proposed improvements can be located, does not comply with St. 1911, p. 733, § 3, providing that the resolution of intention shall refer to the streets to be improved by official or popular name.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Joe M. Park and others against the Pacific Fire Extinguisher Company, the City of Berkeley, and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Richard B. Bell, of Berkeley (R. M. F. Soto, of San Francisco, of counsel), for appellants. Wilson & Haines and Frank D. Stringham, all of San Francisco, and B. D. Marx Greene, of Berkeley, for respondents.

BEASLY, Judge pro tem. In this case the plaintiffs resist the action of the city of Berkeley in ordering the improvement of certain streets of that city by the construction and installation of electroliers and a conduit system for the purpose of lighting its streets. The specific relief sought is injunction pendente lite against the performance of a contract let for the above purpose, and a final judgment that this contract is void. The judgment of the trial court was for the defendants, and this appeal is from that judgment on the judgment roll consisting of the complaint, answer, findings, and judgment.

The work was to be done under the improvement Act of 1911 and its amendments (St. 1911, p. 730) and in accordance with specifications previously adopted by the city council generally covering such work. A resolution of intention, adopted by the council on December 3, 1915, provided that 232 electroliers be installed within the limits of a district fully described, the cost of the improvement to be made a charge upon the property within the district, and that the electroliers be wired and connected by the underground system of conduits with the electric distributing system used for the lighting of the streets of Berkeley, the work to be done in accordance with the specifications above referred to and adopted by a resolution of the council. These specifications were referred to in the resolution of intention by number, and were by the language thereof specifically incorporated therein and made a part thereof; and the resolution also provided that the work be done in accordance with the Improvement Act of 1911 and its amendments, as above stated. The specifications described the work to be done more definitely and more at length than the resolution of intention, but they do not add anything to its provisions except that they provide for the connection of the lighting system of the city with the Pacific Gas & Electric Company's lines.

The findings were in accordance with the complaint, determining the foregoing facts as therein alleged except as to the posting of notices of the improvement and the affidavit of posting, which in the view we take need not be noticed.

The trial court held the contract valid.

[1] The first objection relied upon by the appellants is that the improvement described in the resolution of intention is not authorized by the Improvement Act of 1911 as amended.

Section 2 of that act, under which the city of Berkeley undertakes to do this work, if valid, empowered the city council to order the construction or reconstruction upon its streets of poles, posts, wires, pipes, conduits, lamps, and other suitable or necessary appliances for the purpose of lighting its streets. This, it is claimed, is repugnant to the provisions of section 24, art. 4, of the Constitution to the effect that every act of the Legislature shall embrace but one subject, which subject shall be embraced in its title. The specific ground of the objection under consideration is that the act describes all the work therein contemplated as street work, and that the work provided for by this resolution of intention is neither street work nor street improvement. The title of that act in so far as it is involved here is this: "An act to provide for work in and upon streets," etc.; and if the word "work" as used in the act does not include this species of improvement the contract in issue here must be held invalid. Counsel cites a number of cases in some of which at least it is held that street work does not include the installation of a lighting system. Typical of those cases is Electric Light Co. v. San Bernardino, 100 Cal. 348, 34 Pac. 819, wherein it is held that the term "street work" is a phrase in common usage and has a well-defined meaning, and, says the court in that case, "the words mean exactly what they indicate upon their face, namely, work upon a street, work in repairing or making a street"; and it was there held that the installation of an electric lighting system, differing considerably, however, from the system in question here, was not street work within the meaning of those words. The case did not arise under the statute of 1911, but under the general Municipal Incorporation Act as amended in 1891 (Stats. 1891, p. 54).

The other cases cited by appellants are of similar import. None of them, however, arose under the act of 1911; indeed, they were all decided before that year. We do not think it necessary to analyze and distinguish these cases, although this might conceivably be done, for the Legislature has in effect in the act of 1911 defined what it meant by the words in the title thereof. In subdivision 2 of section 79 of said act (Stats. 1911, p. 766) is the following provision:

> "The words 'work,' 'improve,' 'improved' and 'improvement,' as used in this act shall include all work mentioned in this act, and also the construction, reconstruction and repairs of all or any portion of said work."

Read in connection with the provisions of section 2 of the act, this provision shows clearly that the Legislature had in mind the inclusion of everything contained in section 2 thereof when it used the word "work" in its title. The purpose of section 24 of article 4 of the Constitution is to protect the members of the Legislature as well as the public against fraud from deceitful and misleading titles; and, if the title is of such a character as to mislead the public or the members of the Legislature as to the subject embraced in it, then section 24 applies. But it is not necessary that the title of an act should embrace an abstract or catalog of its contents; and, where the title of an act is not misleading, the act will not be held void simply because of the fact that its title does not so catalog or schedule every item contained therein.

These propositions are so well settled as to need no citation of authority, and indeed are quotations from numerous cases decided by the Supreme Court. That the Legislature was not misled by the use of the word "work," but intended to include a provision in the act for the installation of a street lighting system, is quite apparent from the language above quoted. The Legislature had the authority to so define the words used in the title if it chose to do so; and therefore, as it has done so and it is apparent that it had these matters in mind, the court will not hold this act unconstitutional because the Legislature did not itemize a lighting system as a part of the street work. Indeed, a lighting system is as necessary to the convenient use of streets in the present age in a city the size of Berkeley as is the pavement of the street itself; and the tearing up of the streets to place conduits therein for the purpose of laying wires for conducting electricity for lighting purposes is quite as much street work, it seems to us, as any other work upon a street.

[2] It is next contended that the Improvement Act of 1911 has been suspended by the Public Utilities Act of 1913 (Stats. 1913, pp. 421, 429). The act of 1911 covers street improvement alone. That of 1913 covers the acquisition of public utilities. As these two purposes are intimately connected with each other, the provisions of the latter statute overlap the former, but they are not so inconsistent with it as to repeal it; and they are certainly not so repugnant that it must be held that the Public Utilities Act of 1913 repealed the Improvement Act of 1911 by implication. There is, indeed, a strong reason for concluding that the Legislature had no such intention when it enacted the Public Utilities Act, for in that act it expressly repealed the Improvement Act of 1905 (St. 1905, p. 564), and at the same time failed to mention the Improvement Act of 1911. It must therefore be concluded that the Legislature intended to repeal the act of 1905, but did not intend to repeal the act of 1911.

The appellants next contend that the city of Berkeley had exclusive authority to provide for the lighting of its streets as a municipal affair under charter provisions, and that therefore the Improvement Act of 1911 does not apply to that city.

[3] Street lighting is a municipal affair; but the charter of the city of Berkeley, while conferring power upon the city to adopt a complete procedure for the creation of a system of street lighting, does not contain such a procedure. This is conceded. The city has power to provide such general scheme; but, not having done so, it is governed by general law in that respect, and may in this case follow the provisions of the Improvement

Act of 1911. Fragley v. Phelan, 126 Cal. 383, 58 Pac. 923.

[4] The next objection to this proceeding is that the proposed assessment for the improvement described in the resolution of intention, if made, would violate the Constitution of the United States. It is claimed that it will constitute a part and parcel of the public utility now owned and controlled by a public service corporation, namely, the Pacific Gas & Electric Company, mentioned in the resolution of intention. But this does not appear to be so. It seems to us that the proposed improvement will become the property of the city of Berkeley, and that the only connection that it has with the Pacific Gas & Electric Company is a physical connection with that company's lines for temporary convenience. We do not see that this in any way violates section 1 of article 14 of the amendments to the Constitution of the United States.

[5] The final attack upon this contract and the proceeding upon which it is based is grounded upon the following considerations: It is provided in section 3 of the Improvement Act of 1911 that before ordering any work to be done or improvement made the council shall pass a resolution of intention so to do, "referring to the street by its lawful or official name, or the name by which it is commonly known." This resolution does not name or refer to the streets to be improved; but it is contended by the respondents that the specifications and plans for the work referred to therein do so, and that this fulfills the requirement in question. The reference relied on is in these words:

> "All the work to be done in accordance with the specifications contained in resolution adopting specifications No. 317 N. S. for the construction of single lamp or electroliers and conduit system."

The specifications do not contain the names of the streets nor any reference to them, unless the provision of the specifications that the "plans attached hereto, sheets Nos. 1, 2 and 3, are to be considered with and are hereby made a part of these specifications," are sufficient to comply with the statute. These plans are engineering prints, and are marked "Lighting District No. 1, showing location of electroliers and conduits, Berkeley, California," and they contain a legend explaining the colors by which the location of the electroliers, conduits, and other details of the work are shown.

In construing this portion of the proceeding, the purpose of the provision that the streets shall be named in the resolution of intention must be taken into account. That purpose seems to be the giving of information to the property owners as to the intention of the city council to improve the street in front of their property, or some other streets, the expense of which will be made a burden upon their property by taxation. Section 6 of the act provides that any owner of property liable to be assessed for the work may make written protest against the proposed work, or against the extent of the district to be assessed, or both, and provides the method by which such protest shall be made to the council. The method which the property owner must follow under this proceeding as above outlined in order to ascertain whether his property is to be made liable for this street improvement is first to examine the resolution of intention, which would advise him that the property within a certain district was to be taxed for a certain improvement upon certain streets; but these streets were not named in the resolution of intention, and therefore he must look further in order to ascertain upon what streets the improvement is proposed to be made. Accordingly he must consult the specifications, and in the specifications he would find nothing except a reference to a map or plan, and this map or plan is an engineering plan; while in this case, simple and comparatively easy to understand by a person in the least accustomed to reading such documents and interpreting them, it would not be easy, and perhaps would not be possible, for many persons who might own property within a district such as this in which improvements upon the streets were to be made, to ascertain by an inspection of the plan exactly what particular streets were to be improved. Indeed, this plan only purports to show the approximate location of certain portions of this work, namely, the feeder risers; and if it can be held that the reference herein is sufficient, and that these plans in themselves were notice of the points at which this improvement was to be made, a plan approximating the location of all the work might be sufficient to fulfill the measure of the statutory requirement.

With the contention that this is so we cannot agree. We think that the city council should mention the streets to be improved by their lawful or official names or the names by which they are commonly known, in the resolution itself; or, at the very least, should plainly state in the specifications the names of the streets to be improved so that, without the trouble of inspecting engineering plans, the property owner might know exactly for the improvement of what streets his property is to be assessed. It seems to us that there is no excuse for not following this simple requirement of the statute; and, further, that the rule adopted in construing the Vrooman Act (St. 1885, pp. 160, 161), by which a reference in the resolution of intention to plans and specifications on file for the purpose of supplementing the general description of the work in the resolution itself, would be unduly stretched by permitting such a reference as was attempted here.

We have thought proper to consider all the points raised in view of the fact that the city council of Berkeley may still wish to proceed with this work under a resolution of intention sufficient in form for that purpose within the views herein expressed.

The judgment is reversed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

(36 Cal. App. 766)

GRAVES et al. v. UNION OIL CO. OF CALIFORNIA. (Civ. 1768.)

(District Court of Appeal, Third District, California. April 12, 1918. Rehearing Denied by Supreme Court June 10, 1918.)

1. Master and Servant 🔑278(1)—Actions for Injuries—Evidence.

In an action for the death of defendant's employé through fire in an asphalt shed communicated thereto by burning oil, evidence *held* to show actionable negligence of defendants in discharging the liquid contents of a gas seal into a ditch running near certain furnaces, whereby the oil was ignited.

2. Master and Servant 🔑179, 204(1)—Injuries to Servant—Safe Place to Work.

Where plaintiff's decedent lost his life by fire in defendant's asphalt shed, wherein he was employed, due to burning oil negligently poured into a ditch, without being responsible for the fire and without contributing to the accident, defendant was liable for failure to maintain a safe place to work, regardless of the origin of the fire; assumption of risk and fellow servant's negligence having been abrogated by statute.

3. Appeal and Error 🔑971(1)—Discretion—Hypothetical Questions.

The trial court has large discretion as to the form of hypothetical questions to experts, and the appellate court will place great reliance upon his decision in passing upon a sufficiency of the facts narrated.

4. Evidence 🔑553(3, 4) — Hypothetical Questions.

A hypothetical question on which the opinion of an expert is to be based must include only such facts as are in evidence, but may include any state of facts which the evidence tends to prove and which the jury might reasonably find to be proven.

5. Evidence 🔑553(4)—Action for Personal Injuries—Hypothetical Questions.

In an action for wrongful death of employé by fire in defendant's asphalt shed, communicated by burning oil negligently poured from a gas seal into a ditch and filtering through a trap, hypothetical questions as to whether inflammable oil would be condensed and formed on the water in the gas seal and as to the results if such burning oil entered the trap, *held* supported by the evidence.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Laura A. Graves and others against the Union Oil Company of California. From a judgment for plaintiffs, defendant appeals. Affirmed.

Chickering & Gregory and Frank H. Gould, all of San Francisco, A. V. Andrews, of Los Angeles, and A. F. Bray, of Martinez, for appellant. Elmer E. Nichols, of Berkeley, Stetson & Kofod, of Oakland, T. D. Johnston, of Richmond, and A. T. Shine, of Oakland, for respondents.

CHIPMAN, P. J. Plaintiffs bring the action as heirs at law of Warren Graves, deceased, who was burned to death while employed by defendant and through the alleged negligence of defendant. The appeal is from the judgment on the verdict in favor of plaintiffs.

The cause of action is identical with the case of Hallawell v. Union Oil Co. (No. 1767) 173 Pac. 177, decided by this court April 3, 1918. Both Hallawell and Graves lost their lives at the same time and under identical circumstances. Each case was tried before a jury and in each plaintiffs had the verdict. The judgment in No. 1767 was affirmed. The facts and circumstances surrounding the accident causing Graves' death are fully set forth in the opinion in cause No. 1767, and need not be here repeated. The testimony of witnesses in the present case is not, nor was it at all likely to have been, literally the same as when given by the same witnesses in the Hallawell Case. But obviously, if the testimony was substantially the same in both cases and was deemed sufficient to support the verdict in favor of plaintiff in the Hallawell Case, a like verdict in the present case must also be held to have support, and the judgment should be affirmed unless some error of law crept into the case at the trial of sufficient gravity to require a reversal.

The contention of appellant here, as it was in the Hallawell Case, is: (1) That there is no proof of negligence in connection with the asphalt shed; (2) that there is no showing of causal connection between the fire in front of the stills and the fire at the asphalt shed; (3) there is no showing of negligence upon the part of defendant in connection with the fire in front of the asphalt stills. But one assignment of error is relied upon, namely, that the court erred in permitting answers to the hypothetical questions put to the witness Cooper. The present case was tried some time after the trial in the Hallawell Case, and was conducted without change of attorneys on either side. It is not likely that plaintiffs would fail to make as strong a showing in support of their contentions in the second trial as they did in the first. We think in some respects the showing is stronger.

[1] As to appellant's first point, we thought the evidence in the Hallawell Case, and we think the evidence in this case, was sufficient to establish actionable negligence in discharging the liquid contents of the gas seal onto the ground in a way to cause it to run along the ditch in front of the stills and over the ground around and near the trap and so as to quickly take fire as it did from the furnaces under the stills. This was the initial act of defendant's negligence which we held in the Hallawell Case and which we think in the present case was shown to have caused

the fire at the asphalt shed. There was evidence in the present case that the inflammable oil in this fluid was seen burning within two or three feet of the trap, a foot nearer than appeared in the Hallawell Case. It was shown, too, that the temperature of this fluid was raised after it left the gas seal, as was also the water flowing in the ditch which came from the condensers, by the heat from the furnaces and by the burning oil on the surface of the fluid which came from the gas seal, and that this increased temperature would cause inflammable vapor to rise from the trap, become ignited by the flame near the trap, and thus ignite the oil in the trap on its way down to the asphalt kettles through the eight-inch pipe. We do not think it necessary to recite the evidence. In our opinion it strengthened rather than weakened the showing in the Hallawell Case.

We think, too, that the evidence tending to show a causal connection between the fire at the asphalt shed and the fire in front of the stills was equally satisfactory, if not more convincing than at the first trial. There was no evidence upon which any rational theory could be predicated that the fire started at the asphalt shed otherwise than by the burning oil carried through the eight-inch pipe. That there was negligence on the part of defendant shown in connection with the fire at the asphalt shed appeared even more strongly than at the Hallawell trial. It will be recalled that this shed was an open wooden building of size 130x150 feet, with a wooden floor, and that the asphalt kettles were at the side of the part of the building called a "lean-to"; the asphalt was drawn from the kettles through long metal nozzles into barrels; to facilitate the drawing off of the asphalt which became cooled, particularly in these spouts, the practice was to build fires of old barrel staves under these spouts and feed the fire with distillate brought in buckets—cans nailed to sticks; these fires gave off large quantities of black smoke which caused inflammable soot to fasten itself on the posts, roof, rafters, and other parts of the building, though most of these surfaces were covered with galvanized iron; the barrels, when filled, were wheeled across the floor to the platform on the west side of the building or were stored in the building; it was the custom to cover the floor with sand to absorb the asphalt spilled in moving barrels or which came from leaking barrels; this covering was often saturated with asphalt and would then be removed and fresh sand supplied in its place; around the kettles inflammable material was allowed to accumulate. The second story was used both as a workshop and for storage of barrels and barrel material, as fully described in the Hallawell Case. The rapidity with which the building was enveloped in flames and the upper story filled with suffocating smoke caused by the accummulated soot was very convincing evidence of the dangerous character of the building.

[2] We have nothing to add to what was said in our former opinion as to the unsafe place in which deceased was placed to work. Our conclusion was, and still is, that these two men lost their lives by reason of conditions with which defendant caused them to be surrounded while at work and which defendant could have avoided by the exercise of ordinary care. This conclusion may be reached in the present case, regardless of the origin of the fire, since the deceased was in no degree responsible for the fire, in no degree contributed to the accident which caused his death, and since under existing statutory law the defenses of assumption of risk and fellow servants' negligence have been abrogated.

[3] There remains to notice the alleged error of the court in permitting expert witness Cooper to answer certain hypothetical questions. There were several of these questions, and to ascertain whether or not the court erred in its rulings one must read more than 100 pages of the typewritten record. It will be observed in doing so that the court took an active and, we think, an impartial part in an endeavor to make the questions conform to the rules governing this class of testimony. In some instances alleged facts were eliminated as not proven; in other instances facts deemed essential were by leave of the court proven and afterward incorporated in the questions. Throughout this prolonged examination of the witness, defendant's objections were not only clearly made but were supported by such reasons as defendant's counsel deemed pertinent or necessary to advance, to all which the court gave attentive consideration. The court showed entire familiarity with the facts testified to, and its rulings showed a purpose to allow no question that was not fairly deducible from facts proven. The trial judge is in a position to have the circumstances far more clearly before him than the appellate court can have them. A large discretion relating to the form of the question must necessarily rest with the judge. Where many facts and circumstances, as in this case, are made the basis of the question, the appellate court is justified in placing much reliance upon the decision of the trial court in passing upon the sufficiency of the facts narrated in the question.

[4] We have given this part of the record such attention as satisfies us that no prejudicial error was committed by the court by any of its rulings upon these hypothetical questions. The rule is that:

> "A hypothetical question on which the opinion of an expert is to be based must include only such facts as are supported by evidence; but it may include any state of facts which the evidence tends to prove and which the jury

might reasonably find to be proven." 11 R. C. L. p. 575.

"The evidential facts are usually in dispute; neither counsel nor witness knows what the jury will find to be the actual facts proven, and the witness cannot be allowed to give an opinion based on hearsay or on his own idea of what constitutes evidence. Nevertheless, each party has the right to lay before the jury the scientific inferences properly deducible from the facts which he claims to have proved, subject to the contingency that the jury shall find such facts to be as claimed. * * * The solution of this problem which has been worked out by the courts is to permit counsel to put to the expert, after his competency has been established, a question in which the things that counsel claims to have proved are stated as a hypothesis, and the witness is asked to state and explain the conclusion which, in his opinion, results. Then if the jury should find that the facts assumed in the question have been proved by the evidence, they may use the technical information and instruction obtained from the expert in determining the ultimate facts; but if they should find that the facts assumed in the question are not true, then of course the opinion based on them should be wholly disregarded." Id. 578.

Mr. Jones, in his Commentaries on Evidence, vol. 2, §§ 370, 371, says:

"The facts are generally in dispute; and it is sufficient if the question fairly states such facts as the proof of the examiner fairly tends to establish. A question should not be rejected because it does not include all the facts, unless it thereby fails to present the case fairly. The truth of facts assumed by the question is in doubtful cases a question for the jury; and, if they find that the assumed facts are not proved they should disregard the opinions based on such hypothetical questions; and the court will so instruct them."

[5] We are quite convinced from an examination of the record that plaintiffs' counsel formulated and presented their hypothetical questions in good faith, and that they were based upon facts proven and fairly stated and upon inferences fairly deducible from the facts proven. It may be stated that the opinion of the witness, whose competency as an expert was not disputed, was sought to show whether, under the conditions stated in the question, inflammable oil would be condensed and form on the water in the gas seal. He answered it would. The contention of defendant was that no oil would be condensed in the gas seal for the reason that it was all condensed as it passed through the condensers; that witnesses had so testified; that one witness Del Monte testified that six months before the accident he had repaired the gas seal and found it necessary to empty the contents on the ground and he observed no oil. There was evidence that while the condensers were designed to precipitate practically all available oil in the gases passing into them from the stills, the process did not arrest all of it. The undisputed fact was that oil did accumulate in this gas seal after the gas had passed through the condensers, and when the contents of the gas seal ran into the trench and on the ground around the trap it quickly took fire. It was oil that burned, for the seal contained only water and gas, and there was no possible way for oil to be found there except by condensation of gases.

There was evidence that the liquid, negligently, as we think, poured on the ground out of the gas seal—60 or 70 gallons of it—ran down the trench in front of the furnaces and was seen while burning not far from the opening of the six-inch pipe which ran to the trap, and also around the trap and within two or three feet of it; that the flames rose up from the burning fluid two or three feet; that a high wind was blowing from the southeast across the furnaces and across the trap; the distance from the intake of this six-inch pipe to the trap and the slant or grade were shown, and that the outlet of this pipe was so placed at the trap as that the top of the pipe would always be about an inch under water in the trap; the construction of the trap was shown to be of brick and about eighteen inches square and was open at the top and flush with the surface of the ground; that an eight-inch pipe carried the contents of the trap down to the asphalt kettles; these and other facts and circumstances appeared, some of which are set forth in the opinion in the Hallawell Case. Subsequent hypothetical questions had to do with the result which would follow, assuming that the water carrying on its surface this burning oil in the trench in front of the stills, under the conditions mentioned in the questions, entered the six-inch pipe; and also as to what would happen on the assumption that oil on the water in the trap was ignited by the burning oil coming through the six-inch pipe or in some other manner. The testimony of the expert was that, from causes he fully explained, the oil would be forced through the six-inch pipe to the trap; that the oil at the trap would be ignited and pass on down quickly to the asphalt kettles through the eight-inch pipe; that at the admitted temperature of the water in the trench and in the trap, of 70 degrees Fahrenheit, the trap would give off inflammable vapors, and that these vapors being lighter than air, if no wind was blowing, would rise and spread out equally over the sides of the trap and if there was wind blowing these vapors would be carried with and in the direction of the wind and would be ignited by the nearby fire burning around the trap, and this fire would follow the burning vapors back to the trap and ignite the oil in the trap, and this burning oil would pass rapidly down the eight-inch pipe to the asphalt kettles.

We have given some of the facts, but by no means all, that were matters of evidence or were inferences deducible from evidence of facts, which the court deemed sufficient as a basis for the expert's testimony. Our conclusion is that the court did not err in permitting answers to the hypothetical questions above referred to.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

(37 Cal. App. 101)

PEOPLE v. BROWN. (Cr. 587.)

(District Court of Appeal, Second District, California. April 29, 1918.)

1. CRIMINAL LAW ⚷1186(4) — REVERSAL — TECHNICAL ERRORS—INFORMATION.

Information alleging that between certain dates accused, "did then and there willfully and unlawfully take and entice" his victim "away from her home and usual place of abode and did on various dates and times induce" her "to accompany defendant to various hotels and rooming houses in the city of San Diego, and there occupy the same room and bed with defendant, and that said defendant did then and there have and accomplish acts of sexual intercourse with" her, was sufficient as against objection that the charge was barred by the statutory limitation of one year, in that all the acts might have been committed prior to November 2, 1916; the offenses being charged to have been committed between October 1, 1916, and October 1, 1917, and the information having been filed November 2, 1917, in view of Const. art. 6, § 4½, prohibiting reversal for defect in pleading unless there is a miscarriage of justice.

2. INDICTMENT AND INFORMATION ⚷119—CONCLUSION—SURPLUSAGE.

Information charging that accused "did then and there willfully and unlawfully take and entice" his victim "away from her home and usual place of abode and did on various dates and times induce" her "to accompany defendant to various hotels and rooming houses in the city of San Diego, and there occupy the same room and bed with defendant, and that said defendant did then and there have and accomplish acts of sexual intercourse with" her, further alleging that accused induced the girl to so live as would cause and manifestly tend to cause her to become and remain a person coming within the provisions of the Juvenile Court Law of the state of California, was not objectionable because the further allegation was a conclusion of law, as it would be regarded as surplusage.

3. INFANTS ⚷20—DELINQUENT CHILDREN—INFORMATION—SUFFICIENCY.

Information charging contributing to delinquency of 15 year old girl showing that surnames of accused and the girl were different, that she was 15 years of age, and that he enticed her from her usual place of abode and induced her to live with him at various hotels and rooming houses, was not insufficient for failure to allege that accused and the girl were not husband and wife.

4. CRIMINAL LAW ⚷1186(4) — APPEAL — HARMLESS ERROR.

In view of Const. art. 6, § 4½, preventing reversal in the absence of miscarriage of justice, court on appeal from conviction for contributing to delinquency of girl need not consider alleged error in failing to compel election of offense or strike out testimony as to acts barred by the statute of limitations or excluding questions seeking to impeach the prosecutrix or in the alleged misconduct of the district attorney, where there is no miscarriage of justice.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Harry J. Brown was convicted of contributing to the delinquency of a 15 year old girl, and he appeals. Affirmed.

E. L. Johnson, of San Diego, and Ralph F. Twombly, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

WORKS, Judge pro tem. The appellant was charged with contributing to the delinquency of a 15 year old girl, the information having been predicated upon the terms of Juvenile Court Law (Stats. 1915, p. 1225; Deering's Gen. Laws, p. 766) § 21, which provides that:

> "Any person who shall commit any act or omit the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of twenty-one years to come within the provisions of any of subdivisions 1 to 13 inclusive of section 1 of this act, or which act or omission contributes thereto, or any person who shall, by any act or omission, or by threats, or commands, or persuasion, induce or endeavor to induce any such person, under the age of twenty-one years, to do or to perform any act or to follow any course of conduct, or to so live as would cause or manifestly tend to cause any such person to become or to remain a person coming within the provisions of any of subdivisions 1 to 13 inclusive of section 1 of this act, shall be guilty of a misdemeanor."

Subdivision 8 of section 1 of the act provides that the act shall apply to any person under the age of 21 years "who habitually uses intoxicating liquors or habitually smokes cigarettes, * * *" and subdivision 11 of that section makes the law apply to any person under 21, "who is leading, or from any cause is in danger of leading, an idle, dissolute, lewd or immoral life." The evidence of appellant's guilt was directed to these two subdivisions. He was convicted, and was sentenced to two years in the penitentiary.

The testimony of the victim of the appellant was to the effect that she first met him at a dance; that they frequently saw each other from that time forward, and soon became engaged to be married; and that immediately after the engagement they began to indulge in sexual intercourse together, the acts being committed almost daily, over a considerable period of time, in the rooms of appellant in the several hotels and lodging houses at which he lived during the period. The landlady of one of the places at which appellant lived testified that on a certain occasion she became suspicious that appellant had a girl in his room; that she went to the room and rapped on the door, but that he refused to admit her or to open the door; that he later came down stairs in company with the girl whose testimony is stated above; that she, the landlady, then asked him what right he had to bring a girl into the hotel, to which he replied that he was not doing anything, that he was changing his clothes, whereupon she said to him that he had no right to receive the girl in his room and change his clothes; and that appellant responded that he would vacate the room. He did surrender the room that day. Two police officers who took the appellant into custody testified that he acknowledged to them that he had committed the sexual act with the girl. We shall refer specifically to the testimony of but one of these officers. He says that the appellant named the places where the sexual act had been committed between the two, the officer stating them from the stand and they being some of the places named by the girl in her testimony; that he had always intended to marry the girl; but that they had trouble at various times which prevented it. Practically the entire testimony of the prosecution above stated related to times within a year before the filing of the information against the appellant, that time being the period of limitation in such cases. The evidence of the prosecution showed without dispute that the appellant and the girl had never been married to each other.

In the evidence on the part of the defense there was no contradiction of any part of the testimony above stated, except that several witnesses testified that the girl's reputation for veracity was bad. At least three of these witnesses testified, however, on cross-examination, that they had seen the girl in the rooms of appellant at various times, and one of them said that she had "stayed with" the appellant.

Evidence was also introduced by the prosecution tending to show that appellant had induced the girl to drink intoxicating liquors; that he had compelled her, by persuasion, threats, and blows, to prostitute her body to the uses of other men; and that he had taken from her the money derived from such prostitution. As to all this evidence there was some contradiction in the testimony of the witnesses for the defense.

It is contended by the appellant that the trial court erred in holding that the information was sufficient in the face of an objection that the charge attempted to be made by it was barred by the statutory limitation of one year, the criminal acts of the appellant having been stated in the information to have been committed "on various dates and times" between October 1, 1916, and October 1, 1917, and the information having been filed November 2, 1917. It is insisted that the charge does not negative the possibility of all the criminal acts having been committed prior to November 2, 1916. It is to be noted that the crime of contributing to the delinquency of a juvenile may be of a continuing character; in fact, the offense is usually made of a series of overt acts or of a continuous chain of omissions. The information now before us plainly attempts to charge a crime of that character. There was no special demurrer to the information, but the claim that it was insufficient came in the form of an objection, at the trial, to the introduction of evidence in support of the charge, on the ground that, as to any offense charged in the information, "a greater portion of it is barred by the statute of limitations." The peculiar form of this objection made it practically meaningless, as it carried the inference, if not the assertion, that some portion of the charge was not barred. The objection was also made, at the same time, that the information did not charge a public offense. The point now before us seems to be within the rule announced in People v. Griesheimer, 167 Pac. 521. In that case the defendant was charged with collecting money from the prosecuting witness by means of false and fraudulent representations. The representations were to the effect that the defendant was authorized to solicit subscriptions on behalf of a certain publication, and that he had in fact collected such subscriptions from various persons. It was charged that the prosecuting witness relied on these false representations, and that he was thereby "induced to and did deliver * * * money to the defendant." There was a general demurrer to the information, which the trial court overruled. In passing upon the contention of the appellant that the ruling was erroneous, the Supreme Court said:

> "We are of the opinion that as against the defendant's general demurrer the information should be held sufficient on appeal. While there is no direct allegation that the money was paid to the defendant as a subscription or loan to the Fatherland Magazine, a reader of the information could hardly draw from it any other inference than that the payment was made for such purpose. It may be conceded that a direct allegation to this effect would have been more in accord with technical requirements. But what was intended to be charged in this connection is perfectly plain from the language in fact used, and no person of common understanding could fail to understand that it was substantially charged, by necessary inference at least, that the money was paid because of the alleged false representations, and for the purpose suggested thereby. Section 4½, art. 6, of the Constitution provides that: 'No judgment shall be set aside, or new trial granted in any case, * * * for any error as to any matter of pleading, * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' We are satisfied that to reverse the judgment on this ground would be to entirely ignore this provision of our Constitution."

[1] The information now before us alleges that, between the dates already mentioned, the appellant "did then and there willfully and unlawfully take and entice" his victim "away from her home and usual place of abode and did on various dates and times induce" her "to accompany defendant to various hotels and rooming houses in the city of San Diego, and there occupy the same room and bed with defendant, and that said defendant did then and there have and accomplish acts of sexual intercourse with" her. To a person of common understanding this language must plainly carry the meaning that the appellant continued his illicit acts from a time on or about the first date to a time on or about the second date mentioned in the information. The charge was sufficient as against the objections made by the appellant at the trial, in view of the constitutional provision mentioned in the quotation from the opinion in People v. Griesheimer.

[2] The appellant presents the further point that the trial court acted erroneously

in holding the information to be sufficient over an objection that it stated but a conclusion of law in this respect, that it charged the appellant with having induced the girl "to so live as would cause and manifestly tend to cause" her "to become and remain a person coming within the provisions of the Juvenile Court Law of the state of California." This language is used in one part of the information, it is true, but the point which is attempted to be made concerning it is divested of all importance when we remember the very definite charge which is set out above and which specifically denounces the conduct of the appellant toward the girl at various times and at various hotels and rooming houses in San Diego. The general language inveighed against by the appellant may be treated as surplusage; for the charge against him is specifically and definitely stated in other parts of the information. The point is not well taken.

[3] The appellant contends that the information was insufficient to charge a public offense, in that it did not allege that at the time of the commission by the appellant of the acts of which complaint is made he and the girl were not man and wife. The information does show, however, that the surnames of the appellant and the girl were different; that she was but 15 years of age; and that he took and enticed her from her usual place of abode and at various times induced her to go to various hotels and rooming houses with him, where they were sexually familiar with each other. This language of the information brings the case within the terms of the opinion in People v. Griesheimer, from which quotation is above made. No person of ordinary intelligence could read the information without plainly understanding from its terms that the appellant was charged with committing the denounced acts upon one who was not his wife.

[4] The appellant contends that there was error in various other particulars in the proceedings of the trial court. It is asserted that the court erred in denying an application made by appellant at the trial to the effect that the prosecution be compelled to select and specify, by date, some particular act upon which reliance would be placed for a conviction; also in refusing to strike out certain testimony as to acts of defendant toward the girl, committed more than a year before the filing of the information; and, further, in sustaining objections to certain questions asked a witness for the purpose of impeaching the girl as to some of her testimony on the subject of her being led by appellant to indulge in the use of intoxicating liquors. In addition to these specifications of error said to have been committed by the court, the appellant insists upon a reversal because of alleged misconduct of the district attorney in the prosecution of the case. We do not find it necessary to consider the merits of any of these points, nor to state the argument by which the Attorney General meets nearly, if not quite, all of them. We need not consider these questions for the reason that none of them militate against nor minimize the fact that the appellant's guilt was established by the uncontradicted evidence stated above. Having regard to the provisions of section 4½ of article 6 of the Constitution, we have made a careful examination of the entire cause, including the evidence, and we are of the opinion, from such examination, that no errors in the record, if any there be, have resulted in a miscarriage of justice.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(178 Cal. 416)

CHAMBERS, Controller, v. GIBSON et al.

(Sac. 2579.)

(Supreme Court of California. June 14, 1918.)

Taxation 🔑905(2) — Inheritance Tax — Limitations.

State controller's proceeding, under the act of 1905 (St. 1905, p. 374), to recover inheritance taxes on corporate stock, under Code Civ. Proc. § 338, subd. 1, must be commenced within three years after death of donor, there having been gift, though the act of 1905 imposes lien on property in donees' hands.

Department 1. Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Proceeding by John S. Chambers, as Controller of the State of California, against Mrs. J. S. Gibson and others, as trustees for N. C. Moore, and Mrs. J. S. Gibson and another, as trustees of Jozie S. Gibson. From judgment for plaintiff, defendants appeal. Reversed.

A. L. Shinn, C. L. Shinn, and C. G. Shinn, all of Sacramento, and Thomas Rutledge, of Colusa, for appellants. Robert A. Waring and J. Paul Miller, both of Sacramento, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment in respondent's favor in a proceeding to recover certain inheritance taxes alleged to be due the state upon certain stock in a corporation known as J. S. Gibson Company, assigned and transferred by J. S. Gibson to the defendants and appellants herein in May, 1906. Said Gibson died on June 14, 1906. The defense to the action was the statute of limitations.

We are unable to perceive any distinction in principle between this case and the case of Chambers v. Gallagher, 171 Pac. 931, nor any reason for the application of a different rule than that therein applied. In the briefs of counsel for respondent filed since the decision of that case it is urged that such a distinction is to be found in the fact that in the Gallagher Case the action was against the executor of an estate in respect to whom no lien was created by the state upon the property which has passed through his hands, while in the instant case it is contended that by the act of 1905 (St. 1905, p. 374) under which the tax is sought to be collected a lien was imposed upon the property in the hands of the donees of the decedent, and that this is a proceeding to enforce that lien. The fact that the statute imposes such lien does not affect the application of the doctrine laid down in the former decisions; for it is there shown that in analogous cases when the law permits a personal action to be maintained for the collection of taxes upon property, which taxes are also a lien upon such property, the personal liability created by statute for such tax is a cause of action which, under section 338, subd. 1, of the Code of Civil Procedure, is barred after the expiration of three years from the time when the right of action accrued. The right of action in the present case accrued upon the death of the donor of the property claimed to be subject to this tax, and must therefore have been commenced within three years thereafter. San Diego v. Higgins, 115 Cal. 170, 46 Pac. 923; Los Angeles v. Ballerino, 99 Cal. 595, 32 Pac. 581, 34 Pac. 329; San Francisco v. Luning, 73 Cal. 610, 15 Pac. 311; Lewis v. Rothchild, 92 Cal. 625, 28 Pac. 805; Dranga v. Rowe, 127 Cal. 506, 59 Pac. 944; Clark v. San Diego, 144 Cal. 361, 77 Pac. 973. Upon the authority of these cases and of Chambers v. Gallagher, supra, the judgment is reversed.

We concur: SHAW, J.; SLOSS, J.

(178 Cal. 329)

CROCKER NAT. BANK OF SAN FRANCISCO v. BYRNE & McDONNELL.

(S. F. 7896.)

(Supreme Court of California. May 27, 1918. Rehearing Denied June 24, 1918.)

1. Corporations 🔑472 — Bonds — Title of Purchaser.

Under Civ. Code, § 3088, declaring that a negotiable instrument must be without any conditions not certain of fulfillment, etc., and section 3093, providing that negotiable instruments must not contain any contract other than those permitted by the chapter of which it is a part, corporation bonds and coupons thereon payable to bearer, but stating on their face that they were secured by trust deeds or mortgages, were not negotiable.

2. Corporations 🔑473—Bonds—Title of Purchaser.

The rule that the seller of ordinary property cannot transfer to the buyer a better title than he himself has applies to corporation bonds, which, though payable to bearer, do not possess the character of negotiable instruments.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negotiable.]

3. Customs and Usages 🔑8—Modification of Statute.

The Civil Code is a positive statute, and nothing can be established by custom contrary to its terms.

4. Constitutional Law 🔑70(1) — Encroachment on Legislature.

The rule that custom cannot overcome the positive provisions of a statute, or make that a negotiable instrument which the Code declares shall not be such, is equally forceful to prevent the courts from creating exceptions not made by the Code, and which are contrary to its express provisions.

5. Corporations 🔑472 — Bonds—Negotiability—Statutes.

The language of Civ. Code, §§ 3088, 3093, defining negotiable instruments, permits of no exceptions in favor of a corporation bond non-negotiable in form, whereby it may become negotiable after the first holder has sold it, or as against all persons other than the obligor.

6. Corporations 🔑472—Bonds—Negotiability.

That some of the reasons which led to the exception of negotiable instruments from the general rule that a seller can give no better title than he himself has would apply with equal force to instruments payable to bearer, but not negotiable in form, is not sufficient excuse or reason for including such instrument within the exception provided by statute.

7. EVIDENCE 🔑65 — NEGOTIABLE INSTRUMENTS—PRESUMPTION.

The exception to the general rule that the seller can give no better title than he himself has having been confined to negotiable instruments, money, and currency, it is to be presumed that this is generally understood, and that the owners of such property guard the same with greater care.

8. CORPORATIONS 🔑472—BONDS—"NEGOTIABLE."

That title to a corporation bond payable to bearer may be passed by delivery does not make it "negotiable," within Civ. Code, §§ 3088, 3093, although such a bond is negotiable in the sense in which such word is often used.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negotiable.]

9. BANKS AND BANKING 🔑113 — BONDS — RIGHTS OF PURCHASER.

The assistant cashier of a bank had authority to remove certain nonnegotiable bonds payable to bearer from its vaults to have the interest coupons detached, or for presentation for payment at maturity, but had no authority to dispose of them. He employed defendants to act for him as brokers in the purchase of stocks, and was required by them to keep a cash margin to cover possible losses. Being unable to raise the necessary funds for the margin, he took from the vaults of the bank certain of the bonds, and deposited them as security to cover possible losses on stock purchases and such advances as defendants should make for him from time to time. Defendants accepted the bonds in good faith, believing that they were, as stated by the cashier, owned by him. *Held*, that there was no estoppel in favor of defendants, and that the bank was entitled to recover, since the cashier was acting for himself, and told defendants that he was the owner.

Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Crocker National Bank of San Francisco against Byrne & McDonnell, an association of persons. Judgment for defendants, and plaintiff appeals. Reversed.

Pillsbury, Madison & Sutro and Morrison, Dunne & Brobeck, all of San Francisco, for appellant. Harrison & Harrison, of San Francisco, for respondent.

SHAW, J. The plaintiff sued the defendants to recover the value of certain corporation bonds belonging to the plaintiff which had come into the possession of the defendants and had been by them converted to their own use. The bonds and the coupons thereon were payable to bearer, they stated on their faces that they were secured by trust deeds or mortgages, and they were in other respects in the same form as the mortgage bonds under consideration in Kohn v. Sacramento, etc., Company, 168 Cal. 1, 141 Pac. 626. The court below found in favor of the defendants, and rendered judgment accordingly, from which plaintiff appeals.

The defendants obtained possession of the bonds in the following manner: Baker was an assistant cashier of the bank, and his duties were of such a character that he necessarily had access to the vaults of the bank and to the bonds kept therein. He had authority to take them out of the vaults to have the interest coupons detached, or for presentation for payment at maturity, but he had no other authority to remove said bonds, and no authority to negotiate or dispose of the same. Byrne & McDonnell were stockbrokers in San Francisco. Baker employed them to act for him as brokers in the purchase of stocks for sale on the stock board of San Francisco and other cities. To carry on these operations he was required by Byrne & McDonnell to keep with them a cash margin to cover the possible losses on such stock purchases and such advances as they should make for him from time to time in the business. Being unable at all times to raise the necessary funds for this margin, he abstracted the bonds in question from the vaults of the bank, without the knowledge or consent of plaintiff, and pledged them with Byrne & McDonnell as security for his liabilities on the transactions with them as stockbrokers. Two of the bonds so pledged matured and were collected by the defendants, the proceeds being credited by them to their account against Baker, leaving a balance in their favor of $10,685.71. Upon discovering the fact that Baker had thus disposed of the bonds, the plaintiff demanded of defendants the return of all the bonds. The demand was refused, defendants claiming the right to the proceeds of the bonds that had been paid and the right to hold the remainder as security for the amount they claimed was due them from Baker. Plaintiff thereupon began this action for the value of all the bonds so taken and pledged to defendants. The court below found that Baker, at the time of pledging the bonds, represented to the defendants that he was the owner thereof, and that defendants accepted them as security in good faith, in the belief that said representation was true and without knowledge of, or reason to suspect, the fact that Baker had no title.

In Kohn v. Sacramento, etc., Company, supra, we held that bonds in the form of those here in controversy, though payable to bearer, and transferable by delivery, under our law are not negotiable instruments, as that term is defined in sections 3088 and 3093 of the Civil Code. The case attracted much attention, it was thoroughly argued, and was carefully considered by the court. Similar principles were declared in Meyer v. Weber, 133 Cal. 681, 65 Pac. 1110, Briggs v. Crawford, 162 Cal. 124, 121 Pac. 381, National Hardware Company v. Sherwood, 165 Cal. 1, 130 Pac. 881, and Taylor v. Jones, 165 Cal. 108, 131 Pac. 114. The transactions between Baker and the defendants occurred before the enactments of the amendments of 1915 changing the above sections so as to meet the decision in the Kohn Case. The doctrines laid down in the Kohn Case are therefore applicable to the present case. We see no reason for changing them. They apply, of course, to transactions made prior to said amendment of the Code.

[1] That decision establishes the proposition that these bonds were not negotiable instruments. The plaintiff invokes the well-known rules that the seller of ordinary property can transfer to the buyer no better title than he has himself, and that if such property has been lost by the true owner, or stolen from him, one who buys from the finder or from the thief, though he pays full value and buys in good faith, without notice, obtains no title as against the true owner.

[2] The decision in the Kohn Case and in Chase v. Whitmore, 68 Cal. 547, 9 Pac. 942, fully support plaintiff in the claim that these rules apply to bonds or notes payable to bearer which do not possess the character of negotiable instruments. The last-mentioned case is even stronger than the case at bar. Chase was the owner of a promissory note which was not negotiable because it provided for attorneys' fees in case of suit, a provision which the Code, prior to 1905, did not allow in a negotiable instrument (Civ. Code, § 3088), and also because at the time of the transaction involved it had lost its character as a negotiable instrument by reason of the fact that it was past due. It was made payable to order, and the payee had indorsed it in blank, thus making it transferable by delivery without further indorsement, and practically payable to bearer. In effect, therefore, it was of the same character as the bonds here involved. Chase became the owner of it and intrusted it to the possession of an agent, but gave him no authority to dispose of it. The agent sold it, as his own to Whitmore, who paid full value, was without notice of the want of title, and bought in good faith. It was held that the note did not come within the rule that the seller of a negotiable instrument can transfer a good title to a buyer, though he has no title himself; that for both reasons above stated it was not a negotiable instrument at the time of the transfer; that the seller, having no title in himself, could transfer none; that the mere possession by the seller was not evidence of authority from the true owner to sell it; that Chase was not by that fact estopped from reclaiming it from such buyer; and that the defendant Whitmore was liable to the true owner for the return of the note, or for its value, if he failed to return it on demand.

The respondent admits the rule to be that the seller of ordinary property can transfer no better title than he has himself, and that one who buys such property from a finder or from a thief obtains no title against the true owner. They seek to avoid the effect of the rule in this case under the claim that in this state bonds payable to bearer, but not negotiable instruments according to the definition of the Civil Code, pass by delivery alone, and that by the general usage and custom of trade they have came to be generally considered as negotiable instruments, and have acquired that character notwithstanding the fact that they violate the terms of section 3088, declaring that a negotiable instrument must be made payable in money only, without any conditions not certain of fulfillment. They further claim that even if such bonds are not negotiable instruments as against the obligor therein, they are such with respect to successive holders as to all matters which do not concern the obligor, and therefore are to be treated as negotiable instruments in any controversy between the plaintiff and the defendants concerning them. Evidence of the usage mentioned was introduced, the court below found that such usage existed, and held with the defendants on both propositions.

The two cases last mentioned hold to the contrary of the first of these propositions, and they are decisive on that subject. The English cases cited by respondents in support of the proposition that bonds similar to those here in dispute may, by usage, acquire the character of negotiable instruments, place the decision on the ground that in England negotiable instruments are not defined or declared to be such by statute, but became invested with their peculiar characteristics originally by the general custom of merchants, and that there was in that country no reason why such general custom could not also invest other instruments which pass by delivery with the same qualities and put them in the same class, and they declare that if there was a statute governing the subject, such custom could not enlarge the class created by the statute. Goodwin v. Robarts, L. R. 10 Exch. 337; Rumball v. Metropolitan Bank, 2 Q. B. D. 194; Bechuanaland, etc., Co. v. London T. Bank, 1898, 2 Q. B. D. 658; Edelstein v. Schuler, 1902, 2 K. B. D. 144. In the Kohn Case we said that custom "never overcomes the positive provisions of statutes" (168 Cal. 7, 141 Pac. 626), and the statement cannot be disputed.

[3] The Civil Code is a positive statute, and nothing can be established by custom contrary to its terms. The existence of such custom is therefore of no effect. The court below erred in admitting evidence thereof.

[4, 5] No authority is cited for the second proposition, and we think it is likewise in contravention of the Code. It is really nothing more than a claim that notes or bonds of a form which the Code declares cannot be deemed negotiable instruments may nevertheless become such under some circumstances. The rule that custom cannot overcome the positive provisions of a statute, or make that a negotiable instrument which the Code declares shall not be such, is equally force-

ful to prevent the courts from creating exceptions not made by the Code, and which are contrary to its express terms. The language of the Code defining such instruments permits of no exceptions in favor of a note or bond nonnegotiable in form, whereby they may become negotiable instruments after the first holder has sold them, or as against all persons other than the obligor. The courts cannot legislate, especially where the legislation proposed would, in effect, repeal or modify a statute.

We cannot assent to the claim that the rule by which negotiable instruments may be sold by a finder or a thief before maturity, so as to pass a good title to the buyer, should be, or has been, extended so as to include bonds or notes which, though not negotiable in form, are made payable to bearer, and to which title may be passed by sale and delivery. This is directly contrary to the decision in Chase v. Whitmore, supra. There, as we have said, the note was not negotiable, but it had been indorsed in blank by the payee, and by reason of that fact the title thereto could be passed by sale and delivery without further indorsement, and it was, in legal effect, thereafter payable to bearer, either before or after maturity. Chase had obtained it by sale and delivery after the first indorsement. Yet it was there decided that it was not a negotiable instrument as between Chase and Whitmore, and that the latter derived no title to the note by his purchase from one who had neither title nor authority from the true owner to sell it.

[6, 7] It may be that some of the reasons which led to the exception of negotiable instruments from the general rule that a seller can give no better title than he has himself would apply with equal force to instruments payable to bearer, but not negotiable in form. But this is not sufficient excuse or reason for including such instruments within the exception. The exception has been established from time immemorial, and it has hitherto been confined to negotiable instruments, money, and currency. It is to be presumed that this is generally understood; that the owners of such property guard the same with greater care for that reason, a care which the owners of other property need not exercise. It would be unjust and inadvisable as a matter of policy to extend the exception by a judicial decision. And besides, it would be judicial legislation, a thing forbidden to the courts. Moreover, in this state, the same cause would logically extend the exception to all personal property. The Code makes the title to all such property transferable by oral sale and delivery of possession, and where it so passes, the Code allows the buyer to sue in his own name to recover it, if a chattel, or to enforce it if it consists of a promise to pay money. We apprehend that even the respondents' counsel would shrink from these logical consequences of this part of their argument.

[8] It is further argued that every note or bond payable to bearer is negotiable by mere delivery, and is therefore a negotiable instrument, regardless of its form. The argument on this head is supported mainly by extracts from opinions of the courts of other jurisdictions in which the word "negotiable" is used in a sense different from that which it has in the phrase "negotiable instrument." Any contract to pay money the title to which may be passed by delivery alone, or by indorsement, is "negotiable," in the sense in which the word is often used. When the title has so passed, it is often said that the instrument has been "negotiated." But the fact that title may be so passed does not make it a negotiable instrument, within the meaning of the Civil Code, nor within the meaning of that term as used in the decisions which except negotiable instruments from the general rule regarding sales by a finder or a thief. This statement is well illustrated by reference to the case of an ordinary negotiable instrument made payable to bearer, or indorsed in blank by the payee and which has become past due. It is then negotiable, in the meaning above referred to, by mere delivery, the same as it was before maturity, but it is no longer a negotiable instrument, nor within the exception as to sales by a finder or thief. Chase v. Whitmore, supra.

Respondents cite Mohr v. Byrne, 135 Cal. 87, 67 Pac. 11. The case holds that the purchaser by assignment of a chose in action which is not a negotiable instrument takes it free from a secret trust, whereby a third person had acquired an interest in it not apparent on its face. A similar rule applies to all property. But there the prior holders were the lawful owners of the legal title. There was no sale by a thief or finder, and no such question as is here presented could have arisen. The application of the arbitrary exception respecting such sales of negotiable instruments was not involved or discussed. The case does not aid the respondents.

[9] There is nothing in the facts found which constitutes an estoppel in favor of the defendants. The transaction was not one in which Baker was assuming to dispose of the bonds in behalf of the bank, so that his position as assistant cashier might imply that he was authorized to do so. He was acting for himself, and he told the defendants that he was the owner. He merely had the possession of the bonds. His possession, for the purpose for which he took them, was wrongful. He had them without the authority, knowledge, or consent of his principal, who was the true owner, and in violation of his duty as an agent, or employé. The case is not as strong as that of Chase v. Whitmore, supra, where the agent had been expressly intrusted with

the possession of the note which he wrongfully sold. Here the possession as well as the pledge thereof was wrongful. In that case the court held that there was no estoppel in favor of the buyer. It is decisive of the case at bar on this point also. See, also, Yamato v. Bank, 170 Cal. 351, 149 Pac. 826, to the same effect.

For these reasons, we are of the opinion that the court below erred in its conclusions of law, and in giving judgment for the defendants. It is unnecessary to consider the other objections urged in supporting the appeal.

The judgment is reversed.

We concur: SLOSS, J.; RICHARDS, Judge, pro tem.

(178 Cal. 406)

NORTH AMERICAN DREDGING CO. OF NEVADA v. OUTER HARBOR DOCK & WHARF CO. (L. A. 4195.)

(Supreme Court of California. June 12, 1918.)

1. Appeal and Error 🔑347(1)—Time—Notice of Judgment.

Where a judgment was not actually entered until December 18th, notice of entry of judgment served December 7th on attorneys for appellant was premature and ineffectual for any purpose, and appellant, under the statutes regulating the procedure on appeal in effect prior to 1915, had six months from the date of the actual entry of the judgment in which to appeal.

2. Work and Labor 🔑22—Performance—Complaint.

In an action by a dredging company to recover on quantum meruit for work done under a contract with defendant dock company, the complaint, while indefinite and uncertain, *held* not so fatally defective as to be subject to general demurrer on the ground that it did not show that the work of filling on the dock company's property had been completed according to the terms of the contract, so far as to have entitled the dredging company to be paid the full rate of 24 cents per cubic yard for its work done during a particular month.

3. Contracts 🔑264—Rescission—Party in Default.

A party to an agreement may not rescind it while he himself is in default in respect to a material part.

4. Arbitration and Award 🔑8—Contract Requiring Arbitration—Invalidity.

Where a dock company's contract with a dredging company provided that in case of any disagreement respecting any matter under the contract for dredging the same should be settled and the rights of the parties determined by arbitration, the three arbiters selected as provided to hear all evidence offered, and to make an investigation of the facts, and the decision of the majority of the arbiters to be final and binding on both parties, such clause in the contract was not binding so as to require the dredging company first to have recourse to arbitration before either bringing an action on the contract or working its rescission and commencing action on quantum meruit, if otherwise entitled to rescind it; the arbitration clause being invalid as an attempted interference with the jurisdiction of the courts to decide controversies between parties to contracts.

5. Contracts 🔑262—Breach—Right to Rescind—Waiver by Accepting Payment.

Where a dock company, acting on the report and estimates of its engineers, offered to pay a dredging company doing work for it for the amount of its dredging work done during the month a sum calculated at the rate of 12 cents per cubic yard, and the dredging company, though insisting that they were entitled to be paid a sum calculated at 24 cents per cubic yard, nevertheless accepted the sum tendered by the dock company as partial payment, and continued its work, the dredging company waived and lost its right to rescind the contract for the dock company's failure to make full payment.

6. Work and Labor 🔑14(1)—Rescission—Date Character.

Where, when a dock company tendered to a dredging company doing work for it a sum for work done during a month calculated at the rate of 12 cents per cubic yard, insisting that the sum tendered was the whole sum due on that date according to the report and estimates of its engineers, so that the dredging company was fully informed of the exact nature and extent of the dock company's default, if any, in the fulfillment of the terms of the contract, which called for payments at 24 cents per cubic yard, but the dredging company not only accepted the sum tendered as a partial payment on the contract, but also went on with the work, which, under the contract, it was to perform during the following month, and continued with the performance of such work for nearly a month after the dock company's default, if any, and the nature, extent, and reasons thereof were fully known to it, and did not even then attempt to exercise its right of rescission for the dock company's claimed breach until nearly two months more had elapsed, and until the entire term within which the entire contract was to have been completed by it had expired, the dredging company's attempted rescission, if its right thereto ever existed, came too late to avail it as basis for its action on a quantum meruit.

Department 1. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the North American Dredging Company of Nevada, a corporation, against the Outer Harbor Dock & Wharf Company, a corporation. From judgment for defendant, plaintiff appeals. Affirmed.

Chase, Overton & Lyman and Overton, Lyman & Plumb, all of Los Angeles, for appellant. Andrews, Toland & Andrews, of Los Angeles, for respondent.

RICHARDS, Judge pro tem. [1] This is an appeal from a judgment rendered in the defendant's favor after its demurrer to the plaintiff's third amended complaint had been sustained; the plaintiff declining to further amend its pleading. Respondent urges a preliminary objection to the hearing of this appeal upon the ground that it was taken too late. On December 7, 1914, attorneys for the appellant were served with a notice of the entry of judgment in the action on December 3, 1914. The judgment was not, however, actually entered until December 18, 1914. Such notice was therefore premature and ineffectual for any purpose, since there could be no valid notice of the existence of something which did not in fact exist. This appeal was taken in February, 1914, prior to the changes in the statutes regulating the procedure on appeal enacted in 1915, and which dispensed with the requirement of notice of entry of judgment in order to set in motion the time for taking appeals. As the statute stood at the time this appeal was taken an appeal from a judgment was required to be taken within 60 days after notice of the entry of judgment, or in any event within 6 months after entry of the judgment. Foss v. Johnstone, 158 Cal. 119, 110 Pac. 294. In the absence of a valid notice of the entry of the judgment the appellant under the former state of the statute had 6 months from the date of the actual entry of judgment within which to take its appeal, and having taken it within such time its appeal is properly before this court.

The action was one upon quantum meruit for work and labor performed. The complaint alleged that the plaintiff and the defendant had upon March 29, 1912, entered into a written contract for the doing of certain dredging work adjacent to certain lands in the harbor of San Pedro, of which lands the defendant was in possession, and also the doing of certain filling upon said lands. The contract was made a part of the complaint. By its terms the plaintiff was to dredge certain channels, shown on a map attached to the contract, designated as the east and west channels and the north slip of the Watchorn basin. The east and west channels were to be completed to the 30-foot contour line within 5 months from date—by August 29, 1912. At least 150,000 cubic yards of dredged material were to be deposited on the property of the dock company each 90 days until the land was filled to a certain grade, and at least 30,000 cubic yards each month. All filling was to be completed by November 1, 1912, and a certain portion, the "outer mole," was to be completed within 90 days. All the work of dredging and filling was to be completed by December 31, 1912. The dock company was to construct in advance of the dredging, and to maintain all levees and bulkheads necessary to retain material excavated. The payment which the dredging company was to receive was based entirely on amount of material dredged, being 24 cents per cubic yard in certain cases and 29 cents in others. A partial payment of 12 cents per cubic yard is also provided for in certain cases. Payment was to be made on or before the tenth of each month for all work done the previous month; 10 per cent. being reserved until the next month as a guaranty for faithful performance. All work was to be estimated each month by the dock company's engineers, which estimates might be checked by the dredging company's engineers, but in making final settlement for any work such estimates were to be disregarded and the actual amount of material excavated was to control. All payments were to be made promptly when due. The dredging company was to prosecute all work diligently until completion. Time and minimum quantities of work to be done during a specified time were of the essence of the contract. In case of any disagreements between the parties, they were to be settled by arbitration.

The questions raised upon this appeal involve the sufficiency of the plaintiff's complaint viewed in the light of certain clauses of this contract and also of certain other exhibits, which it made by reference a part of it. The appellant contends that the averments of its complaint sufficiently show that it was not in default in respect to its performance of the contract at the time it undertook to rescind it, but that, on the other hand, the defendant was in default in respect to the payments to be made by it thereunder, and that in view of such default upon the defendant's part plaintiff had a right to stop the work, rescind the contract, and sue in quantum meruit for the reasonable value of the work and labor performed. The first point urged by the appellant under this general contention is that the defendant, having failed and refused on November 11, 1912, to pay at the rate of 24 cents per cubic yard for the material dredged during the month of October, such refusal constituted a violation of the contract which entitled the plaintiff to rescind it and bring and maintain this action. The specific answer made by the respondent to this contention is that the complaint does not sufficiently show that the defendant was in such default. The plaintiff avers in one of the paragraphs of its complaint that prior to November 1, 1912, to wit, on or about August 3, 1912, the former of said dates being that fixed in the contract for the completion of the work of filling to be done upon the property of the defendant, the plaintiff "fully performed and completed all filling of the property of the defendant as in said contract specified and provided." If this averment were the only one upon this subject in the complaint it would doubtless have sufficed to show plaintiff's performance of the terms of the contract as to the amount of filling to be done upon the defendant's property within the time stipulated in the contract, so as to have entitled it to the full payment of 24 cents per cubic yard for the work of dredging done by it during the months of September and October; but the complaint goes further and alleges that the defendant did a large amount of dredging during the month of September, 1912; that as to a portion of the material dredged during September "the plaintiff elected to dispose of it elsewhere than upon the fill provided for in said contract;" that on the 10th of October, 1912, the defendant presented to plaintiff the statement and estimates of its engineers in relation to the work done and payments due for September, which statement is attached to the complaint, marked

Exhibit C, and made a part thereof. From such exhibit it appears that as to the portion of the material dredged during September which the plaintiff elected to dispose of elsewhere than upon the fill the defendant offered to pay at the rate of 12 cents per cubic yard and no more. No other conclusion can be drawn from this statement than that the defendant did not consider that the work of filling provided for in the contract had been fully performed. The complaint then proceeds to aver that the plaintiff refused to accept the sum tendered, and for a short time ceased work, but on October 19, 1912, accepted from the plaintiff a payment, which so far as the complaint discloses was based upon the estimate of 12 cents per cubic yard for the dredged material deposited elsewhere than upon the fill; but that the plaintiff accepted said sum under an alleged mutual agreement between the parties to the contract "that each party should, and then and there did, expressly agree to waive any and every default of the other party, but plaintiff did not agree to waive its rights to claim on final settlement full remuneration for all work performed."

These averments in the complaint, to say the least of them, shed grave doubt upon the question as to whether or not the amount of filling required by the contract had been fully done prior to the 10th of October, 1912; but the complaint does not stop here, but goes further in the way of increasing this doubt by proceeding to aver that the plaintiff desired to place all of the material dredged during the month of October on the defendant's fill and offered to do so, but that the defendant refused to allow the plaintiff to deposit any more material upon its fill, and that for that reason it deposited its dredged material for that month elsewhere. Notwithstanding this alleged fact, which would seem to indicate that the plaintiff did not at that time consider its work upon the fill completed, the complaint shows that the defendant's engineers, on November 10, 1912, in their statement of the work done during October, and of the sum due thereon, again estimated the amount to be paid by the defendant for such work on the basis of 12 cents per cubic yard, and that the defendant presented such statement and estimate to the plaintiff on said day and tendered the amount so estimated to be due upon said basis. This report and estimate is also made a part of the complaint. The only theory upon which such estimate could have been prepared and presented on the part of the defendant is that the defendant did not then consider that the work of filling provided for in the contract had been fully performed. The complaint proceeds to allege that, while the plaintiff then demanded payment for the dredging done by it during October at the full rate of 24 cents per cubic yard, it accepted the sum tendered by the defendant as a partial payment thereon, but subsequently demanded the payment of the remainder claimed by it to be due at the rate of 24 cents per cubic yard for said October work. This the defendant refused to pay, but, notwithstanding such refusal, the plaintiff continued to dredge until December 4, 1912, when it ceased all work under the contract. Negotiations for the settlement of the controversy which had thus arisen between the parties were entered upon and continued until January 29, 1913, when the plaintiff undertook to work a rescission of the contract. The complaint also shows that during this period of negotiation, in response to letters from the plaintiff to the defendant in an endeavor to arrive at a basis of adjustment of their differences, the defendant stated that the contract provided for an arbitration of their differences and suggested a recourse to that method of settling their controversy. The plaintiff, however, did not adopt or act upon this suggestion, but undertook to rescind the agreement and sue in quantum meruit without having sought to invoke the method provided in the contract for settling the controversy which it concedes had arisen. The provision of the contract providing for arbitration for the adjustment of such differences between the parties to it as might arise is section 7 of article 6 thereof, which reads as follows:

> "In case of any disagreement between the parties respecting any matters under this contract, settlement of which are not hereinbefore provided for, the same shall be settled and the rights of the respective parties determined by arbitration, each party hereto to select one arbitrator and the two so chosen to select a third, and the three arbitrators shall hear all evidence offered and make investigation of the facts, and the decision of the majority of such arbitrators shall be final and binding on both parties."

[2] As to the first question presented by the foregoing recital of facts as shown in the complaint as to whether the work of filling upon the defendant's property had been completed according to the terms of the contract so as to have entitled the plaintiff to be paid the full rate of 24 cents per cubic yard for its work of dredging done during October, the complaint, while very indefinite and uncertain, cannot be said to be so fatally defective as to be subject to a general demurrer; and as to its uncertainty in this respect the record discloses that no special demurrer is aimed at it upon this specific ground.

[3, 4] Passing this question, therefore, we come to the next point urged by the respondent as a reason for not sustaining this appeal. The complaint affirmatively alleges that a controversy and disagreement arose between the parties to the contract respecting the amount of money which the plaintiff was entitled to receive from the defendant for the dredging work done during September and October. If this controversy and disagreement was one which was contemplat-

ed and properly included within the terms of section 7 of article 6 of the contract above quoted, then the question arises as to whether the plaintiff was bound to submit, or at least offer in good faith to submit, the matter to arbitration before it could be entitled to work a rescission of the contract based solely upon the defendant's alleged failure to make the payments respecting the proper amount of which such disagreement and controversy had arisen. It is elementary that a party to an agreement may not rescind it while himself in default in respect to a material part thereof. Golden Gate Land Co. v. Sahrbacher, 105 Cal. 114, 38 Pac. 635; Fairchild, etc., Co. v. Southern, etc., Co., 158 Cal. 264, 110 Pac. 951; Cal. Sugar, etc., Agency v. Penoyar, 167 Cal. 274, 139 Pac. 671. The respondent invokes this principle to defeat this action, relying in the first instance upon the plaintiff's failure to invoke the arbitration clause in the agreement. The appellant, however, insists that it cannot be given application to the facts of this case as they appear upon the face of its complaint for the reason that the arbitration clause in the contract is void as an attempted interference with the power and jurisdiction of the courts to decide controversies between parties to contracts. There is respectable authority, both in this state and elsewhere, sustaining this contention. Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54; Loup v. Cal. S. R. R. Co., 63 Cal. 97; O. S. Land Co. v. Commercial U. Assur. Co., 66 Cal. 253, 5 Pac. 232; Hamilton v. Home Ins. Co., 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708. The respondent, however, cites the cases of California Sugar, etc., Agency v. Penoyar, 167 Cal. 274, 139 Pac. 671, and other cases, to the effect that where parties to a contract of the character of that in question here have agreed upon or authorized an arbiter to determine the existence of any fact which may be matter of dispute betwen them, the decision of such arbiter to be binding and conclusive upon the parties, such a clause in the contract is valid and binding upon the parties. The distinction, however, between this line of cases and those upon which the appellant relies is well drawn in the early case of Holmes v. Richet, supra, wherein the court, in quoting from the case of The President, etc., v. Pa. Coal Co., 50 N. Y. 250, says:

> "The distinction between the two classes of cases is marked and well defined. In one class, the parties undertake by an independent covenant or agreement to provide for an adjustment and settlement of all disputes and differences by arbitration, to the exclusion of the courts, and in the other they merely, by the same agreement which creates the liability and gives the right, qualify the right by providing that before any right of action shall accrue certain facts shall be determined, or amounts and values ascertained, and this is made a condition precedent, either in terms or by necessary implication. This * * * condition being lawful, the courts have never hesitated to give full effect to it."

In the case at bar the clause in the contract comes clearly within the line of inhibition, and hence must be held to have not been binding upon the parties to the agreement so as to have required the plaintiff to have first sought recourse to arbitration before either bringing an action upon the contract or working its rescission and commencing this action upon quantum meruit if otherwise entitled to rescind it.

[5, 6] The respondent contends, however, that the plaintiff was not otherwise entitled to rescind this contract for the following reasons shown upon the face of its complaint. The plaintiff alleges that on November 10, 1912, the defendant, acting upon the report and estimates of its engineers, offered to pay the plaintiff for the amount of its dredging work done during the month of October a sum calculated at the rate of 12 cents per cubic yard; the plaintiff, while insisting that it was entitled to be paid a sum calculated at the rate of 24 cents per cubic yard for such work, nevertheless accepted the sum tendered by the plaintiff as a partial payment thereon, and thereafter continued its dredging work up to December 4, 1912, when it stopped all work under said contract. It also appears that between said date and January 29, 1913, when the plaintiff finally undertook to declare the contract rescinded, the parties were negotiating for a compromise of their differences, during all of which time the defendant was insisting that its obligation under the contract had been fully met by the payment it had tendered and the defendant accepted on November 10, 1912. Under these circumstances affirmatively disclosed by the plaintiff's complaint the respondent contends, we think, correctly that the plaintiff had waived and lost its right to a rescission of the contract. This case is not like the case of California Sugar Agency v. Penoyar, supra, and the cases cited therein, where it was held that the failure or refusal of a party without sufficient cause to pay installments due upon a contract justified a repudiation of the contract by the party not in default. In this case the defendant tendered to the plaintiff the whole amount which it claimed to be due for the work of dredging done in October, and the plaintiff, with full knowledge that the sum so offered was tendered in full performance of the defendant's obligation, and not otherwise, accepted and received the same. It is true the plaintiff states that it accepted and received said sum as part payment for such work, but this it could not do without thereby waiving its right to rescind the contract upon the ground of the defendant's failure to fully perform it. While the contract was divisible as to each installment due upon it, the installments were not divisible so as to entitle a party to accept a portion of an installment tendered as the full sum due thereon and thereafter be permitted to repudiate the con-

tract because the balance of the installment had not been tendered or paid. To permit this would be to allow the party to receive a portion at least of the benefits accruing to him under the contract with one hand while preparing to destroy it with the other. Wolfert v. Caledonia Sprgs. Ice Co., 195 N. Y. 118, 88 N. E. 24, 21 L. R. A. (N. S.) 864; Lyon v. Bertram, 20 How. 149, 15 L. Ed. 847.

But there is another reason appearing upon the face of the plaintiff's complaint why the right of rescission of the contract, if it ever existed, was lost to it at the time of its attempted exercise. When the defendant made its tender of the sum claimed by it to be due from it to the plaintiff for the dredging work done during October it was equally known to both parties that the sum tendered was the whole sum which was due on that date according to the reports and estimates of the defendant's engineers. The plaintiff was thus fully informed of the exact nature and extent of the defendant's default, if any, in the fulfillment of the terms of its contract. Knowing this, it not only accepted the sum then tendered as a partial payment upon the contract, but it also went on with the work which, under the contract, it was to perform during the month of November and continued with the performance of such work for nearly a month after the defendant's default, if any, and the nature, extent, and reasons thereof were fully known to it; nor even then did it attempt to exercise the right of rescission until nearly two months more had elapsed and until the entire term within which the work under the contract was to have been completed by it had expired. We think that under these circumstances the plaintiff's attempted rescission of the contract, if its right to such rescission ever existed, came too late.

For the foregoing reasons the judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

(178 Cal. 386)

SOUTHERN CALIFORNIA ELECTRIC CO. v. GRANT et al. (L. A. 4139.)

(Supreme Court of California. June 5, 1918.)

1. MECHANICS' LIENS 🔑195 — RIGHT OF CLAIMANTS—NOTICE TO WITHHOLD PAYMENT —PREFERENCE—STATUTE.

Under Code Civ. Proc. §§ 1183 to 1203, the Mechanics' Lien Law, a claimant for labor or materials bestowed on a building, who, before maturity of the last installment of the contract price, served on the owner a notice to withhold payments as provided in section 1184, was entitled to preference in the money due over another claimant who served notice after maturity of the installment.

2. MECHANICS' LIENS 🔑113(2)—REMEDIES—NOTICE TO WITHHOLD PAYMENT—ENFORCEMENT OF LIEN.

The remedy of a claimant for labor and materials bestowed upon a building by notice to the owner to withhold payment from the contractor under Code Civ. Proc. § 1184, is distinct from and disconnected with his remedy by perfecting and enforcing his lien upon the property under section 1183.

3. MECHANICS' LIENS 🔑114(2)—ASSIGNMENT BY CONTRACTOR — RIGHT OF CLAIMANT — STATUTE.

An assignment of an installment of the contract price for a building made by the contractor to a third person does not prevent a lien claimant, under Code Civ. Proc. § 1184, from intercepting the money to be paid by a notice to the owner to withhold payment to the contractor given prior to maturity of the installment, and the right of such claimant is superior to that of the assignee.

4. SCHOOLS AND SCHOOL DISTRICTS 🔑81(2)—FURNISHING MATERIAL FOR SCHOOLHOUSE—RECOVERY AGAINST CONTRACTOR — STATUTE.

Where by the terms of a bond given pursuant to St. 1911, p. 1422, the contractor to erect a schoolhouse became bound to pay for all materials or supplies furnished for the performance of the work at his request or that of a subcontractor, plaintiff, who furnished a subcontractor with supplies, could recover of the contractor for a schoolhouse $70 still remaining due it for supplies.

5. GARNISHMENT 🔑51 — ASSIGNMENT OF MONEY TO BECOME DUE—ACCEPTANCE.

Judgment against a subcontractor on a school building in an action wherein the contractor was garnished was not a defense available to the contractor against the claim of a company which furnished labor and materials to the subcontractor under its previous assignment from the subcontractor of moneys to become due from the contractor, which the contractor accepted by stating he would honor it when the money was due, since the claim under the assignment would be paramount to the claim of the subcontractor's subsequent attaching creditor.

6. SCHOOLS AND SCHOOL DISTRICTS 🔑81(2)—BOND OF CONTRACTOR TO PAY FOR LABOR AND MATERIALS—GARNISHMENT—DEFENSE.

Judgment against a subcontractor on a school building in an action wherein the contractor was garnished was not a defense available to the contractor in action on the contractor's bond by the company which furnished labor and materials to the subcontractor.

7. MECHANICS' LIENS 🔑201 — NOTICE TO WITHHOLD PAYMENT — PRIORITY OVER ATTACHING CREDITOR.

The claim of a company which furnished labor and materials to a subcontractor working on a school building for $500 of the final installment of the price due the contractor, intercepted by its notice to the owner school district to withhold payment, was superior to the claim against the contractor of any attaching creditor of the subcontractor.

Department 1. Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by the Southern California Electric Company against Alex Grant and others. From the judgment, plaintiff and the named defendant appeal. Reversed, and judgment directed in accordance with the opinion.

Edward G. Kuster, Gilbert A. McElroy, and Henry M. Young, all of Los Angeles, for appellant and respondent Grant. Edward T. Bishop and Carl W. Gibson, both of Los Angeles, for appellant Southern California Electric Co. Lewis Sherman Jones and Frank C. Hoyt, both of Los Angeles, for cross-complainant and respondent Lorbeer Electrical Supply Co.

SHAW, J. The record presents two appeals from parts of the judgment—one by the plaintiff; the other by the defendant Alex Grant.

The main question presented on plaintiff's appeal is whether or not, under the Mechanics' Lien Law as revised in 1911 (Code Civ. Proc. §§ 1183 to 1203) a claimant for labor or materials bestowed upon a building, who first serves on the owner a notice to withhold payments, as provided in section 1184, is entitled to preference in the money due from the owner to the contractor, intercepted by such notice, over another claimant who serves a later notice. A brief statement will show the facts upon which this question arises.

Alex Grant was the original contractor for the erection of a school building for the Los Angeles school district. C. F. McDonald was a subcontractor for the electrical work under said contract. The plaintiff furnished to McDonald a part of the work and materials necessary for the performance of the subcontract, and thereby McDonald became indebted to and still owes plaintiff a balance of $570.

The Lorbeer Electrical Supply Company furnished other labor and materials to McDonald on said subcontract, whereby McDonald became indebted to and still owes it a balance of $550. Some extra work was done by McDonald at the request of Grant upon which the Lorbeer Company performed labor and furnished material to McDonald to the amount of $106, for which McDonald is still indebted to it.

The building was completed in accordance with the contract. On October 10, 1913, the plaintiff served upon the school district a notice to withhold money from the contractor for the payment of its claim aforesaid. At that time there was no money due on the contract price from the school district to Grant, but thereafter, on October 14, 1913, the sum of $500 became due thereon to Grant. Apparently this was the final payment, although the record does not show the fact. Before the trial the district paid this sum into court, and thereupon by order of the court and with the consent of the parties, the district was exonerated from further liability, and the case was dismissed so far as it was concerned. On October 16, 1913, two days after said $500 payment became due, the Lorbeer Company served upon the school district a notice to withhold payments from Grant to the amount of its claim for $550 aforesaid. Thereafter, on November 7, 1913, it served on the district a second notice covering only the claim for $106 on account of said extras.

The plaintiff's complaint states a cause of action to recover from McDonald the entire amount of its claim against him and to have the money due from the school district to Grant applied on said claim. The Lorbeer Company filed a cross-complaint setting up its claim against McDonald and Grant and praying that the money due from the school district be applied thereon. The court below divided the $500 due from the school district proportionally between plaintiff and the Lorbeer Company, giving the plaintiff $254.46 and the Lorbeer Company $245.54. In making this apportionment it excluded the Lorbeer claim on account of the extras aforesaid. These sums were credited to Grant on the respective claims aforesaid, and judgment was rendered against him for the balance, that is, for $315.54 in favor of the plaintiff, and for $410.46, including the $106 for extras, in favor of the Lorbeer Company.

[1] The plaintiff's argument in support of its appeal is, as indicated above, that the effect of section 1184 is that the one or two or more claimants who first serves a stop notice on the owner is entitled to preference, not only in an installment of the contract price then overdue, but also in all installments then unpaid, whether then due or not, and that the fact that one claimant serves his notice before and the other after the maturity of an installment is immaterial. The question presented is not quite so broad. It will be observed that the installment of $500 here involved was not due when the plaintiff served his notice, but was past due when the notice of the Lorbeer Company was served. The question whether claimants who serve stop notices prior to the maturity of a given installment are to have preference therein in the order of the time of service, or whether they shall share proportionally, is not involved. It may be that in such a case they should share proportionally in such installment, but we need not and do not decide the question. We think that the fact that the installment became due after plaintiff's notice and before the service of the Lorbeer Company's notice is material, and that it is decisive of the rights of the parties.

Section 1184 provides that any person described in section 1183 as entitled to a lien may at any time give the stop notice to the owner, stating that he has performed labor or furnished material, or has agreed to do so, to the contractor and the amount thereof in value, and then proceeds as follows:

> "Upon such notice being given it shall be lawful for the owner to withhold, and in the case of property which, for reasons of public policy or otherwise, is not subject to the liens in this chapter provided for, the owner or person who contracted with the contractor, shall withhold from his contractor sufficient money due or that may become due to such contractor to answer such claim. * * *"

So far as public corporations are concerned, this provision is in the same language as it was before the revision of 1911. The owner "shall withhold from his contractor sufficient money due or that may become due to such contractor to answer such claim." In Diamond Match Co. v. Silberstein, 165 Cal. 282, 131 Pac. 874, this language was construed, and it was held that it made it the duty of the owner upon receiving such notice to withhold a sufficient sum to answer the claim from the first moneys that became due thereafter upon his contract with the contractor, and that if he failed to do so, and later notices were served, sufficient to absorb all the subsequent installments of the contract price, the owner could be required by the person who served the first notice to pay the entire amount of his claim up to the amount of the installment which first became due after the service of his notice. Other decisions, in effect, hold that the right of a building contractor to an installment of the contract price is subject to the claims of materialmen and laborers who have given stop notices to the owner prior to the maturity of such installment, and that, if the stop notice is given after maturity, the right of the materialman or laborer therein is subject to any previous disposition thereof by the contractor or any previous right acquired against the contractor therein. First Natl. Bank v. Perris Irr. Dist., 107 Cal. 62, 40 Pac. 45; Newport, etc., Co. v. Drew, 125 Cal. 585, 58 Pac. 187; Miles v. Ryan, 172 Cal. 205, 157 Pac. 5. These cases decide that, if the contractor has assigned an installment, such assignment is good against a subsequent stop notice served after the maturity thereof, and that, if a creditor of the contractor has garnished such installment, a subsequent stop notice served after maturity is subject to the rights of the attaching creditor. The principle is that, if the laborer or materialman postpones the service of a stop notice until after an installment matures, he can reach only such interest as the contractor then has in that installment, and that he must take it subject to all previously acquired rights of third persons. These propositions are deducible from general principles of law taken in connection with the provisions of section 1184. The obligation of the contract requires the payment of the installment when it becomes due. The owner is then required to make the payment. If stop notices had been previously given, he is required to pay the amount thereof to the laborer or materialman, and the balance only to the contractor. The right of such laborer or materialman accrues immediately upon the maturity of the installment. He may immediately begin an action against the owner for so much of the installment as is necessary to pay his claim for labor or materials furnished in the building, and the rights of the parties thereupon became fixed. If a laborer or materialman neglects to serve the stop notice prior to the maturity of an installment, he must be deemed to have waived all right to participate therein as against other claimants who have served notice prior to such maturity, and as against the owner, in the event that he pays such installment promptly at maturity, or before the service of such notice. There is no necessary hardship in this rule. The previous portion of the section allows such claimants to give the stop notice as soon as they have made the agreement to perform labor or furnish materials; they need not wait until the agreement is performed. Promptness on their part, therefore, will secure to them all the benefits which the original contract affords them at the time they enter into the agreement to perform labor or furnish materials for the erection of the building. It necessarily follows that the court below erred in dividing the $500 payment proportionally between these two claimants, and that plaintiff was entitled to have it appriated on its own claim.

[2] The Lorbeer Company cites cases where there was a sale of land under a foreclosure of liens, holding that the proceeds must be divided proportionally among lien claimants of equal rank, regardless of the time of filing their respective claims of lien in the recorder's office. The remedy by stop notice under section 1184 is entirely distinct from, and disconnected with, the remedy by perfecting and enforcing a lien upon the property under section 1183. Bates v. Santa Barbara, 90 Cal. 547, 27 Pac. 438; First Nat. Bank v. Perris Irr. Dist., supra. The decisions as to such foreclosure sales have therefore no application to the present case.

[3] It further appears that at the time of making the agreement between the Lorbeer Company and McDonald for the work and labor upon which its claim of $550 is based, which was on October 24, 1912, nearly one year before the $500 became due from the school district to Grant, McDonald assigned to said Lorbeer Company all his right, title, and interest in all moneys to become due from Grant to him on his subcontract, and ordered Grant to pay the same to said assignee. Grant at that time accepted this order in these words: "I will honor the above order when money is due. Alex Grant." The Lorbeer Company claims priority in the fund by virtue of this assignment. This claim is untenable. As we have said, an assignment of an installment of the contract price made by the contractor to a third person does not prevent a claimant under section 1184 from intercepting the money by a stop notice given prior to the maturity thereof, and the right of such claimant is superior to that of the assignee. First Nat. Bank v. Perris Irr. District, supra; Newport, etc., Co. v. Drew, supra. In so far, therefore, as the transaction of October 24, 1912, operated to transfer or assign to the Lorbeer Company any part of the money to become due from the school district to Grant, it would be inoperative against the notice of the plaintiff, which was given prior to the time that the $500 became due.

It follows from the foregoing conclusions that the judgments below against Grant are not for the correct amounts. Both claimants contracted with McDonald, and hence their claims against Grant are limited to the amount owing by Grant to McDonald on the subcontract, which was $650. The $500 applied on plaintiff's claim from the money due to Grant for the district operates as a credit to Grant on the subcontract with McDonald, and leaves only $150 due thereon to McDonald. The recovery of the Lorbeer Company against Grant by virtue of its assignment is therefore limited to this $150 and $106 for the extras, making a total of $256.

[4] The application of the $500 on the claim of the plaintiff, as aforesaid, leaves remaining unpaid $70 of its claim against McDonald. The mere fact that this money is due for materials furnished to McDonald for the building gives the plaintiff no claim against Grant therefor. Its claim against Grant is based on the fact that Grant gave a bond in accordance with the act of March 27, 1897 (St. 1897, p. 201), as amended in 1911 (Stats. 1911, 1422). This act provides that every contractor for the erection of a building by a school district must file with the school board a bond in the sum not less than one-half the contract price, to be executed by the contractor and at least two sureties. Other acts allow a single surety on such bonds. The bond must provide that, if the contractor fails to pay for any materials or labor furnished for the work, the sureties will pay the same, not exceeding the amount of the bond. By the terms of the bond Grant became bound to pay for all materials or supplies furnished for the performance of the work, whether furnished at the request of Grant himself, or of a subcontractor under him. French v. Powell, 135 Cal. 636, 68 Pac. 92; Associated Oil Co. v. Commary-Peterson Co., 32 Cal. App. 582, 163 Pac. 702. The plaintiff complied with all the conditions of the act necessary to establish the liability of Grant, and thereupon it began suit against Grant and the National Surety Company upon said bond. By agreement of the parties and order of the court this action was consolidated with the action of the plaintiff to recover the balance due from the school district to Grant, and the two cases were tried together. Upon these facts the plaintiff is entitled to recover of Grant in that action the $70 still remaining due to it for supplies furnished McDonald.

[5-7] It appears that on September 6, 1913, one Bechtol sued McDonald in a justices' court and attached Grant as garnishee. Grant answered the writ, admitting that he then owed McDonald $135. Judgment was rendered against McDonald in a justice's court, and he took an appeal to the superior court, where the cause is still pending. Grant pleaded these facts in defense. Bechtol is not a party to this action. Grant's pleading does not show for what amount Bechtol sued, or that it was for money due on contract. Even if the matter had been properly pleaded, it would not avail Grant as a credit or defense against the claim of the Lorbeer Company, inasmuch as the claim of the Lorbeer Company under its assignment would be paramount to the claim of a subsequent attaching creditor. Nor is it good against the plaintiff as a defense to its action on the bond on which it recovers $70, or its action for the $500 intercepted by its stop notice, which also was superior to the claim of any attaching creditor of McDonald.

These embrace all the points made in support of the two appeals. The parties have stipulated to the facts, and it is apparent that there never was any dispute concerning them. A retrial is therefore unnecessary. The court below can adjust the rights of the parties upon the going down of the remittitur by entering a new judgment that the $500 deposited in court be applied on the claim of plaintiff, that plaintiff recover of Grant the sum of $70, and that the Lorbeer Company recover of Grant the sum of $256, together with costs and interest in each case. It is to be observed further that McDonald does not appeal, and so far as he is concerned the judgments against him have become final. The new judgment will affect only the respective rights of the plaintiff, the Lorbeer Company, and Grant.

It is ordered that the judgment be reversed, and that the court below proceed to enter judgment in accordance with this opinion.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

(37 Cal. App. 171)

LINN et al. v. PEIRSOL. (Civ. 2394.)

(District Court of Appeal, First District, California. May 7, 1918. Rehearing Denied June 6, 1918.)

1. APPEAL AND ERROR ⚿873(3) — APPEAL FROM JUDGMENT—MATTERS REVIEWABLE.

Although appeal from judgment was taken more than 60 days after entry thereof, where case is one where statute abolishing appeal from orders denying new trial went into effect while motion for new trial was pending and undecided, action of court in denying motions for nonsuit and directed verdict is reviewable.

2. APPEAL AND ERROR ⚿387(3)—UNDERTAKING ON APPEAL—TIME FOR FILING.

Where notice of appeal was filed before expiration of statutory period, an undertaking filed five days thereafter was within time.

3. PHYSICIANS AND SURGEONS ⚿15 — MALPRACTICE—EVIDENCE.

Where, after performance of first operation on plaintiff, trouble resulted from hemorrhage because of use of catgut, defendant physician cannot be held liable for consequences resulting from use of silk on second operation; it being at most a mistake in judgment in weighing probabilities.

4. Physicians and Surgeons ⟹14(1) — Skill and Care.

A physician is required to possess only ordinary skill in his profession, and to use his best judgment in the exercise of that skill.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Anna Linn and husband against F. C. Peirsol. Judgment for plaintiff named, and defendant appeals. Reversed.

J. K. Peirsol, of Ft. Bragg, and Thomas & Thomas and Robert Duncan, all of Ukiah, for appellant. Mannon & Mannon, of Ukiah, for respondents.

ZOOK, Judge pro tem. In this action, defendant, a physician, appeals from a judgment in favor of plaintiff Anna Linn in an action for his alleged malpractice. His main point on this appeal is that there was no showing of negligence on his part sufficient to warrant sending the case to the jury, and that therefore either his motion for nonsuit or his motion for a directed verdict should have been granted.

[1] Respondents contend that this point cannot be considered because the appeal was taken more than 60 days after the entry of the judgment. The case is one where the statute abolishing the appeal from orders denying a new trial went into effect while the motion for new trial was pending and undecided, and under the decision of this court in Nathan v. Porter, 172 Pac. 170, it is proper on the appeal from the judgment to review the action of the lower court on the motion for new trial, and to use the bill of exceptions for that purpose. The action of the court in denying the motions for nonsuit and for directed verdict is therefore reviewable on this appeal.

[2] Respondents' further claim that the appeal should be dismissed because the undertaking on appeal was filed more than six months after the judgment is without merit. The notice of appeal was filed before the expiration of the statutory period, and the undertaking was filed within five days thereafter and was within time. Lowell v. Lowell, 55 Cal. 316.

[3, 4] The alleged negligence of the physician for which plaintiff sought to recover lay in the use by him in an operation of nonabsorbable silk sutures instead of catgut. The only testimony in the record to show that this was improper is contained in an answer to a single question propounded to Dr. Marquis, one of plaintiffs' witnesses, who testified that a careful surgeon would not use silk in the place where it had been used. On cross-examination he admitted, however, that, where a physician requires a ligature that will hold fast to prevent bleeding, he may with propriety use the silk, and he made it clear that his previous answer was based entirely on the conditions as he found them at an operation performed by himself six months after the operation by appellant. The only other medical witness for respondents testified that the choice between silk and catgut is a matter of judgment in each particular case, and there is no testimony in the record to show that, under the conditions as they appeared to appellant when he performed the operation, the use of silk was negligence. It appeared from appellant's testimony that he had performed two operations on Mrs. Linn, that on the first occasion he had had trouble from hemorrhage as a result of the use of catgut, and that therefore he had used silk on the second occasion. It is true that the results of the use of the nonabsorbable silk in the case at bar proved unfortunate, as the silk caused certain perforations of the intestine, which produced serious trouble; but it is clear that on the second operation appellant was in a dilemma. The use of catgut had resulted in hemorrhage before, which he wished to guard against, and the use of silk might produce irritation. Under the circumstances, he should not be held liable for what was at most a mistake of judgment in weighing the probable consequences of the different methods that might be pursued. A physician is required to possess only ordinary skill in his profession and to use his best judgment in the exercise of that skill, and, if he complies with these requirements, he is not liable for the nonsuccess of his treatment. McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 870, 873; Houghton v. Dickson, 29 Cal. App. 321, 155 Pac. 128; Foreman v. Hunter Lumber Co., 173 Pac. 408.

The motion for a new trial should have been granted, as the court's orders denying the motions for nonsuit and for directed verdict were erroneous.

The motion to dismiss appeal is denied. Judgment reversed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

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37 Cal. App. 141

VAN HAGEN v. FIRST STATE BANK OF CLOVIS. (Civ. 2223.)

(District Court of Appeal, First District, California. May 3, 1918. Rehearing Denied June 1, 1918.)

1. Pledges ⟹48—Discharge of Note—Directed Verdict.

In an action for value of plaintiff's collateral note, wrongfully retained by defendant, evidence *held* not to support a directed verdict for plaintiff on the ground that, as the consideration for the principal note had failed, plaintiff was entitled to a return of the collateral note.

2. Pledges ⟹48—Retention of Note—Action for Value of Note—Evidence.

In action for value of plaintiff's collateral note, wrongfully retained, defendant might show that plaintiff had received a consideration for his payment and the execution of his principal note to defendant, and that he had relinquished his interest in the collateral note.

3. PLEDGES ⟹48—RETENTION OF NOTE—ACTION FOR VALUE—RECOVERY.

In action for value of a collateral note wrongfully retained, where the evidence showed an agreement that defendant was to hold a third party's note until taken up by plaintiff's principal note, and that it was not paid, plaintiff could not recover the collateral note or its value.

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by William Van Hagen against the First State Bank of Clovis. Judgment for plaintiff, and defendant appeals. Reversed.

Ernest Klette, M. B. Harris, and E. M. Harris, all of Fresno, for appellant. Kitt Gould, of Clovis, and C. K. Bonestell, of Fresno, for respondent.

KERRIGAN, J. This is an action to recover the sum of $1,080, alleged to be the reasonable value of a certain promissory note owned by plaintiff and wrongfully retained by defendant. The case was tried before a jury. At the conclusion of the testimony there was an instructed verdict for plaintiff for the sum claimed. Defendant moved for a new trial, and in support of the motion specified, among other things, the insufficiency of the evidence to justify the verdict, and assigned as error certain rulings of the court. This motion was denied, and defendant appeals from the order and from the verdict and judgment.

From the evidence it appears that a Mrs. Amer and one Cadwallader were indebted on a joint note executed by them to the State Bank of Clovis in an amount approximating $1,100. Mrs. Amer was desirous of taking this note up, and induced Van Hagen, the plaintiff herein, to assist her in so doing. In October, 1914, they went together to the defendant bank, and there met a Mr. Norrish, its president and manager, to whom they stated their business. It cannot be clearly ascertained from the testimony of Mrs. Amer and the plaintiff Van Hagen what arrangement was made between the parties, but it does appear from the testimony of Norrish that he received and accepted a certificate of deposit for the sum of $500 from Van Hagen, which sum was credited on the Amer and Cadwallader note. It further appears that Van Hagen at this time executed his promissory note in favor of the bank for the sum of $600. This note was unsecured, and Norrish insisted that some collateral be furnished to insure its payment. Van Hagen at that time was the owner of a note for $1,000, referred to in the evidence as the Kepley note, and which note is the subject of this action, and he indorsed this note over to the defendant bank as security for the payment of his unsecured note to the bank for $600. Norrish took the Kepley note, retained the Amer and Cadwallader note and also the note of Van Hagen, and informed the parties that the Amer and Cadwallader note would be delivered up when the Van Hagen note was paid. The matter remained in this unsettled condition for over two years until the filing of this action on November 17, 1916.

[1, 2] Upon this evidence the trial court directed a verdict for the plaintiff upon the ground that when plaintiff made the $500 payment and executed his note for $600, secured by the Kepley note, the bank had agreed to deliver up the Amer and Cadwallader note, and, not having done so, that the consideration for the Van Hagen note of $600 had failed, and no recovery could be had thereon, and, this being so, plaintiff was entitled to a return of the Kepley note given to secure its payment. The evidence does not support this conclusion. The undisputed testimony of Norrish—and it is the only testimony on the subject—is that he was to retain all of the notes until such time as plaintiff's note was paid. Defendant undertook to make some explanation of the transaction and to show that Van Hagen had received consideration for the payment by him of the $500 and the execution by him to the bank of his note, and that he had relinquished his interest in the Kepley note. This evidence was rejected by the trial court. Defendant clearly had the right to prove this fact.

[3] Defendant further offered in evidence the record in an action entitled "Van Hagen v. Amer," from which record it appears that plaintiff had secured a judgment foreclosing a mortgage executed by Mrs. Amer to secure a note given to Van Hagen in settlement with him; and in making the offer attorney for defendant attempted to state that his purpose in making it was to show that Van Hagen had received full and complete satisfaction of his claim. This statement was rejected, but the judgment roll was admitted. A reading of the testimony discloses the fact that all the circumstances surrounding the transaction in this case are not in evidence. No recovery is sought for the $500 paid by plaintiff. There is also evidence to show that when demand was made upon Norrish for the Kepley note he stated that he was holding it for the benefit of Cadwallader until such time as the Van Hagen note was paid. The evidence as a whole is very unsatisfactory and not convincing, but there is nothing contained therein to contradict the statement of Norrish that the agreement between the parties was that he was to hold all of the notes until plaintiff's note was paid. The note not having been paid, plaintiff was not entitled to recover the Kepley note nor its value.

No question is raised as to the sufficiency of the pleadings herein.

Assuming that plaintiff's complaint is an appropriate one, it simply declares upon a common count for goods sold and delivered by plaintiff to defendant in the sum of $1,080, which it is alleged is the reasonable value of the property, namely, the note, describing it. The value of the note is denied by defendant. The evidence is silent as to whether or not the note had any value. Aside from this, the undisputed evidence shows that the bank was to retain the note in question until the Van Hagen note was paid. This being so, there is no evidence to support the judgment.

For the reasons given the judgment is reversed.

We concur: BEASLY, Judge pro tem; ZOOK, Judge pro tem.

(37 Cal. App. 227)

ROBBEN v. BENSON et al. (Civ. 1773.)

(District Court of Appeal, Third District, California. May 13, 1918. Rehearing Denied by Supreme Court July 11, 1918.)

1. VENDOR AND PURCHASER 🔑132—TITLE OF VENDOR—CHANGE OF RECORDS—LIABILITY OF PURCHASER.

Where a deed was recorded in the name of one "Robbins" as grantee, a different recorder's substitution of the name "Robben" would not render an abstract of title free from defects, and require the purchaser to accept it, make payments, or forfeit payments made.

2. RECORDS 🔑10—CHANGE BY COUNTY RECORDER—AUTHORITY.

Where a deed was recorded in the name of one "Robbins" as grantee, a subsequent county recorder had no authority 38 years thereafter to strike out the name "Robbins" and substitute the name "Robben," with a marginal insertion of the date and his initials.

3. VENDOR AND PURCHASER 🔑280(2)—BREACH BY VENDOR—ACTION AGAINST PURCHASER—REMEDIES OF PURCHASER.

Where a vendor, after breaching its contract to furnish an abstract showing title free from defects, sues to foreclose purchaser's rights, and the purchaser, within time for answering, surrendered the land, he might file a cross-complaint to recover installments paid and damages for the breach.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by William D. Robben against Mrs. I. M. Benson and others, with counterclaim by defendants. Judgment for plaintiff, and defendants appeal. Reversed, with directions.

Shinn & Hart, of Sacramento, for appellants. W. U. Goodman, of Fairfield, and F. F. Marshall, of Dixon, for respondent.

PLUMMER, Judge pro tem. On a former hearing of this cause this court expressed its views upon some of the issues involved, which, upon review, we are still satisfied correctly express the law upon the questions considered, and, in so far as the opinion then announced relates thereto, the same is hereby adopted, to wit:

"On the 6th day of December, 1911, the plaintiffs and defendants entered into an agreement for the sale and purchase of certain real estate, situate in the county of Solano, for the agreed price of $21,600, payable in installments, $200 in cash, $1,800 on the 21st day of the same month, $3,000 on the 6th day of December, 1914, and subsequent installments, not necessary to mention herein, further than that all deferred payments were to bear interest at the rate of 6 per cent. per annum, to be paid on the 6th day of December of each succeeding year, until the full purchase price should have been paid. Under this agreement the defendants went into possession, paid the sum of $2,000 on account of the purchase price, and two interest payments in the sum of $1,176 each, as the same became due, together with all installments of taxes on the premises agreed to be purchased. It was also provided in the agreement that the defendants should make improvements on the premises in the way of installing pumping plants and leveling up and planting to alfalfa at least 34 acres of said land, all of which covenants appear to have been faithfully kept at a considerable expense on the part of the defendants.

"The contract of purchase further provides as follows. 'The said party of the first part agrees to furnish said second parties with a complete abstract of said premises up to date hereof, within a reasonable time hereafter, and the second parties are to be given 15 days in which to examine said abstract and report upon the same; in the event that title to said premises shall be found to be defective, said first party is to be given a reasonable time in which to perfect the same. In the event of a failure to comply with the terms hereof by the said parties of the second part, the said party of the first part shall be released from all obligation in law or equity to convey said property, and said second parties shall forfeit all right thereto.' It is also covenanted that, in the event of a failure to pay interest on the deferred installments, the vendor might at his election declare the unpaid balance immediately due and payable. On the 8th day of December, 1914, the plaintiff not having furnished the defendants with an abstract of title, demand was made therefor, and the abstract in question was delivered to the defendants for their inspection.

"In order to show a complete title, it became necessary to show a conveyance from one W. D. Vail to B. W. Robben. The abstract disclosed, however, a conveyance made and executed on the 8th day of November, 1876, and recorded November 10, 1876, from W. D. Vail to B. W. Robbins. Accordingly the abstract was returned to the attorney for the plaintiff, who, it appears, together with an abstracter, went to the office of the recorder of the county of Solano, and on the 14th day of December, 1914, had the recorder draw two or three lines across the word 'Robbins' and write immediately above the word 'Robben,' and then insert on the margin of the record the following: '12/18/14 F. N. D. by J. P. B.' Thereupon the page in the abstract which had theretofore shown a conveyance from Vail to Robbins was removed, and in its place a page inserted, showing a conveyance from Vail to Robben, but not disclosing the interlineations and additions and erasures made upon the official records in the recorder's office.

"The defendants, not being satisfied, made a personal inspection of the official records and ascertained the manner in which the changes above noted had been made, and thereupon declined to accept the title altered in such manner, and asked that the defect be properly corrected. The plaintiff refused to have anything more to do with the abstract, but it does appear that on or about the 15th of January, 1915, a conveyance from Vail to Robben was taken to the recorder's office and recorded. However, the existence of this conveyance and of the fact of its being placed of record was not called to the attention of the defendants, nor does it appear that any supplemental abstract was furnished by the plaintiff to the defendants, showing the devolution of title from Vail to Robben. The matter appears to have remained in statu quo until about April 5, 1915, when the plaintiff began this action to quiet title to the premises involved. The defendants and appellants counterclaimed for the recovery of the purchase money already paid, and for damages. Judgment passed for the plaintiff, and defendants appeal.

"Upon the trial the plaintiff introduced in evidence a patent from the United States to one William T. Smith, and subsequent conveyances down to and including one to himself, establishing that at the time of the execution of the contract referred to he possessed a merchantable title. Among the deeds introduced was the one hereinbefore referred to, which appears to be a deed from W. D. Vail to B. W. Robben, dated November 8, 1876, recorded November 10, 1876, and re-recorded January 15, 1915. This deed, filed as plaintiff's Exhibit 6, is the one which was erroneously recorded in 1876 as being a conveyance from W. D. Vail to B. W. Robbins. There does not appear to be any testimony showing that the existence of this deed was called to the attention of appellants until its introduction in evidence. Upon the conclusion of the plaintiff's testimony showing the matters above recited, the defendants moved for a nonsuit, which, not being granted, and which does not appear to have been passed upon by the court at all, the defendants introduced testimony as to their payments, their objection to the title, and damages claimed to have been suffered.

[1, 2] "It will be observed that the contract of purchase called for an abstract showing a title free from defects, and not merely for proof on the trial that the plaintiff had a good and sufficient title to the premises agreed to be sold. Was the attempted correction of the title by the erasure on the official records of the name 'Robbins' and the insertion of the name 'Robben' sufficient to render the title clear from doubt, and make it obligatory upon the appellants to accept the same, make payments as provided in the contract, or suffer forfeiture and loss of all former installments? In the case of Benson v. Shotwell, 87 Cal. 49, 25 Pac. 249, 681, in an action to quiet title brought by the vendor against the vendee for failure to accept title, it appears that a deed which was in fact signed 'Hepburn' was recorded as signed 'Hopkins.' The court said: 'Under the contract, defendant was entitled to a good paper title, sufficient in law, and was not bound to accept a title resting upon the statute of limitations, or take the risk of determining, from facts which he might learn dehors the record, whether or not the statute of limitations could be successfully pleaded against an adverse claim. * * * True, plaintiff claimed, and upon the trial proved, that the record was wrong, and that the deed purporting to be from Hopkins was in fact from Hepburn. But at the time when it was his duty to show good title he allowed the matter to rest upon his naked assertion, and refused to submit his proof for examination, or to permit the deed to be recorded correctly. Defendant had a right, therefore, to stand by the record, and to govern his conduct accordingly.'

"In the case at bar, there does not appear to have been any controversy over the deed from Vail to Robben. Its actual existence does not appear to have been disclosed, nor does the fact that it was taken to the recorder's office a month later than the furnishing of the corrected abstract, and then re-recorded, appear to have been brought home to the defendants. It thus appears that the plaintiff's right to prevail in this action must stand or fall upon the erasures and interlineations made upon the official record in the recorder's office 38 years after the recording of the written instrument, by a different officer, and for reasons and upon evidence not disclosed to the appellants. In the Shotwell Case it was held that the vendor had not complied with his contract to show title, and that the production of the deed, the exhibition of it to the vendee, and its introduction upon the trial, did not comply with his contract.

"In Foster v. Dugan, 8 Ohio, 87, 31 Am. Dec. 432, the court, having under consideration a correction made by a recorder, and a marginal memorandum, held as follows: 'The marginal note, made by the recorder on the registry, cannot be admitted as evidence to affect the validity of the deed. When it was made does not appear, but it must have been after registration. It is not competent for a public officer to undo what he has once done, and thus correct his errors; when he has executed his duties, he is functus officio, and has lost his power over the subject.' In Jennings v. Dockham, 99 Mich. 253, 58 N. W. 66, it appears that title was vested in one 'Nahum' Chadbourn. By deed recorded October 2, 1848, title was sought to be sustained by offering in evidence a record of a deed purporting to be executed and acknowledged by 'Nathan' Chadbourn to John Chadbourn, recorded October 3, 1853, and a marginal entry on the record as follows: 'The word "Nahum" was recorded "Nathan" by mistake in the annexed record.' Upon these facts the Supreme Court of Michigan used the following language: 'We think the attempted correction of the record of the deed from Nathan Chadbourn to John Chadbourn by the deputy register was without authority of law.' The case was reversed and remanded for a new trial.

"In Elliott v. Piersol, 1 Pet. 328–341, 7 L. Ed. 164, it appears that the record of an acknowledgment to a deed was corrected by interlineations and erasures. There the Supreme Court of the United States disposes of this question in the following decisive form: 'Had the clerk authority to alter the record of his certificate of the acknowledgment of the deed, at any time after the record was made? We are of opinion he had not. We are of opinion he acted ministerially, and not judicially, in the matter. Until his certificate of the acknowledgment of Elliott and wife was recorded, it was, in its nature, but an act in pais, and alterable at the pleasure of the officer. But the authority of the clerk to make and record a certificate of the acknowledgment of the deed was functus officio as soon as the record was made. By the exertion of his authority the authority itself became exhausted. The act had become matter of record, fixed, permanent, and unalterable; and the remaining powers and duty of the clerk were only to keep, and preserve the record safely. If a clerk may, after a deed, together with the acknowledgment or probate thereof, have been committed to record, under color of amendment, add anything to the record of the acknowledgment, we can see no just reason why he may not also subtract from it. The doctrine that a clerk may, at any time, without limitation, alter the record of the acknowledgment of a deed, made in his office, would be, in practice, of very dangerous consequence to the land titles of the county, and cannot receive the sanction of this court.' In Chamberlain v. Bell, 7 Cal. 293, 68 Am. Dec. 260, it appears that the description of the premises intended to be conveyed was omitted, and afterwards supplied by interlineation. The court there said: 'Conceding the propriety of the interlineation, it could only impart notice from the time it was made, and could in no way impair or defeat a title previously acquired.'

"It is not decided, nor can it be logically inferred from this language, that the Supreme Court approved the correction of a deed by the change of the grantee's name upon the record by a different recorder, 38 years after the original record was made, and that such a procedure established a merchantable title, free from doubt, upon which a purchaser must act at his peril, or be held to have forfeited all purchase money theretofore paid by him, without the existence of the deed in its actual form being brought home to him, or any proof adduced showing that the recorder had acted upon anything other than personal request. In those jurisdictions where it is held that a clerk may amend or correct his records, which do not affect titles to real estate, it is the established rule that the correction must be made by the officer who committed the error. The court, in Baker v. Webber, 102 Me. 414, 67 Atl. 144, thus states the rule: 'It is undoubtedly an established rule in New England, respecting the amendment of the records of a city or town, that the clerk who has made an erroneous or incomplete record may while in office, or after a re-election to the same office, amend or complete such record according to the truth, being liable, like a sheriff who amends his return, for any abuse of the right [citing cases]. But without statutory authority one who was formerly a town clerk, but is no longer in office, cannot amend a town record made by him when clerk.' That a vendor, who seeks the harsh remedy of forfeiture, must show strict compliance with the terms and conditions of his contract, requires no citation of authorities, and that a clear title, free from doubt, or what has frequently been described as merchantable, must be exhibited by the vendor to the vendee, is also well established."

The third installment on the contract in question became due and payable on December 6, 1914, up to which time it appears that the abstract of title to the premises, though prepared, had not been delivered by the plaintiff to the defendants, and on the 8th day of December demand was made therefor, whereupon the same was delivered by the plaintiff to the defendants. It appears from the transcript that the defendants waived any rights they might have had by reason of the nondelivery of the abstract, and stipulated that there was no breach in such delivery prior to said 8th day of December. It was further stipulated that the abstract furnished by the plaintiff to the defendants on the 8th day of December showed a conveyance from W. D. Vail to B. W. Robbins, from whom no mesne conveyances were shown vesting title in the plaintiff, and no other action taken than as hereinbefore set forth. Under such circumstances, the defendants were not in default at the time of the institution of plaintiff's suit. It may be stated that it further appears from the transcript that plaintiff, through one of his attorneys, informed the defendants that they would do nothing further in relation to the abstract.

It may be conceded that the plaintiff had, in fact, a good title; but that he failed to make exhibit thereof to the defendants seems to us beyond question. The re-recording of the deed from Vail to Robben on January 15, 1915, and exhibit thereof to the defendants, would have laid a foundation for maintaining an action wherein, all proper parties defendant having been joined, judgment might have been entered by the trial court, finding plaintiff's title valid, quieting any claims of B. W. Robbins to said premises, establishing of record that the conveyance purporting to be made to Robbins was in fact made to Robben, and decreeing performance by the appellants within a reasonable time or suffer the alternative of forfeiture. However, the plaintiff did not elect to pursue this remedy, but chose rather to consider the contract at an end, himself absolved from all its obligations, and instituted this proceeding to quiet title and thus gain the advantage of the installment payments already made under the contract, even though he himself was the party in default. Under these circumstances, what are the rights of the vendees under such contract? In an exceedingly exhaustive opinion, the Supreme Court of this state, speaking through Justice Henshaw, in Glock v. Howard, 123 Cal. 10, 55 Pac. 716 (43 L. R. A. 199, 69 Am. St. Rep. 17), thus lays down the rule:

"Now, in such contracts, upon a breach by the vendor of a covenant to convey, what courses are open to the vendee? Obviously these: He may stand upon the contract and sue at law for damages for the breach. Here his recovery will be governed by section 3306 of the Civil Code; or, still standing upon his contract, he may go into equity, seeking its specific performance; or he may sue at law to recover the amount that may have been agreed upon as stipulated damages; or, finally, treating the vendor's breach as an abandonment, he may himself abandon it, when, the contract having thus come to an end, he may sue at law to recover what he has paid, in an action for money had and received, for, the contract being at an end, the vendor holds money of the vendee to which he has no right, and to repay which, therefore, the law implies his promise."

To a similar effect is the case of Boas v. Farrington, 85 Cal. 535, 24 Pac. 787, where it is stated, in substance, that:

"Where a contract for the sale of land provided that the purchase money should be payable in installments, the first installment to be paid on the signing of the agreement, the 'title to be good or the money to be refunded, the party of the first part to furnish abstract of title to said land,' and the vendor furnished an abstract which failed to show a good title, the purchaser may rescind the contract, and recover the money already paid, although the vendor, as a matter of fact, had a good title to the property, if the vendor did not offer to remedy the abstract, or cause a perfect abstract to be furnished before the time arrived for payment of the second installment."

There, as here, the question was not so much the fact of good title as the failure of the abstract to show a title free from objections. In Seals v. Davis, 25 Cal. App. 68, 142 Pac. 905, the vendee brought an action to recover money paid on account of an agreement to purchase real estate by reason of the vendor's attempted rescission, and the court there held:

"When a plaintiff seeks to recover money which he has paid upon a contract which the defendant has attempted to rescind, he may accept such rescission, and bring his action in the form of a common count for money had and received by the defendant to his use and benefit" —citing a number of authorities.

In McNeil v. Kredo, 31 Cal. App. 76, 159 Pac. 818, the right of the vendee was before the court upon the sufficiency of the complaint, but the right of the vendee to recover was again affirmed; the court saying:

"The complaint states the cause of action. It in effect alleged that the defendants without cause repudiated the contract, declared it canceled, and denied to plaintiffs any right or interest thereunder. This being so, the plaintiffs were relieved from the obligation of further performance on their part and were privileged to consider and accept the defendant's renunciation of the contract as a rescission of the same" —citing also a number of authorities.

[3] In the case at bar, after the plaintiff had declined to do anything further in relation to the abstract in question or for clearing the title to the premises agreed to be conveyed, and had begun his action to foreclose the rights of the defendants under the contract, the defendants, within the time allowed for answering the plaintiff's complaint, surrendered the lands and premises to the plaintiff and filed a cross-complaint for the recovery of the installments already paid and damages suffered by reason of the plaintiff's breach. Under the authorities above cited it must be held that the defendants had a right to consider the contract as rescinded and prosecute their action for repayment of all installments paid, and also to recover whatever damages they had suffered by reason of the failure of the plaintiff to comply with his covenants therein contained.

The defendants' motion for nonsuit should have been sustained, and the trial court should have proceeded to ascertain and determine the amount of recovery to which the defendants as cross-complainants were entitled. It follows, therefore, that the judgment of the trial court must be reversed, with directions to proceed with the further hearing of this matter in accordance with this opinion; and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

(37 Cal. App. 200)

CORBETT v. SPANOS et al. (Civ. 2389.)

(District Court of Appeal, First District, California. May 10, 1918. Rehearing Denied by Supreme Court July 8, 1918.)

1. NEGLIGENCE ⟹134(1)—INJURIES TO CUSTOMER IN STORE.

Inference of storekeeper's general invitation to customers to use employés' toilet in rear of store cannot be drawn from single instance of use of toilet by customer by permission of clerk.

2. NEGLIGENCE ⟹32(2)—STORE CUSTOMER AS "LICENSEE."

A customer in a store who asked for the toilet and was shown by a clerk to a toilet in the rear of the premises supplied for employés only was a mere licensee.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Licensee.]

3. NEGLIGENCE ⟹32(1) — INJURIES TO LICENSEE—WILLFULNESS.

A storekeeper owes to his customer, a mere licensee in the use of a toilet supplied for employés only, no duty except to refrain from willfully or wantonly injuring her.

4. NEGLIGENCE ⟹32(1)—INJURIES TO LICENSEE—WANTONNESS.

A customer in store premises, a mere licensee as to the use of a toilet supplied for employés only, was not injured as the result of the storekeeper's willfulness or wantonness when she stepped, after leaving the toilet, into a trapdoor in the passageway opened while she was in the toilet.

5. NEGLIGENCE ⟹31 — VIOLATION OF ORDINANCE—CUSTOMER IN STORE.

Storekeeper's violation of city ordinance prohibiting for fire protection covering of stairways with permanent flooring would not constitute negligence as to customer injured by falling through trapdoor in the flooring; she not being within the class which the ordinance was designed to protect.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Elizabeth A. Corbett against Gus Spanos, Ellard B. Whitney, and Hattie E. Wilson. From judgment for defendants, plaintiff appeals. Affirmed.

Louis Ferrari, of San Francisco, for appellant. Cannon & Abbott, of San Francisco, for respondents.

ZOOK, Acting Presiding Judge pro tem. This is an action for damages for physical injuries alleged to have been sustained by plaintiff through the negligence of defendants. Plaintiff appeals from a judgment for defendants entered upon an instructed verdict in their favor at the close of plaintiff's evidence. The facts testified to were as follows: Defendant Spanos conducted a candy and light lunch business in a store owned by defendants Whitney and Wilson, where plaintiff was accustomed to take lunch. In the rear of the store there was a partition running across the width of the store, with a door in the center opening into a narrow and rather dark passageway, on the opposite side of which there was a room containing a toilet and wash basin for the use of the young women employed in the store. There was a trapdoor in the passageway with a flight of stairs leading down to the basement, where candy was made and stored. This stairway was frequently used by the employés when they wished to bring candy up from the basement. On the day of the accident plaintiff, having lunched at the store, asked one of the attendants if there was a dressing room, and was shown to the toilet in question. The trapdoor was closed at the time, and, as it fitted flush with the floor, there was nothing to indicate its existence to plaintiff, and she received no warning about it. While plaintiff was in the toilet some person whose identity was not shown on the trial, but presumably an employé of the store, lifted the trapdoor and left it open. When plaintiff attempted to return to the outer store, she did not notice the open trapdoor, but in opening the partition door, which swung towards her, she stepped backwards and through the trapdoor, and fell down the steps to the basement below.

[1-4] We are of the opinion that the lower court correctly instructed the jury to bring

in a verdict for the defendants upon the facts above set forth. While plaintiff was undoubtedly seriously injured by the fall, she could only recover damages therefor upon showing some breach by the defendants of a duty owing to her, and this she has failed to do. The law of California as to the duties owing by a proprietor of a store to his customers and to the public is settled by the cases of Schmidt v. Bauer, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580; Means v. So. Cal. Ry. Co., 144 Cal. 473, 77 Pac. 1001, 1 Ann. Cas. 206; Herzog v. Hemphill, 7 Cal. App. 116, 93 Pac. 899. It is well expressed in the following quotation from Schmidt v. Bauer, supra:

> "The keeper of a public place of business is bound to keep his premises and the passageways to and from it in safe condition, and use ordinary care to avoid accidents or injury to those properly entering upon his premises on business. * * * But this rule only applies to such parts of the building as are a part of or used to gain access to, or constitute a passageway to and from the business portion of the building, and not to such parts of the building as are used for the private purposes of the owner, unless the party injured has been induced by the invitation or allurement of the owner, express or implied, to enter therein."

While in the complaint in the case at bar it was alleged that the so-called dressing room was placed by the defendant Spanos at the disposal of his customers and as an inducement to have customers patronize his business, absolutely no evidence in support of this allegation was produced at the trial except the fact that, on the single occasion when plaintiff was injured, she was shown to it by an attendant in response to her query as to whether or not there was a dressing room in the place. It affirmatively appeared in the evidence that there was no sign on the door to the passageway leading to the toilet in question to indicate that there was a dressing room there for the use of customers, and the simple equipment of the room itself, as well as its situation in a poorly lighted passageway, negatives the idea that it was intended for the use of any one other than Spanos' employés. The attendant who showed plaintiff the way was not called to testify upon the trial, and no authority in her to permit the use of the room by the patrons of the place was shown. In the absence of such showing, no inference of a general invitation or inducement by the proprietor of the store such as is alleged in the complaint can be legitimately drawn from this single instance of its use by permission of his servant. The only duty of a proprietor of a store to a mere licensee, when in that portion of the premises not customarily used by the public, and to which the licensee is not expressly or impliedly invited, is to avoid doing any willful or wanton injury to such licensee, and no such injury is shown by the record in the case at bar.

It is also claimed by the plaintiff that the trapdoor and stairway were constructed and maintained by both Spanos and the owners of the building in violation of the provisions of a certain ordinance of the city and county of San Francisco which provides as follows:

> "Stairs or stairways passing from one floor to another in any building shall not be covered with a permanent flooring, but may be closed with a board partition extending from the floor to the ceiling, and provided with a door, which must be kept free from all obstruction at all times, so as to give to the fire department and fire patrol easy access from one floor to another, provided this section shall not apply to buildings used for public assemblages.
>
> "Goods or obstructions of any kind shall not be placed on the stairs of any building.
>
> "Explosive or inflammable compounds or combustible materials shall not be stored or placed under any stairway of any building, or used in any such place or manner as to obstruct or render egress hazardous in case of fire."

[5] It is very doubtful whether or not this trapdoor, which could be easily opened and shut, comes within the prohibition of the ordinance as to covering stairs "with a permanent flooring," but it is unnecessary to decide the point here. The ordinance is purely a fire protection measure, designed to enable the fire department to have unobstructed access from one floor of a building to another in case of fire, and it is manifestly not intended to provide for the protection of the general public from injury. Therefore, conceding the ordinance to have been violated, plaintiff cannot claim that such violation constituted negligence, because she does not come within any class of persons which the ordinance was designed to protect. Toomey v. S. P. R. R., 86 Cal. 374, 24 Pac. 1074, 10 L. R. A. 139. As is said in the article on Negligence in 29 Cyc. at page 438:

> "The violation of a statute or ordinance designed to protect persons entitled to be on premises will not constitute negligence as to mere licensees or trespassers to whom no duty is owed independently of the statute."

In view of this principle, the alleged violation of the ordinance cannot operate to create liability on the part of either owners or proprietor.

Judgment affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge, pro tem.

(37 Cal. App. 164)

DELLA MORA v. FAVILLA. (Civ. 2390.)

(District Court of Appeal, First District, California. May 4, 1918.)

1. APPEAL AND ERROR 🔑854(6)—REVIEW—ORDER GRANTING NEW TRIAL.

Where court granted motion for new trial, without specifying reasons, if there is any good reason contained in the notice, the order will not be disturbed.

2. NEGLIGENCE 🔑6 — VIOLATION OF ORDINANCE.

The violation of a city ordinance in and of itself constitutes and establishes negligence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negligence.]

3. EVIDENCE 🔑14—JUDICIAL NOTICE—FOOT TRAFFIC.

It is matter of judicial knowledge that heaviest foot passenger traffic on streets of San Francisco takes place between 8 a. m. and 6 p. m., and that pedestrians would be annoyed and inconvenienced, and, on steeper sidewalks, endangered, by having walks washed between those hours.

4. MUNICIPAL CORPORATIONS 🔑120 — ORDINANCE AS TO WASHING SIDEWALKS — PURPOSE.

Ordinance of city of San Francisco, providing sidewalks should not be washed between 8 a. m. and 6 p. m., was designed to obviate inconvenience, annoyance, and danger to pedestrians during hours when streets were most in use, as well as to conserve water supply.

5. NEW TRIAL 🔑70 — VERDICT — LACK OF SUPPORT IN EVIDENCE.

If the trial court, having the evidence before it, and having seen witnesses, determined that verdict as to plaintiff's contributory negligence was not supported by the evidence, it was the court's duty to grant plaintiff a new trial.

6. APPEAL AND ERROR 🔑933(4)—NEW TRIAL —GROUNDS—PRESUMPTION.

Presuming trial court acted either on conviction its instruction, that negligence was established by proof of violation of ordinance, was not followed by jury, or that jury found contributory negligence against preponderance of evidence, order granting plaintiff new trial must be affirmed.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Dino Della Mora against C. Favilla. From an order granting plaintiff new trial, defendant appeals. Affirmed.

James A. Bacigalupi, of San Francisco (Edmund Nelson, of San Francisco, and Michele Cimbalo, of counsel), for appellant. Joseph A. Brown and Frank J. Egan, both of San Francisco, for respondent.

BEASLY, Judge pro tem. [1] The plaintiff was injured by slipping and falling on a steep sidewalk in the city of San Francisco. The sidewalk had been wetted by being washed by the defendant at 10 o'clock on the morning of the accident, and it was claimed that the wet and slippery condition of the sidewalk caused the plaintiff to fall. By washing the sidewalk at that hour defendant violated an ordinance of the city and county which made it unlawful to wash a sidewalk between 8 a. m. and 6 p. m. The defenses were the legal contention that the ordinance was not designed for the protection of pedestrians on a sidewalk, but that its purpose was to conserve the water supply of the city, and hence that it did not constitute negligence between the parties here for the defendant to wash the sidewalk in violation of the ordinance; and, second, the allegation as a fact in the answer that the plaintiff was intoxicated when the accident occurred, and that this either caused or contributed to his fall. The jury found for the defendant. The plaintiff moved for a new trial on the grounds of insufficiency of the evidence to justify the verdict; that it was against law, and of errors occurring at the trial. The court granted the motion, without specifying its reasons. If, therefore, there is any good reason for granting it contained in the notice, the order will not be disturbed.

[2] The trial court instructed the jury at length as to the bearing of this ordinance on the case; the gist of its charge on that subject being comprised in an instruction which read as follows:

> "The violation of an ordinance in and of itself constitutes and establishes negligence. Therefore, if the plaintiff in this case has satisfied you that the defendant here on the occasion in question violated that ordinance, then he has established negligence on the part of the defendant. And the next question for you to determine would be whether such negligence on the part of the defendant directly contributed to and caused the injury that the plaintiff has suffered."

This instruction correctly stated the law, which is so well settled in this jurisdiction as to need no citation of authority to support it. If the broad proposition of law so established in this state, and given to the jury by the trial court in this case, is to be changed or modified, it must be done by the Supreme Court. It is not the function of this court to change it. This being so, the trial court was justified in holding that the negligence of the defendant was established.

[3, 4] It is contended that the sole purpose of this ordinance is to conserve the water supply of San Francisco; that it was not designed nor adopted for the purpose of protecting people upon the streets from the inconvenience or danger of wet and slippery sidewalks. With this contention we are unable to agree. The ordinance provides that sidewalks shall not be washed between the hours of 8 a. m. and 6 p. m. It is a matter of judicial knowledge that the heaviest foot passenger traffic upon the streets of San Francisco takes place between those hours, and that pedestrians would be annoyed and inconvenienced, and upon the steeper sidewalks of the city endangered, by having the sidewalks wet and slippery when pedestrians were most numerous thereon. For these reasons we think it clear that, while the ordinance may have been designed also the conserve the water supply of the city, another purpose, and the principal purpose of the ordinance, obviously was that the sidewalks should not be made inconvenient, annoying, and dangerous to the pedestrian population of the city during the hours when most in use.

[5, 6] The other question involved in the action was that of contributory negligence upon the part of the plaintiff; it being contended by the defendant that the plaintiff at the time of the accident was intoxicated, and that his intoxication contributed thereto. The plaintiff himself testified that he had not drunk anything that morning. He

was strongly corroborated by other witnesses, although the testimony upon this point was not all one way. The trial court had the witnesses before it. The verdict of the jury must have been based, in view of the law as to the violation of the ordinance establishing negligence in the defendant, upon the contributory negligence of the plaintiff. If the trial court, having the evidence before it and having seen the witnesses, determined that the verdict upon this point was not supported by the evidence, then it was the duty of the trial court to do exactly what it did, namely, to grant the plaintiff a new trial. Presuming that the trial court acted either upon a conviction that its instruction, that negligence was established by proof of the violation of the ordinance, was not followed by the jury, or that the jury found contributory negligence upon the part of the plaintiff, when by the great preponderance of the evidence such contributory negligence did not exist, and accordingly granted a new trial, the order granting the same must be affirmed.

It is so ordered.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

(37 Cal. App. 218)

PULLIN v. ALLEN et al. (Civ. 2285.)

(District Court of Appeal, Second District, California. May 13, 1918.)

1. Trover and Conversion 🔑23—Right to Sue—Attorney and Client.
Where attorneys performed services and received money for client, the client could not maintain conversion during time attorneys were entitled to retain the money pending determination of reasonable fee.

2. Trover and Conversion 🔑67—Instructions—Law of Case.
Defendants in conversion are entitled to instruction stating matters necessary to make out a cause of action for conversion.

3. Trover and Conversion 🔑67—Instructions—Burden of Proof.
Defendants in conversion are entitled to instruction on burden of proof.

4. Trover and Conversion 🔑67—Actions—Instructions.
In client's action for conversion of money by attorney from funds coming to him through services, notwithstanding testimony that client offered $100 for services rendered, that the attorney demanded $500, and that the client thereafter accepted further services, the attorney was not entitled to instruction on issue of agreement to pay $500.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by S. E. Pullin against W. S. Allen and another. Judgment for plaintiff, and defendants appeal. Reversed.

Frank P. Doherty and Allen & Allen, all of Los Angeles, for appellants. Courtney Lacey, of Los Angeles, and A. S. Bongiorno, for respondent.

JAMES, J. Defendants appeal from the judgment. The action was brought for the alleged conversion of the sum of $500, which by the complaint it was asserted belonged to the plaintiff. The defendants made answer, first specifically denying the allegations of the complaint. It was then alleged that defendants had rendered professional services for the plaintiff to the reasonable value of the sum of $500; that in the course of their employment the defendants came into possession of certain moneys and property as the result of the professional services rendered to said plaintiff; and that said defendants, after deducting their expenses, costs, and fees in the sum of $500, delivered all of the remainder and residue of said moneys and property to the plaintiff. The undisputed evidence in the case showed that the defendants as attorneys at law were engaged by the plaintiff to attend to litigation already commenced and threatened against the plaintiff. That the services were rendered in a satisfactory manner, no dispute is made. A part of the services required of the defendants was to attempt the negotiation of the interests of the plaintiff in the furniture of a certain apartment house. After attending to the clearing up of certain mortgage liens against this property, defendants secured a purchaser for the interests of the plaintiff, and upon a sale of such interests received certain moneys into their hands in excess of the sum of $500. After the work had all been completed, defendants made return to the plaintiff of all moneys except the sum of $500, which latter sum they retained, claiming the right so to do under the understanding had with the plaintiff that they were to receive a reasonable fee for their services. It seems to be indicated beyond all question that the agreement between the parties was that defendants should be paid out of the moneys in their hands for the services which they had rendered. It would seem to be immaterial, therefore, whether, as defendants assert, they possessed a lien upon the money independent of any agreement entitling them to retain such a sum as would reasonably compensate them for their work. Plaintiff in her testimony did not claim to have paid to the defendants any money in compensation for the services rendered, but only sought to show that the sum of $500 was an excessive amount to be allowed. After considerable of the services which defendant had been engaged to perform were rendered, a conversation occurred between the plaintiff and one of the defendants relative to the fee to be charged. Plaintiff on that point testified that in conversation with Mr. W. S. Allen she then said:

> "Why, yes. I am going to give you $100 of it. He said, 'You do not think you are going to get off with $100 for me with all this work?' He said, 'You do not think you are going to give me

$100?' I said: 'Certainly I am going to give you $100. I insist on giving you $100.' 'Well,' he said, 'I won't take less than $500, and I wouldn't do it again for $1,000.' "

The sister of the plaintiff, referring to the same conversation, testified as follows:

> "We were talking to Mr. Allen, and I was sitting at my desk, and we were talking about the business and talking about the rebating. Then I said again, 'But, Mr. Allen, we are going to give you $100 out of this, and by the time we have paid up everybody, where does my sister come out?'" She added that Mr. Allen replied that he was going to charge $500 for the work, and that she said, "You are just joking," and that he said, "I am not joking."

It was after this conversation was had that the sale of the furniture interests was made and the proceeds collected by the defendants. As we have before noted, the matter of the right of the defendants to retain out of the money collected a reasonable fee was not questioned by the plaintiff.

[1] Conceding, as we think must be admitted, that under the facts of the case the defendants had the right to retain possession of the $500 until it were legally ascertained that a reasonable compensation for their services amounted to a less sum, then it must follow that until such ascertainment was had there would be no ground for the action of conversion. There could be no conversion while the right to retain the money existed. By the verdict of the jury the plaintiff was awarded judgment in the sum of $250.

[2-4] Instructions were offered by the defendants and refused by the court, advising the jury of the essential matters necessary to make out a cause of action for conversion. We think that the defendants were entitled to have the offered instructions on these points given. They were also entitled to have an instruction, which was offered and refused by the court, given touching the matter of where the burden of proof rested in the action. The court did instruct the jury as to what was meant by the term "preponderance of the evidence," but, so far as we can find from the transcript, gave no instruction at all as to the burden of proof being upon the plaintiff to establish her cause of action by such a preponderance of the proof. We do not think it was error to refuse offered instructions on the matter as to whether there was an agreement to pay the sum of $500 as compensation for defendants' services. Defendants base their right to have this instruction given upon the evidence showing the conversation had between defendant W. S. Allen and the plaintiff after a considerable part of the services for which compensation was claimed had been rendered. The argument is that, as the defendants then stated that they would charge $500 for their services, because the plaintiff accepted further services in the same matter she would become bound to pay the amount claimed. We do not believe that the facts shown by that conversation are sufficient to make it appear that the plaintiff became bound as by agreement to pay the amount alleged. That conversation showed merely that the plaintiff and defendants were wide apart in their ideas as to what a reasonable compensation would be. The plaintiff asserted that she was going to pay $100, and the defendant W. S. Allen asserted that the charge would be $500. The question of the amount of compensation was not there settled, but was left an open and disputed matter. The trial judge treated that question as being the only one in the case, for in his instruction to the jury he said:

> "The facts in this case are comprised in a very small compass. It is admitted that the defendants retained $500. No complaint is made at all of their services in the way that any portion of the money was spent. It is claimed they retained $500. It is admitted that they are entitled to some part of that on account of their services, and it is for you to determine what part they are entitled to, or whether or not they are entitled to all of it. That is all there is to this case."

The remainder of the instructions given consisted principally of a statement of general rules for the guidance of the jury in arriving at a verdict. In the particulars which we have hereinbefore pointed out, we think that the charge was not as complete as the defendants were entitled to have given.

The judgment appealed from is reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

(37 Cal. App. 144)

MEYERS v. McKILLOP. (Civ. 1799.)

(District Court of Appeal, Third District, California. May 3, 1918.)

1. Frauds, Statute of 🔑158(4) — Original Promise—Contract of Employment —Evidence.

In an action for services of physician rendered to third party, evidence *held* to show that they were rendered in reliance that defendant would pay therefor, and that defendant directly promised to make such payment.

2. Frauds, Statute of 🔑33(2)—Promise to Pay Debt of Third Party—Original Contract.

Where plaintiff's services for the benefit of a third person were performed in reliance that defendant would pay therefor, and defendant directly promised to pay, there was an original contract, with a sufficient consideration for its support.

3. Trial 🔑396(1) — Findings — Employment—Period of Services.

In action for services of physician rendered to a third party on defendant's alleged promise to pay, an objection as to period of service covered by finding, in view of general allegation in complaint and exact time covered by services as shown by the evidence, *held* without merit.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by E. L. Meyers against John McKillop. Judgment for plaintiff, and defendant appeals. Affirmed.

George F. Jones, of Oroville, for appellant. Lon Bond, of Chico, and Deirup & Deirup, of El Centro, for respondent.

BURNETT, J. The action was for the recovery of the sum of $390.25 for services rendered by plaintiff as physician and surgeon and by his assignors, W. B. Johnson and Sacramento Valley Hospital, a corporation, and the judgment was in his favor for $359.25.

The only question in this case is whether the evidence warranted the court in finding that the transaction between plaintiff and defendant created an original or primary obligation on the part of the latter, it being his contention that he was, at most a guarantor, and that the obligation was void because not in writing. The facts are similar, and the same question is presented in the matter of the two small assigned claims. We think that there can be no doubt that the theory adopted by the trial court finds sufficient support in the record. The services were performed for one F. J. Williams, and Dr. Meyers was called to attend him on the 5th day of October. Two days thereafter, according to plaintiff's testimony, he had the following conversation with the defendant at the Sacramento Valley Hospital:

> "I asked him whether he would pay Mr. Williams' bill. I told him I had an understanding he was going to pay the bill, and he said he would. I told him perhaps we had better make the sister feel more easy about the money. When we went down stairs, I repeated the conversation in front of Sister Marie, and the substance was that he was to pay Mr. Williams' bill."

He furthermore testified:

> "I made three calls on the 7th; on the 8th three calls; on the 9th there were five calls made; and on the 10th he was operated on by myself, Dr. Johnson and Dr. Wilson. I called on him twice subsequent to the operation; on the 11th I called three times; on the 12th I called four times; and on the 13th three times the day he died."

These services, performed after his conversation with defendant, were reasonably worth, so he said, the sum of $305, and this was allowed by the court.

[1, 2] It is a fair inference from the foregoing that these services were performed upon the reliance that the defendant would pay, and it is also a fair inference that the latter directly promised to make such payment. This constitutes an original contract, with a sufficient consideration for its support. Klamath Lumber Co. v. Co-operative Land & Trust Co., 25 Cal. App. 678, 145 Pac. 159.

It is true that Dr. Meyers was originally called by one Barnholdt, but there is no evidence that he was employed by the latter or by Williams, or that he looked to either for his compensation. At any rate, we may eliminate the services performed on the 5th and 6th of October, as did the trial judge, and consider only what was done after said conversation with the defendant. This may be considered a separate and distinct contract, and we see no legal obstacle in the way of enforcing it. It is true that the defendant denied any agreement for the payment of the claim, but the court below obviously did not believe him, and we cannot say that the want of faith was not justified.

[3] There is some contention in the closing brief that it does not appear whether the findings cover the entire period of the service or the time subsequent to plaintiff's employment by the defendant. The particular finding in point follows the allegation of the complaint:

> "That within two years last past plaintiff within the county of Butte, state of California rendered medical and surgical services to one F. J. Williams at the special instance and request of the defendant, and defendant promised and agreed to pay the value thereof."

Of course, from this it could not be determined whether it covered the entire period or not, but the allegation in the complaint was certain and definite enough to withstand the general demurrer which was interposed, and the exact time covered by the services for which defendant was held liable was revealed by the evidence. The amount found due corresponded exactly with the testimony as to the value of these services, and we are not inclined to the view that there is any merit in this claim of the appellant.

Indeed, the case is simple, and there seems no necessity for any further consideration.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(37 Cal. App. 167)

CROCE v. BAZZURO et al. (Civ. 2370.)

(District Court of Appeal, First District, California. May 6, 1918. Rehearing Denied by Supreme Court July 2, 1918.)

1. LIMITATION OF ACTIONS 🔑103(1)—SUITS TO ENFORCE TRUST—ACCRUAL OF CAUSE OF ACTION.

A suit by an administrator against the heirs to recover proceeds of an insurance policy and rentals as trust property is barred by Code Civ. Proc. § 343, requiring actions not otherwise provided for to be commenced within four years; more than four years having elapsed since defendants denied the trust and claimed the property as their own.

2. LIMITATION OF ACTIONS 🔑103(3)—RECOVERY OF TRUST ESTATE—ACCRUAL OF CAUSE.

Where property held in trust is distributed to the trustee's heir, the heir takes as an involuntary trustee, and limitations against a suit to recover the property begin to run at the time of distribution, obviating the necessity of a repudiation of the trust.

3. LIMITATION OF ACTIONS 🔑192(3) — SUSPENSION OF LIMITATIONS—PLEADING.

In a suit to recover rentals and proceeds of insurance as trust property, a complaint alleging that plaintiff had no knowledge, information, or belief that the property was insured, or that the insurance had been collected until six months before the suit, and that plaintiff used reasonable diligence, not amounting to a charge of undiscovered fraud, did not stay the running of limitations.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Suit by Luigi Croce, as administrator of the estate of Francesco Bazzuro, deceased, against Mary Bazzuro and Anna Rose Mary Bazzuro. From a decree for plaintiff, defendant Mary Bazzuro appeals. Reversed.

D. Freidenrich, of San Francisco, for appellant. John J. Mazza and W. E. White, both of San Francisco, for respondent Croce. Harold C. Reyman, of San Francisco, for respondent Anna Rose Mary Bazzuro.

BEASLY, Judge pro tem. This action was begun some time previous to the 9th day of October, 1914, by Luigi Croce, as administrator of the estate of Francesco Bazzuro, against Mary Bazzuro and Anna Rose Mary Bazzuro, a minor daughter of Mary, to recover $1,960 from the defendants upon allegations that they received this fund in trust for the heirs of the deceased Francesco upon a fire insurance policy for loss sustained by the destruction of a building in the fire of April 18, 1906, and also to recover $500 alleged to have been collected by the defendants as rents from the tenants of the building covered by the policy. The facts supporting the action were these: Francesco Bazzuro died intestate in 1879. At his death he held a mortgage upon a lot in San Francisco on which the building above mentioned was situated. His brother, Giuseppe Bazzuro, was appointed administrator of the estate, and as such foreclosed this mortgage, bought in the property at the amount of the mortgage at a sale in the foreclosure proceedings, and obtained a sheriff's deed as administrator of his brother's estate in the year 1884. In that condition the matter rested until the death of Giuseppe, which occurred in 1904. A year after the death of Giuseppe the plaintiff, Luigi Croce, was appointed administrator of the estate of Francesco to succeed Giuseppe, and he is still the administrator of that estate. The defendant Mary is the widow of Giuseppe, and Anna Rose Mary is the daughter of Giuseppe and Mary. Mary and Anna Rose Mary are the only heirs at law of Giuseppe. On the 15th day of July, 1905, a decree of distribution was entered in Giuseppe's estate by which all of the property vested in him at his death was distributed in equal shares to his widow and child. On the 10th day of October, 1905, Mary caused the building on the property to be insured against fire in the sum of $2,000. The policy was made payable to the estate of Giuseppe. About the 7th of November following Mary caused the name of the insured in the policy to be changed from the "Estate of Giuseppe" to "Mrs. Mary Bazzuro." The building was totally destroyed by fire on April 18, 1906, and on the 7th of July succeeding, the defendants collected $1,960 upon the policy because of the loss. On the 25th day of September, 1913, in an action theretofore begun by the plaintiff and the defendants herein, the court made its decree that the real property distributed in the complaint was at that time, and had been from the month of October, 1904, held by the defendants in trust for the heirs at law of Francesco Bazurro, and required the defendants to convey the real property in trust for the said heirs and subject to administration of Francesco's estate. On the 1st day of November, 1913, a commissioner appointed by the court in that action for the purpose executed and delivered to plaintiff a deed pursuant to that decree conveying to him, as administrator, the real property described in the complaint herein in trust for the heirs at law of Francesco and subject to administration of his estate. Before the destruction of the building Mary had collected $500 as rent from tenants thereof.

The insurance money and the rent were not mentioned nor prayed for in the action to recover the real property above referred to. The complaint alleged that the plaintiff had no knowledge, information, or belief that the building was insured or that the defendants had collected the insurance until about six months prior to the commencement of this action, and that thereafter plaintiff used all reasonable diligence in ascertaining the amount of insurance, and when and from what company the same had been collected. Plaintiff did not obtain that information until the 23d day of January, 1915.

The plaintiff had judgment in the action for the insurance money and rent and interest thereon from the time the funds came into Mary's hands. Judgment was given in favor of Anna Rose Mary. From the judgment against herself, the defendant Mary appeals.

[1] The statute of limitations seems to us to be an insuperable obstacle to the affirmance of this judgment. The particular section of the statute depended upon is section 343 of the Code of Civil Procedure, which states that an action for relief, not provided for in the preceding sections of that Code, must be commenced within four years after the cause of action shall have accrued. The cause of action here, certainly in any view, must be held to have accrued at the time of the filing of the answer of Mary Bazzuro in the case in which the land was recovered to the administrator of the estate of Francesco; for in her answer in that case she flatly repudiated any trust which it was claimed reposed in her on account of the facts hereinbefore recited. In that action the answer set up adverse possession by Giuseppe and by the defendants, Mary and her daughter, a position entirely inconsistent with the trust; for in that action the defendants, Mary and her daughter, claimed that the title was vested in them, which claim constituted a denial that they held the prop-

erty in trust, and also in effect a denial that the plaintiff was entitled to the property for the purposes of administration. This adverse claim set the statute in motion, even conceding that a repudiation of the trust was necessary to do so.

[2] However, no repudiation of this trust seems to have been necessary to set this statute in motion for the facts bring it within the rule of Norton v. Bassett, 154 Cal. 411, 97 Pac. 894, 129 Am. St. Rep. 162. The facts of that case were nearly identical with those in this case. Bassett, Sr., held certain property in trust for Norton. He died, and the property was distributed to his son. An action was begun against the latter without a repudiation by him of the trust. The Supreme Court held that no repudiation was necessary to set the statute in motion upon the ground that the younger Bassett was not a trustee of a voluntary trust, but of an involuntary trust, and that as a trustee of a trust obligation cast upon him by law he could plead the four-year statute of limitation without having repudiated the trust. The court, in discussing the matter, said:

> "In the case at bar the trust cast on the defendant Bassett was an involuntary one. The plaintiffs had a right to proceed to enforce their claim to the trust property immediately that the title to the trust property vested in the defendant Bassett as an involuntary or constructive trustee; the statute commenced to run from that date, and this action, not having been commenced until over five years thereafter, was barred by the provisions of the statute requiring such actions to be commenced within four years from the time the right of action accrues."

That case holds that an heir to whom property which his ancestor has held as trustee is distributed takes and holds as an involuntary trustee in whose favor the period of limitation begins to run on the distribution of the property to him, and is therefore authority for holding that this action was barred by limitation at the time that it was begun.

[3] In passing it may be said that the allegations of lack of knowledge on the part of plaintiff of the collection of the insurance money are not sufficient to stay the running of the statute, as those allegations do not amount to a charge of undiscovered fraud on the part of Mary Bazzuro.

The judgment is reversed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

(37 Cal. App. 125)

HOFFMAN et al. v. PACIFIC COAST CONST. CO. (Civ. 1701.)

(District Court of Appeal, Third District, California. May 1, 1918.)

1. PLEADING 🔑72 — PRAYER FOR RELIEF — STATUTES.

In view of Code Civ. Proc. § 580, plaintiff may have some relief, and court has jurisdiction, though complaint does not contain demand for relief, as required by section 426, where issue has been raised by answer.

2. PLEADING 🔑49 — JURISDICTION — AVERMENTS OF FACT.

To determine question of trial court's jurisdiction, Appellate Court must look to averments of complaint setting forth facts of cause of action.

3. PLEADING 🔑243 — AMENDMENT — SUPPLYING PRAYER FOR RELIEF.

Prayer for relief in complaint may be amended, or supplied by amendment when omitted.

4. ATTACHMENT 🔑211 — COMPLAINT OMITTING PRAYER.

The complaint in an action for money, though not containing a prayer for relief, as required by Code Civ. Proc. § 426, accompanied by the affidavit on attachment required by statute, was sufficient as basis for writ of attachment, though, no answer having been filed, judgment could not have been entered.

5. PLEADING 🔑252(2)—AMENDMENT.

Amended complaint supersedes original.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by C. L. Hoffman and De Ver McLaren against the Pacific Coast Construction Company. From an order denying its motion to dissolve attachment, defendant appeals. Order affirmed.

Karl F. Kennedy, of San Francisco, for appellant. Robinson & Robinson, of Oakland, and McCoy & Gans, of Red Bluff, for respondents.

CHIPMAN, P. J. This is an appeal from an order denying defendant's motion to dissolve attachment. Appellant rests its appeal upon the sole ground that the "complaint is insufficient to constitute a basis for said attachment," and this for the reason that the complaint contained no prayer for relief when the levy was made under the writ of attachment.

The action is for money, to wit, the sum of $503.11, alleged to have been paid out to and for defendant at its special instance and request, no part of which has been paid, and the same is now due and unpaid. The complaint was filed May 26, 1916, and summons was issued. With the complaint were filed affidavits on attachment and undertaking. On the same day the writ was issued and a certain lot of pipe attached by the sheriff and taken into his possession. The complaint stated a cause of action for attachment, as did the affidavit. The writ duly issued and was duly executed, and the proceedings were in due form, except, as is contended, that the complaint lacked a necessary element to confer jurisdiction on the court, to wit, a prayer for the relief which the plaintiff claims. This contention arises out of the provisions of section 426 of the Code of Civil Procedure, which reads as follows:

> "The complaint must contain: 1. The title of the action, the name of the court and county in which the action is brought, and the names of

the parties to the action; 2. A statement of the facts constituting the cause of action, in ordinary and concise language; 3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated."

Appellant's position is concretely stated in the following paragraph of its opening brief:

"As to the proposition of a 'complaint' possessing a caption followed immediately thereafter by a prayer, it requires no citation of authority to prove that such paper would be quite worthless, under the second subdivision of the section. It cannot, therefore, be logically urged that any different rule should apply, in the event of an entire omission of the third required part of a complaint, namely, the prayer. The language of the third subdivision is not only as forcible, but is even more emphatic: '* * * The amount must be stated.' Considering its wording, its shoulder to shoulder position with the other two subdivisions, and the practical reason for its existence, there can be no question, we believe, but that the third subdivision's terms must be abided by, or the paper filed as a complaint is quite void."

It becomes necessary to trace the further proceedings in the case, chronologically stated, as to which no step was taken by either party until in the early part of the year following the filing of the complaint and issuance and service of the writ.

On February 19, 1917, defendant filed notice that on March 2, 1917, it would move the court to dissolve the attachment on the ground:

"That the complaint upon which said attachment proceedings were based stated facts which are insufficient, and said complaint is insufficient to constitute a basis for said attachment; that said motion will be based upon all the papers, records, and files in this action."

On March 2, 1917, plaintiff filed an amended complaint alleging the corporate capacity of the defendant, which had been omitted in the original complaint. Otherwise the original complaint was unchanged.

A notice of motion by plaintiff, dated March 10, 1917, appears in the record, that plaintiffs would on March 19, 1917, move the court for leave to file a second amended complaint, form of which accompanied the motion and was the same as the first amended complaint, except that it contained the usual prayer for relief. The motion was based upon the grounds:

"That in the original and first amended complaint of said plaintiff a prayer for relief, based on the facts alleged in said complaint and first amended complaint, was inadvertently omitted, and that leave to amend said complaint by inserting such prayer as the facts alleged justify should be granted in furtherance of justice and under the provisions of section 473 of the Code of Civil Procedure. Said motion will be based upon the said proposed amended complaint and the affidavit of James S. Moore, Jr. [of counsel in the case], copies of which are served herewith, upon this notice, and upon the papers, records, and files in said cause."

Notice is in the record bearing no date, signed by defendant's attorneys, "appearing not generally, but specially and solely for such purpose," that on March 19, 1917, defendant would move the court for an order dismissing the action on the ground:

That "neither the original nor the amended complaint herein contains a prayer, as imperatively demanded by section 426, Code of Civil Procedure of the state of California, that the facts stated in said complaint are insufficient to constitute a cause of action, and that the court has no jurisdiction to try the said cause, and that the county clerk of Tehama county had no lawful power or right to file said complaint."

It does not appear when these various motions were in fact heard. But on April 2, 1917, the court granted leave to file a second amended complaint by the following order:

"[Title of Court and Cause.] Order Granting Leave to Amend. Good cause appearing therefor, and on motion of Messrs. Robinson & Robinson and Price and Messrs. McCoy & Gans, attorneys for plaintiffs herein, and on reading the notice and affidavit on file herein, it is hereby ordered that plaintiffs be, and they are hereby, granted leave to file their second amended complaint in words and figures as set out and with said notice of motion for leave to amend. Dated this 2d day of April, 1917. John F. Ellison, Judge of the Superior Court."

Thereupon, and on the same day, the second amended complaint was filed. On the following day, April 3, 1917, the court made the following order denying the defendant's several motions:

"The defendant's motion to quash the service of summons in this action is denied. The defendant's motion to dismiss the action is denied. The defendant's motion to dissolve the attachment is denied. The defendant allowed 10 days within which to answer or demur to the complaint."

Without further appearance in the case, defendant filed its notice of appeal.

It thus appears that the second amended complaint was on file before the court had ruled upon defendant's motions. The points on which defendant relies are: That in the absence of a prayer for relief the court was without jurisdiction, quite as much so as if the pleading wholly failed to indicate the court, in which latter case such would be the result (citing 31 Cyc. 94, and cases). Hence it is urged that, as the prayer is an essential element to confer jurisdiction, under section 426 of the Code of Civil Procedure, it follows that the court had not jurisdiction. Defendant's second contention is that, as the court did not have jurisdiction, its order to issue the attachment was void for the reason that there was nothing to support the writ.

It is further claimed:

"That absence of the prayer vitiates the purported complaint, and amendment was impossible. But," proceeds the brief, "assuming that the law were otherwise, and permitted the insertion of a prayer by amendment, it would still be true that until such insertion the court would be powerless to do aught but order such insertion. And any process, attachment, or other ruling would be valueless until the insertion of that ad damnum clause stating a jurisdictional amount. Respondents' first opportunity to have a valid attachment issued would arise after the order allowing the insertion."

Doubtless where there is no answer, and hence no trial of issues of fact, no judgment could be entered in the absence of any demand for relief. A default judgment could not legally be given and made if the complaint were prayerless. But it does not follow that the court is without jurisdiction to order a writ of attachment to issue where a cause of action is stated, pursuant to subdivision 2 of section 426 of the Code of Civil Procedure, though the prayer for relief is omitted in the complaint.

[1] Section 580 of the Code of Civil Procedure provides that:

> "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

This section plainly shows that the plaintiff may have some relief without regard to the prayer where an issue has been raised by an answer. Johnson v. Polhemus, 99 Cal. 240, 244, 33 Pac. 908; Woods Central Irr. D. Co. v. Porter Slough D. Co., 173 Cal. 149, 153, 159 Pac. 427; Murphy v. Stelling, 8 Cal. App. 702, 97 Pac. 672. In Donovan v. McDevitt, 36 Mont. 61, 92 Pac. 49, the court said:

> "It is true that the prayer is made a part of the complaint by section 671 of the Code of Civil Procedure; but it is made such part independently of the statement of facts constituting the cause of action. And, if the facts stated in the body of the complaint entitled the plaintiff to any relief, a general demurrer will not lie, no matter what may be the form of the prayer, or, indeed, whether there is any prayer at all. Hiatt v. Parker, 29 Kan. 765; Culver v. Rodgers, 33 Ohio St. 537; Sannoner v. Jacobson & Co., 47 Ark. 31, 14 S. W. 458; Parker v. Norfolk, etc., Ry. Co., 119 N. C. 677, 25 S. E. 722. It may be that the plaintiff cannot recover a money judgment without a prayer in his complaint demanding the same and stating the amount to which he deems himself entitled."

Both the questions of jurisdiction and amendability of the complaint where the prayer was lacking were considered in Eldon Ice Co. v. Van Hooser, 163 Mo. App. 591, 147 S. W. 161, where the court said:

> "But where a petition is in all respects sufficient save for the omission of a prayer, as this one, we do not believe that defect so far nullifies the paper as to deprive it of the efficacy of an invocation of jurisdiction, or that it is so far defective as not to afford a base for amendment. The omission of a prayer will not destroy jurisdiction."

We quote the following from Sannoner v. Jacobson, supra, which has our concurrence:

> "The question then is narrowed to this: Is the omission of a prayer for judgment so grave a matter as to be fatal to the action? If it is not fatal to the action, the intervener cannot be heard to complain. The statute declares that 'the court must in every stage of action disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party.' * * * In a suit upon an account for money advanced like the one under consideration, the only relief to which the plaintiff can be entitled is at once apparent from the allegations of the complaint, and the omission of the demand for judgment cannot be said to affect the substantial right of any adversary."

[2] It has been held that, although, under section 430 of the Code of Civil Procedure, a demurrer to the complaint on the ground that the court has no jurisdiction may be interposed, a demurrer does not lie to the prayer. Althof v. Conheim, 38 Cal. 230, 99 Am. Dec. 363; Bailey v. Dale, 71 Cal. 34, 11 Pac. 804. To determine the question of jurisdiction we must look to the averments of the complaint setting forth the facts constituting the cause of action. It was said in Lehnhardt v. Jennings, 119 Cal. 199, 48 Pac. 56, 51 Pac. 195, that:

> "It has never been held that the prayer of the complaint should conclude the question of jurisdiction."

In Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741, the court said:

> "Even on demurrer to the complaint the defendants cannot object to the prayer, and certainly, so long as the complaint contains every essential of an action upon contract, they cannot upon motion [to dissolve] an attachment accomplish what they could not upon demurrer."

It was held in that case that a motion to dissolve an attachment could not be turned into a demurrer, but that on such motion we are "simply to determine whether: (1) The complaint showed the action to be founded upon contract, express or implied; (2) whether it states facts sufficient to constitute a cause of action against the defendants; and, if not, (3) does it appear therefrom that it can be so amended as to state a cause of action upon contract? As against a nonresident debtor, these questions being answered in the affirmative, we must not concern ourselves further with the complaint."

In Hale Bros. v. Milliken, 142 Cal. 137, 75 Pac. 653, the court said:

> "If the complaint sets forth a cause of action upon a contract, express or implied, it cannot be attacked for ambiguity or uncertainty, and not even whether it states a cause of action if it appear therefrom that it can be so amended as to state a cause of action upon contract; in other words, the motion cannot be turned into a demurrer to the complaint. Kohler v. Agassiz, 99 Cal. 9 [33 Pac. 741]. If we may inquire whether the complaint is capable of amendment in accordance with rules governing amendments, it would seem to follow that such amendment may be made pending the hearing on a motion to dissolve the attachment. So held, we think, in Hathaway v. Davis, 33 Cal. 161, and Hammond v. Starr, 79 Cal. 556 [21 Pac. 971], and results from what is said in Kohler v. Agassiz, 99 Cal. 9 [33 Pac. 741]. We may therefore consider the complaint as amended, for it in no sense changed the nature of the cause of action."

See, also, Pinkiert v. Kornblum, 5 Cal. App. 522, 90 Pac. 969; Pajaro Valley Bank v. Scurich, 7 Cal. App. 732, 95 Pac. 911.

[3-5] No reason can be advanced for holding that the prayer to a complaint may not be amended, or supplied when omitted, in like manner and to like extent that the complaint may be amended where the facts stated are not sufficient to constitute a cause of action, or where the title of the court has been erroneously given through inadvertence

or mistake, or an error has been made in naming the party or parties plaintiff. The prayer may be amended to conform to the proofs at the trial. Why may not it be amended or supplied to conform to the cause of action stated in the complaint? We are of the opinion that the complaint as it originally stood, accompanied as it was by the affidavit required by the statute, was sufficient as a basis for the writ, although in its then form, no answer having been filed, a judgment could not legally have been entered in the case. Furthermore, we think the court was authorized to grant the motion to amend the complaint, before it had ruled upon defendant's motions, by allowing a prayer for relief consonant with the cause of action set forth in the complaint. The amended complaint supersedes the original complaint (Bray v. Lowery, 163 Cal. 256, 124 Pac. 1004); and it has been held that, where no new cause of action is attempted to be stated, the amendment, though made after the expiration of the period of limitation for the action, relates back to the time of the commencement (Ruiz v. Santa Barbara Gas, etc., Co., 164 Cal. 188, 128 Pac. 330).

The controlling questions in the case seem to be disposed of by the foregoing considerations.

The order is affirmed.

We concur: HART, J. BURNETT, J.

(37 Cal. App. 174)

ANDERSON v. NEAL INSTITUTES CO. et al. (Civ. 2395.)

(District Court of Appeal, First District, California. May 8, 1918.)

1. SPECIFIC PERFORMANCE 🔑12 — RIGHT TO REMEDY.
When the enforcement of a contract by decree of court is difficult or practically impossible, specific performance will not be granted.

2. SPECIFIC PERFORMANCE 🔑12 — RIGHT TO REMEDY.
Contract requiring defendant to prepare and furnish medicines and advertising literature and give plaintiff the exclusive right to use the remedies could not be specifically enforced.

3. INJUNCTION 🔑59(1)—RIGHT TO REMEDY—BREACH OF CONTRACT.
Under Code Civ. Proc. § 526, prohibiting injunction to prevent breach of a contract, the performance of which could not be specifically enforced, a contract containing affirmative and negative covenants impossible of enforcement by court will not support suit for injunction to restrain breach.

4. INJUNCTION 🔑114(3)—RIGHT TO REMEDY—ASSIGNEES.
Where contract with principal defendant would not support suit for injunction to restrain its breach, the suit was not maintainable against assignees of the principal defendant.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Suit by E. L. Anderson against the Neal Institutes Company, a corporation, and others. From a judgment sustaining demurrer to amended and supplemental complaint without leave to amend, plaintiff appeals. Affirmed.

W. P. Johnson, of Red Bluff, and James D. Thurman, of San Francisco, for appellant. David A. Nelson, of San Francisco, for respondents.

KERRIGAN, J. This is an appeal by plaintiff from a judgment entered in favor of defendants upon an order sustaining a general demurrer to plaintiff's amended and supplemental complaint without leave to amend.

The facts as alleged in the complaint, stripped of legal verbiage, are substantially as follows: The defendant Neal Institutes Company has been for several years continuously engaged in the business of preparing and distributing certain medical remedies, known as the Neal remedies, for the treatment of patients addicted to the excessive use of alcoholic liquors and pernicious drugs; and it maintains, either directly or through persons acting by its license and permission, institutes in various cities of the United States for the purpose of treating patients according to its system of treatment and by the use of its remedies. By a written contract, made in March, 1910, between the plaintiff and the Neal Institutes Company, the latter granted to plaintiff for a term of 99 years the exclusive right to advertise and use the Neal remedies and the Neal method of treatment in the northern half of the state of California, and to use the name "Neal" in connection with such institutes as might be established by plaintiff in his territory. The company further agreed to supply to plaintiff on his order such of the company's medicines and advertising literature as he might require. Pursuant to the contract the plaintiff, in May, 1910, established an institute in San Francisco at number 1409 Sutter street under the name of the Neal Institute, sometimes followed in advertisements by the descriptive term "of San Francisco." This institute has been continuously maintained by plaintiff and plaintiff's patients there treated with the Neal remedies supplied by the Neal Institutes Company, and by extensive advertising and by the personal care and attention of plaintiff throughout a period of about 5½ years prior to the commencement of the action plaintiff built up a valuable business for his institute, and it acquired a highly valuable good will. In the month of November, 1913, the Neal Institutes Company, acting in confederation with the other defendants, established, and has since continuously maintained, a rival institute in San Francisco at number 1550 Fell street under the name of the Neal Institute of San Francisco. Since this last-named institute was established the Neal Institutes Company has refused to furnish any of its remedies to the plaintiff, but has been furnishing them to the rival institute, and the defendants have there treated patients according to the Neal system and by use of the Neal remedies.

It is charged by plaintiff that the defendants have so acted as to appropriate to themselves the benefit of plaintiff's personal work and of the advertising done by him, and have diverted to their institute business and patronage rightfully belonging to plaintiff, and have thereby seriously prejudiced plaintiff's business and impaired the good will attached to his institute. By reason of the injury, stated in the complaint to be irreparable, caused to plaintiff and his business through the acts of the defendants, plaintiff instituted this action on November 20, 1915, praying for a prohibitory injunction and an accounting. Subsequently, and on March 28, 1916, an amended and supplemental complaint was filed by leave of court, to which the defendants jointly interposed a demurrer. After a hearing had upon the demurrer the trial court held that an injunction could not properly be granted; and, the demurrer being sustained without leave to amend, judgment was entered in favor of the defendants.

The question to be determined on this appeal, therefore, is whether the amended and supplemental complaint states a cause of action, and, if so, whether the plaintiff is entitled to a prohibitory injunction.

The contract which is the basis of the action contains affirmative and implied negative covenants; and it appearing from the nature of the contract that specific performance could not be decreed, it was the view of the trial judge that an injunction to prevent a breach of the contract would not lie. We think this view is correct.

[1, 2] When the enforcement of a contract by decree of court is difficult or practically impossible, specific performance will not be granted.

> "It is elementary," says Pomeroy in his work on Equity Jurisprudence, § 1405, "that the contract must be such that the court is able to make an effective decree for its specific performance, and is able to enforce its own decree when made."

The contract here would require the defendant Neal Institutes Company to prepare the remedies used in the treatment of patients at the institutes which might be established by plaintiff, and this service is of such a character that courts could not make an effective decree for its performance. The impossibility of compelling performance in a case of this kind is well illustrated by the case of Barnes v. McAllister, 18 How. Prac. (N. Y.) 534. Plaintiff concedes this principle of law, and accordingly does not ask for a mandatory injunction directing said defendant to supply its remedies to plaintiff; but he does ask for a prohibitory injunction restraining the Neal Institutes Company from supplying its codefendants with said remedies in violation of its contract with plaintiff.

Where, as here, a contract contains both affirmative and negative stipulations, the authorities are in irreconcilable conflict upon the question whether equity will interfere to prevent a breach of the negative covenant when the affirmative covenant is of such a nature, that it cannot be specifically enforced by a judicial decree. 2 High on Injunctions, § 1164. For example, according to one line of authorities, where an opera singer or actor has contracted to sing or play for plaintiff at his theater, and not elsewhere without his permission, defendant may be enjoined from singing or acting elsewhere; the court thus preventing a breach of a negative covenant, although it cannot specifically enforce the affirmative agreement by compelling defendant to sing or act for plaintiff. Lumley v. Wagner, 1 De Gex M. & G. 604; Daly v. Smith, 49 How. Prac. (N. Y.) 150; McCaull v. Braham (C. C.) 16 Fed. 37. So, where defendant had agreed to make printing presses for the plaintiff, and to sell to plaintiff its entire output, and had expressly covenanted not to make them for any other person, an injunction was granted to restrain a violation of the negative stipulation, although the affirmative agreement was not capable of being specifically enforced against the defendant. Myers v. Steel Machine Co., 67 N. J. Eq. 300, 57 Atl. 1080.

Another line of cases holds to the contrary. In Welty v. Jacobs et al., 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98, it was held that an injunction against the proprietor of a theater will not be granted to prevent the breach of a contract to furnish the theater and its equipment to the manager of a company for a certain period, and to prevent him from furnishing the theater to a rival company during that period, since it was impossible to compel the plaintiff to carry out his contract according to its terms. So, when an actor agreed in writing with a manager not to perform at any other theater for a term of ten years, and broke his agreement, it was held that since the court could not enforce the positive part of the contract, it would not restrain by injunction a breach of the negative part. Hamblin v. Dinneford et al., 2 Edw. Ch. (N. Y.) 529. In those cases it was said that in effect to enjoin one from doing something in violation of his contract is an indirect mode of enforcing the affirmative provisions of such contract, that it amounts to a negative specific performance of the contract, and that courts of equity will not do indirectly what they cannot do directly.

[3] It thus appears, as before stated, that there is a conflict in the decisions as to whether under the circumstances of a case like this the plaintiff would be entitled to an injunction to restrain the violation of a negative covenant of his contract with the defendant; but in this state the question was put at rest at the time of the adoption of the Civil Code by the terms of subdivision 5 of section 3423

(since incorporated in the Code of Civil Procedure [section 526]), which provides:

> "An injunction cannot be granted: * * * Fifth. To prevent the breach of a contract the performance of which would not be specifically enforced."

The same policy was pursued by the Legislature in adopting subdivision 1 of that section, the subject-matter dealt with in which, like the one under consideration, had given rise to conflicting decisions by the courts. That such was the policy of the Legislature has been declared with reference to subdivision 1 of section 3423. Spreckels v. Hawaiian Com., etc., Co., 117 Cal. 377, 379, 49 Pac. 353.

Section 3274 of the Civil Code, which, with section 3423, constitutes a part of the Code entitled "Relief in General," reads:

> "Specific and preventive relief may be given in no other cases than those specified in this part of the Civil Code."

Subdivision 5 of section 3423 is free from ambiguity or uncertainty. It clearly declares as the law in this state the rule laid down in one of two opposing lines of authority. If there could be a doubt as to the intention of the Legislature in this regard, it is removed by an examination of the notes to section 1912 of Field's Proposed Draft of the Civil Code of New York, which section was practically adopted in this state, and by an examination of the notes to subdivision 5, § 3423, Civil Code Annotated, 1874, where the following authorities, cited as the foundation of that provision, declare that the court will not interfere by injunction to prevent the violation of an agreement of which, from the nature of the subject, there could be no decree of specific performance. Newberry v. James, 2 Meriv. 446; Williams v. Williams, 3 Meriv. 160; Hamblin v. Dinneford, 2 Edw. Ch. (N. Y.) 529; Sanquirico v. Benedetti, 1 Barb. (N. Y.) 315. References in the case of Peterson v. McDonald, 13 Cal. App. 644, 110 Pac. 465, and of Farnum v. Clarke, 148 Cal. 615, 84 Pac. 166, tend to support the view here taken.

California cases cited by plaintiff to sustain his position that an injunction will issue to restrain the violation of a negative covenant are not in point, being either an exception to the rule, or based on contracts negative in form, requiring a person to refrain from doing a certain thing, and having no affirmative covenants calling for specific performance. 22 Cyc. 845; 2 High on Injunctions, §§ 1134 and 1166.

[4] From the allegations of the complaint in the case at bar it appears that plaintiff's rights spring from and grow out of a contract containing affirmative and negative stipulations, and therefore the question as to whether or not he is entitled to injunctive relief is governed by the law as declared in subdivision 5 of section 3423 of the Civil Code. It thus appearing that the demurrer is well grounded with respect to the Neal Institutes Company, it follows that it is also well grounded as to the other defendants, who stand in the shoes of the company with regard to certain territory described in the contract. They were in effect the assignees of that company so far as the contract here involved is concerned, and therefore stand in the same relation to the plaintiff as their assignor.

The judgment is affirmed.

We concur: BEASLY, Judge pro tem.; ZOOK, Judge pro tem.

(36 Cal. App. 791)

SAN JOAQUIN VALLEY BANK v. GATE CITY OIL CO. et al. (Civ. 1838.)

(District Court of Appeal, Third District, California. April 16, 1918.)

1. PRINCIPAL AND SURETY ⚷200(7) — CONTRIBUTION — PAYMENT OF JUDGMENT BY SURETY—EVIDENCE.

In a proceeding under Code Civ. Proc. § 709, by defendant surety on a note to compel contribution from his cosureties after judgment, evidence *held* to justify conclusion that defendant had not paid the judgment with his own money, and was not entitled to contribution.

2. PRINCIPAL AND SURETY ⚷200(7) — CONTRIBUTION—AFFIDAVITS.

In view of Code Civ. Proc. § 2009, as to use of affidavits, it was not error, on motion for contribution by defendant surety under section 709, to admit, over movant's objection, affidavits introduced by other defendants to meet the motion; the motion itself being based upon movant's affidavit.

3. PRINCIPAL AND SURETY ⚷194(6½)—CONTRIBUTION BETWEEN COSURETIES.

Code Civ. Proc. § 709, as to enforcement of contribution by a surety who pays the judgment, merely fixes a rule of procedure, and not a maxim of law, entitling a surety, who in fact does not pay a judgment, to contribution.

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by the San Joaquin Valley Bank against the Gate City Oil Company and others. After judgment for plaintiff, defendant J. F. Lynch made motion for contribution. Motion denied, and he appeals. Affirmed.

Gross & Lynch, Geo. F. McNoble, and A. H. Carpenter, all of Stockton, for appellant. Nutter & Orr, O. B. Parkinson, and Philip C. Bordman, all of Stockton, for respondent.

CHIPMAN, P. J. This appeal is taken from an order made after judgment denying the appellant's motion for contribution under section 709 of the Code of Civil Procedure. The original action was brought upon a promissory note executed by defendant corporation to plaintiff and which, as was found by the court at the trial, was signed by defendant corporation as principal and by defendants Smith, Lynch, and Giottonini, as sureties. Plaintiff had judgment in the action, and on appeal to the Supreme Court the judgment was affirmed on May 27, 1915. 170 Cal. 250, 149 Pac. 557.

It was also found by the trial court that, as between the defendants, the said sureties, they executed the note under an agreement between themselves and defendant Gate City Oil Company, that they were merely sureties or accommodation makers, and that said Gate City Oil Company was the principal debtor, and should pay the amount to become due on said note, and they should have no liability chargeable against them, but that plaintiff was not affected by such agreement. The defendant, Gate City Oil Company, received the entire amount of said note for its use and benefit. The defendant Gate City Oil Company and defendant Lynch, appellant herein, took an appeal from said judgment to the Supreme Court, rendered in favor of the San Joaquin Valley Bank, but defendants Smith and Giottonini did not appeal. In that appeal, said defendants the oil company and Lynch gave an undertaking in the usual form to stay the enforcement of the judgment appealed from conditioned for the payment of the judgment by appellants if affirmed, and, if payment was not made by appellants as provided therein, that judgment might be entered against the sureties on said bond. The sureties on this undertaking were C. L. Flack, who was at all times during the litigation one of the principal owners of the defendant Gate City Oil Company and Robert McFadden. Defendant and appellant Lynch during all of said times held a contract signed by the said Flack and one W. R. Jacobs, who was also a principal owner in the Gate City Oil Company, indemnifying him against liability on the note sued upon. On the going down of the remittitur from the Supreme Court, an abstract of the judgment was filed in the recorder's office of Kern county, where the Gate City Oil Company held and owned certain property. After the affirmance of the judgment in said action, and about the time the remittitur went down and the abstract of the judgment was recorded in Kern county, said Jacobs and said Flack, as the officers and managing agents of the Gate City Oil Company, entered into an agreement with the Northern Oil Company, by which the Gate City Oil Company was to sell certain of its leasehold interests in Kern county to the said Northern Oil Company. But the Northern Oil Company, learning of the filing of the abstract of the judgment in the recorder's office of Kern county, declined to complete the purchase until the judgment had been satisfied and the property released from the lien. The defendant J. F. Lynch claims to have paid the full amount of the judgment, to wit: the sum of $8,145.22, and upon that claim he instituted these proceedings to compel contribution from the other defendants, Smith and Giottonini. Within ten days after the date on which he claims to have paid the whole of said judgment, Lynch filed with the clerk of the court where said judgment was rendered a notice of such payment by him and his claim to contribution from the other defendants, the said Smith and Giottonini, and gave the notice required by said section of the Code. The matter was heard upon the motion of said Lynch made upon affidavits and upon evidence submitted by said defendants Smith and Giottonini, and oral testimony submitted at the hearing. The said Smith and Giottonini made no claim that they had paid the said judgment or any part thereof. The matter was submitted to the court for decision, which is found in the record, and is as follows:

> "The motion of defendant J. F. Lynch for an order that an execution herein be issued in favor of said defendant J. F. Lynch and against the defendant Gate City Oil Company, a corporation, J. Jerome Smith, and F. F. Giottonini, upon the ground that the said defendant J. F. Lynch has paid more than his due proportion of the judgment. Certain affidavits and evidence were introduced in support and against said motion, and, the defendant J. F. Lynch having filed herein objections to certain evidence introduced against said motion, and defendant J. F. Lynch having also filed a motion to strike out certain affidavits introduced herein in opposition to said motion, and said motion and objection having been heretofore argued by respective counsel and submitted to the court for consideration and decision, and after due deliberation thereon the court this day rendered its decision as follows, to wit: That said objections to certain evidence be overruled, that petitioner's motion to strike out be denied, and that petitioner's motion to order execution issue herein be, and the same hereby, is, denied, to which ruling Geo. F. McNoble, Esq., attorney for petitioner, duly excepts. Dated: January 31st, 1916."

The appeal is from said order or decision, and the appellant assigns the following particulars as to which he claims there is no evidence to support the order or decision: (1) That there is no evidence to justify the implied finding that defendant Lynch did not pay the full amount of the judgment in the case of the said San Joaquin Valley Bank v. Gate City Oil Company; (2) there is no evidence to justify the finding that defendant Lynch is not entitled to contribution for such payment of said judgment from defendants Smith and Giottonini; (3) there is no evidence to sustain the finding that the Gate City Oil Company paid the aforesaid judgment or any part or portion thereof; (4) there is no evidence to sustain the finding that said Lynch has not paid more than his due proportion of the aforesaid judgment.

It is claimed by respondents that the transaction by which payment of the judgment against the Gate City Oil Company was accomplished was substantially as follows, as set forth in respondent's brief:

> That Flack, Jacobs, and Lynch "devised a plan for the payment, under which they could hold the respondents, J. Jerome Smith and F. F. Giottonini, to contribution thereunder, save themselves from liability, and at the same time release the property of the Gate City Oil Company, the principal debtor, from the effect of the judgment, to the end that it might be sold to

the Northern Oil Company, thus retaining the proceeds of such sale within their own control and for their own use, and defeating recourse by the defendants J. Jerome Smith and F. F. Giottonini against the property of the Gate City Oil Company, which had been practically sequestered to the payment of the judgment. As a part of this plan C. L. Flack, vice president of the defendant and principal debtor, Gate City Oil Company, and its surety on the appeal bond, deposited money borrowed on Mr. Flack's personal credit with the Anglo & London-Paris National Bank in San Francisco, and by understanding with Mr. Lynch arranged to have it paid on the judgment, so that it would appear to be the money of the appellant Lynch, at the same time taking back an agreement from Lynch to pay to Flack all money he could recover by way of contribution from the defendants J. Jerome Smith and F. F. Giottonini. The judgment was then fully satisfied of record, and the sale of the Gate City Oil Company's property was consummated to the Northern Oil Company, and the proceeds of the sale ($4,000 in form of a check and the remainder in notes) turned over to Mr. Flack as vice president of the Gate City Oil Company. Mr. Flack personally received back the surplus money over what had been deposited by him for payment of the judgment, in amount $104.78."

Appellant relies upon the form of the entry on the judgment book in satisfaction of the judgment of the San Joaquin Valley Bank, which is as follows:

"The within judgment is hereby fully paid, satisfied, and discharged this 8th day of July, 1915, by the payment of the sum of $8,145.22 same being the money of J. F. Lynch"

—and also upon the testimony of Flack and the testimony given by appellant himself.

Mr. Flack was a resident of Los Angeles, and in the early part of July, 1915, he met the defendant Lynch in San Francisco at the Anglo & London-Paris National Bank. The witness was asked the following question:

"Q. What, if anything, did you have to do with providing the money for the payment or satisfaction of this judgment as indicated there? A. Well, I gave Mr. Lynch a certificate or cashier's check, I forget which now, for $8,000. I handed him a check payable to the California-Anglo Bank for $250, and he handed those to the California Bank. I was standing there when he did it. He passed them through the window to the bank. Q. Was that your money by which that judgment was discharged? A. No, sir; I had turned it over to Mr. Lynch, and he turned it into the bank. Q. Was that the money of the Gate City Oil Company? A. No, sir; no part of it. * * * Q. State what, if any, transaction took place between you and J. F. Lynch on or about the 8th day of July, 1915, with respect to any money transaction whereby he had received any money from you, or you had received any money from him, the 6th of July. A. I let Mr. Lynch have— Q. (interrupting) I wish you would tell just what took place between you and Mr. Lynch. A. I met Mr. Lynch in San Francisco. I met him at the Anglo-California Bank. I gave to Mr. Lynch at that time— Q. (interrupting). Mr. Flack, the court has sustained the objections to 'gave.' A. I handed to Mr. Lynch at that time a cashier's check, my recollection is for $8,000, with the understanding—with the agreement— Q. (interrupting). I do not care about the understanding. State what took place between you. A. Mr. Lynch gave me an agreement to repay the money; I handed him a check for $250. We stepped up to the window of the Anglo-California Bank, and he laid the check and the cashier's check down and asked for a receipt for that money. I think he has got the receipt now; and then we talked there with him a little while and went away. Mr. Lynch has got a copy of our agreement and the receipt that the bank gave him."

The agreement was then offered and received in evidence, and is as follows:

"In the Superior Court of the State of California, in and for the County of San Joaquin. The San Joaquin Valley Bank, a Corporation, Plaintiff, v. Gate City Oil Company, a Corporation, et al., Defendants. No. 10002. This is to certify and I do hereby certify, that C. L. Flack has this day advanced to me and deposited in bank for my use and benefit the sum of eight thousand one hundred and fifty (8,150.00) dollars, with which I desire to pay and will pay the judgment in the above entitled action to protect my own property from execution and in order to secure the said C. L. Flack in the repayment of said money to him by me I have this day assigned to said Flack all the right, title and interest that I now have or may hereafter have or acquire in and to all money and things of value that I may recover or collect or that may be paid by or collected from the Gate City Oil Company, J. Jerome Smith and F. F. Giottonini, or any of them as a contribution or payment to me by them, or any of them, or their respective proportions or shares of the judgment in the above-entitled action, under the law of contribution, by reason of the payment of said judgment by me, one of the cojudgment debtors in said action.

"[Signed] J. F. Lynch."

"Q. That is the agreement to which you referred in your testimony? A. That is the agreement. I am familiar with Mr. J. F. Lynch's signature, and that is his signature. I saw him sign it. He has not paid me back any portion of the moneys specified in that agreement; and no one else has paid it to me."

On cross-examination:

"Q. You were tending to a sale of the Gate City Oil Company's interest to the Northern Oil Company? A. That was what I was negotiating. The cashier's check that I have referred to was issued by the Bank of Riverbank. I was not an officer of that bank at any time. Q. When did you obtain that cashier's check from the bank at Riverbank? A. I think it was two or three days before that; I could not tell you exactly. Q. Did the Northern Oil Company, before it would close the trade for the purchase of the Gate City, require this judgment to be paid off? A. Yes; they would not take the property with any lien on it of any kind. Q. Didn't you get that cashier's check from the bank at Riverbank for the purpose of using it in satisfying this judgment? A. I did not get all the money— Q. (interrupting). Will you answer my question? A. For the purpose of paying that off? I got that check for the purpose of giving that money to Mr. Lynch, or letting him have it so he could pay it off. Q. Obtain it for the purpose of paying the judgment of the Gate City Oil Company? A. What I am telling you, for the purpose of lending it to Mr. Lynch so he could go and pay it over. Q. Did you intend that the $8,000 evidenced by the cashier's check should be used in satisfying the bank's judgment against the Gate City Oil Company? A. Yes, sir; I did. Q. That was your intention and purpose when you withdrew that money from the bank at Riverbank, was it not? Q. Yes, sir. * * * Q. Whose money was that money in the Bank of Riverbank, when you obtained the cashier's certificate? A. It was mine. Q. Whose money was it that you drew a $250 check for? A. That was mine. Q. In a Los Angeles bank? That was your money? A. That was mine. Q. And it was the check of yours you had drawn upon the bank of Los Angeles for $250, and the $8,000 cashier's check of the Bank of Riverbank, that you had with you at the Anglo-Bank in San Francisco? A. Yes, sir. * * * Q. At that time you were interested, as manager of the Gate City Oil Company, in selling its properties to the Northern Oil Company, were you not? A. I was not manager, but I was interested in selling it; I was vice president. Q. You were there for the purpose of doing whatever the Northern Oil Company required, so that you could close the trade in selling the Gate City Oil Company property? A. That is what I was there for, to clean up the title. I was vice president of the Gate City Oil Company that was defendant in the San Joaquin Valley Bank suit; I was a bondsman on the appeal in that case, and had not been released therefrom at the time I met Mr. Lynch in San Francisco. Q. The only security that Mr. Lynch gave you for this $8,150 is represented in this agreement that has been offered and received in evidence? A. That is all. Q. In other words, you were to let him have the money, he was to pay it, and then he was to call upon these other people for contribution, and whatever he received upon contribution he was to pay back to you? A. Yes, sir. * * * Q. In other words, you used this money you speak of for the purpose of getting some money back out of J. Jerome Smith and F. F. Giottonini? A. Yes, sir. Q. While if you paid it as the Gate City Oil Company's money, then, as between you, you could not get any of it back, is that not so? A. No; that is not properly so; I am not in the habit of loaning $8,000 upon such security. Q. Didn't you just simply transfer this money into Mr. Lynch's name so you might come back in and obtain from Giottonini and Smith some portion of that money? A. My idea was to get the money; I just made the deal with Mr. Lynch so Mr. Lynch could pay the judgment, and then Mr. Lynch, when he recovered back, was to pay me back the amount of money that he got; and, if I say so, he will have to pay it all back. Q. In other words, you are using Mr. Lynch as a convenience to get back some of the money from Smith and Giottonini? * * * A. I did not put it that way, as 'a convenience.' Q. Well, you expected, by operating through Mr. Lynch in the way you have testified, that you stood a chance to get back some of the money from Smith and Giottonini? A. Yes; I thought I would get it back."

He testified further that upon delivery of his checks to the Anglo Bank, the Northern Oil Company paid him $4,000, which was the first installment to be paid upon the transfer of the property, and he deposited that money to his credit in the Bank of Riverbank, and that the Northern Oil Company also delivered the notes and other securities making up the balance of the purchase price.

Defendant J. F. Lynch testified that he met Mr. Flack in San Francisco on the 6th of July, 1915, and, being asked what occurred at the time between them, answered:

"Well, I had explained to Mr. Flack in Stockton before, in reference to this judgment, and I told him that I was a little afraid about this judgment, that the execution might issue and be levied upon my property, and that he had agreed to help me out in the matter, and I expected him to do so, and he said he would see about it."

He testified he received checks from Mr. Flack to the amount of $8,250 on the 6th of July, and that he deposited it in the bank at San Francisco.

"Q. What was afterwards done with it? A. It was sent to the bank here in Stockton to pay this San Joaquin Valley Bank judgment. I am the applicant for contribution here. I was present when this memorandum was made on the judgment book H of the superior court of this county. The money was paid over at that time and place as there indicated, and it was my money; I borrowed it from Mr. Flack; I have not paid him back; I still owe him the money."

W. F. Duffy, cashier of the Anglo & London-Paris National Bank, made affidavit:

"That on or about the 6th day of July, 1915, one C. L. Flack, accompanied by one J. F. Lynch, and two gentlemen representing the Northern Oil Company, came to said Anglo & London-Paris National Bank, and said Flack then and there delivered to affiant a cashier's check on the First National Bank of Riverbank, in the sum of $8,000, and a check of C. L. Flack drawn on the First National Bank of Los Angeles, in the sum of $250, and instructed affiant that said check be forwarded by said Anglo & London-Paris National Bank to the Stockton Savings & Loan Society, at Stockton, Cal., to be by said Stockton Savings & Loan Society utilized to whatever extent might be necessary to satisfy the judgment, interest, and costs, laying in judgment, rendered in favor of the San Joaquin Valley Bank against the Gate City Oil Company, the proceeds, if any, remaining after the satisfaction of such judgment, interest, and costs, to be returned to said Anglo & London-Paris National Bank and held subject to the order of said C. L. Flack; that said C. L. Flack, or said J. F. Lynch, stated to affiant at said time and place that he wanted it to be understood that the aforesaid sum of $8,250 was being paid by said J. F. Lynch; that immediately after handing affiant the aforesaid checks, said C. L. Flack deposited with said Anglo & London-Paris National Bank, to the credit of the aforesaid First National Bank of Riverbank, a voucher check drawn by Northern Oil Company, in favor of Gate City Oil Company, in the amount of $4,000."

Thomas E. Connolly, cashier of the Stockton Savings & Loan Society, made affidavit that on the 7th day of July, 1915, he had a conversation by telephone with the Anglo & London-Paris National Bank with reference to the payment of the judgment in question, in which he was informed by the latter bank that a deposit of $8,250 had been made with the latter bank to be used in satisfying said judgment, and on the same day he received a letter from that bank dated July 6th, informing his bank of the deposit and the purpose for which it was made, and stating, among other things:

"Mr. J. F. Lynch, as one of the interested parties, states that he will call on you to-morrow morning, and desires to co-operate with you in the satisfaction of this judgment. Mr. Lynch, however, is without authority in the matter, and we would request that prompt action be taken in accordance with the terms of this letter. It is his desire that when payment is made it shall be specifically stated in the records that it is he, personally, who is satisfying the judgment, his object being to lay the foundation for a claim against his codefendants for their proportion of the judgment. If it can be handled in this way, it will be an act of courtesy to Mr. Lynch, but the judgment should be satisfied even if his wishes in this respect cannot be met."

The letter closes with a request that report be made of the satisfaction of the judgment, etc.

R. B. Teefy, cashier of the San Joaquin Valley Bank, plaintiff in the action, made affidavit:

> That Thomas E. Connolly, cashier of Stockton Savings & Loan Society, on July 8, 1915, "handed witness, as cashier of plaintiff company, a certificate of deposit for the sum of $8,145.22, drawn in favor of the said San Joaquin Valley Bank as and for the payment in full of the judgment heretofore rendered in favor of the San Joaquin Valley Bank and as against said defendants in the action entitled as above. That said deponent on behalf of the said San Joaquin Valley Bank thereupon accepted said certificate of deposit in full payment and satisfaction of said judgment, and entered upon the records in said clerk's office the following statement, to wit: 'The within judgment is hereby fully paid, satisfied, and discharged this 8th day of July, 1915, by the payment of the sum of $8,145.22 same being the money of J. F. Lynch. [Signed] The San Joaquin Valley Bank, by R. B. Teefy, Cashier.'"

He further deposed:

> "That deponent did not at said time know, and does not now know, who furnished the money for the payment of said judgment as evidenced by said certificate of deposit, but that one J. F. Lynch was present at the time of said payment and said delivery of said certificate of deposit by said Thomas E. Connolly to deponent, and then and there requested deponent to make the written statement, 'same being money of J. F. Lynch.' That deponent was advised by counsel that such writing could work no injury to said the San Joaquin Valley Bank, and as a matter of closing the transaction, deponent wrote said statement 'same being money of J. F. Lynch.'"

A copy of the certificate of deposit referred to showed that the money was deposited by the Stockton Savings & Loan Society.

[1] It is unnecessary to go further into the evidence, of which there was, together with the facts above appearing, sufficient to show that the claim made by respondents, quoted above from their brief, is clearly established, and that the court was fully justified in making its findings, and that the order appealed from is abundantly supported. It seems to us that what took place between Flack and Lynch in the Anglo & London-Paris National Bank, at the time Flack's certified check on the Bank of Riverbank for $8,000 and his check on a Los Angeles bank for $250 were passed over the counter of said Anglo Bank, was mere camouflage, which failed to conceal the true nature of the transaction.

[2] Appellant urges the point that it was error for the court to admit, over appellant's objection, the various affidavits introduced by respondents to meet the motion which was itself based upon Lynch's affidavit. There is no merit in this contention. Code Civ. Proc. § 2009; California M. & S. Bank v. Graves, 129 Cal. 649, 62 Pac. 259; Guardianship of Van Loan, 142 Cal. 423, 76 Pac. 37.

The entry on the margin of the judgment book referring to the payment of the judgment, to wit, "same being the money of J. F. Lynch," was the statement of an immaterial fact, was unknown to be the fact by the cashier of the bank who made it, and was made to carry out the plan concocted in the Anglo & London-Paris National Bank. It was not conclusive on anybody, and was in violation of the actual facts. Appellant's right to contribution under section 709, Code of Civil Procedure, depended entirely upon his paying the judgment, and as he did not pay it, he failed to establish any right to contribution.

[3] There is no question as to the scope of section 709 of the Code of Civil Procedure, for it has been held by this court that a rule of procedure, and not a maxim of substantive law, is announced by that statute. It simply provides a convenient method of enforcing contribution by a judgment debtor who had paid a judgment as against a codefendant or codefendants liable for a proportion of the debt. Dow v. Sunset Tel. & Tel. Co., 162 Cal. 136, 138, 121 Pac. 379.

Respondents advance the point that the principal debtor, the Gate City Oil Company, and J. F. Lynch having appealed from the judgment, and having given an undertaking staying execution of the judgment, the original sureties (respondents here) were thereby released so far as any right to contribution is concerned. This for the reason that:

> "If the rule were otherwise, it would permit the property of the principal debtor to be released and disposed of, and thereby shift payment to other and prior sureties" (citing cases).

We do not find it necessary to pass upon the point. The order of the court finds ample support in the evidence, and it is therefore affirmed.

We concur: HART, J.; BURNETT, J.

(178 Cal. 495)

SILVA et al. v. AZEVEDO et al. (Sac. 2569.)

(Supreme Court of California. July 3, 1918. Rehearing Denied Aug. 2, 1918.)

1. BOUNDARIES 🔑46(1) — PRACTICAL LOCATION—CONCLUSIVENESS.

Where adjoining landowners, after employing surveyor to locate dividing line, construct a substantial fence thereon, and for more than six years regard such fence as the true boundary, improving and cultivating land up to fence, the owners will be deemed to have agreed on fence as true boundary.

2. BOUNDARIES 🔑46(1)—AGREEMENT—VALIDITY.

Adjoining owners cannot, by agreement, establish a boundary they know is not true boundary; such agreement constituting transfer of land which is possible only through conveyance.

3. BOUNDARIES 🔑46(3) — AGREEMENT — EFFECT.

Where a fence has been accepted as true boundary line for a period greater than that fixed by statute of limitations, and during such time adjoining landowners have improved and cultivated land up to fence, the boundary will not be changed upon discovery that fence was not originally built on true dividing line.

Department 1. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Manuel I. Silva and others against Joseph V. Azevedo and another. Judgment for plaintiffs, and defendants appeal. Reversed.

S. Luke Howe and Downey, Pullen & Downey, all of Sacramento, for appellants. Driver & Driver, B. F. Van Dyke, and Frank Tade, all of Sacramento, for respondents.

SLOSS, J. Ejectment to recover a strip of land containing about 6½ acres. Judgment went for plaintiffs, and the defendants appeal. The plaintiffs are the successors in interest of Manuel Silva. The defendants are husband and wife. For purposes of statement and discussion, we may treat the case as if Manuel Silva were the plaintiff, and Joseph V. Azevedo the sole defendant. In 1908, Azevedo purchased a tract of farming land, containing something over 126 acres, in Sacramento. The parcel was quadrilateral, its easterly and westerly lines being parallel, the southerly line meeting these at right angles, and the northerly line running diagonally from northeast to southwest. Roughly speaking, the length of the parcel, from north to south, was about three times its width, from east to west. Prior to the purchase of the tract there had been an understanding that the land was to be divided equally between Silva and Azevedo. Accordingly, Azevedo conveyed to Silva the east half of his holding, the land granted being described in the deed by metes and bounds. A fence was built, dividing the entire tract into two parcels, and each proceeded to occupy, improve, and farm the land on his side of the fence. After some six years, Silva discovered that the fence had been placed about 70 feet too far east, and that a part of the land described in his deed, comprising the strip in controversy, was in Azevedo's possession. The present action resulted.

Azevedo's defense was based, principally, upon the claim that the fence line had been agreed upon as the boundary between the two parcels, and that such agreement was binding upon the parties. The rule invoked is a familiar one. An early case applying it, and one that has frequently been cited in this court, is Sneed v. Osborn, 25 Cal. 619. The scope and effect of the doctrine are thus defined in Young v. Blakeman, 153 Cal. 477, 95 Pac. 888:

> "When such [adjoining] owners, being uncertain of the true position of the boundary so [in their deeds] described, agree upon its true location, mark it upon the ground, or build up to it, occupy on each side up to the place thus fixed and acquiesce in such location for a period equal to the statute of limitations, or under such circumstances that substantial loss would be caused by a change of its position, such line becomes, in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location as it may appear by subsequent measurements."

In the present case, the court found that there was no uncertainty as to the location of the boundary line, and no agreement between the parties that the fence line should be taken to be the true boundary. We think, however, that these findings, if not at variance with the more specific facts found, are without support in the evidence. It is found (and the evidence shows without conflict) that before the execution of the deed from Azevedo to Silva the entire tract theretofore acquired by Azevedo had not been divided, nor had the boundary line between the east and west halves thereof been marked upon the ground; that Azevedo and Silva, acting jointly, engaged a surveyor to survey the tract, to divide the same into east and west halves, to furnish a particular description by metes and bounds of the east half for use in the deed to be executed, and to locate upon the ground, by means of stakes, the division line between the east and west halves. The surveyor made the survey and furnished the description, which was carried into the deed, and correctly described, by metes and bounds, the east half of the tract. He also established a line of stakes upon the ground, but by mistake located these stakes too far to the east, thus throwing the disputed strip into the westerly subdivision of the tract. Neither Silva nor Azevedo knew of said mistake. The two joined in building a substantial fence on the line marked by the stakes, believing such line to be the true line called for by the deed. Azevedo has ever since been in possession of the land lying to the west of the fence, and has made valuable and permanent improvements on the strip in controversy, relying upon "the mutual mistaken belief of all parties" that the fence was located upon the true division line. It appears, further, that one-half of the surveyor's charge was paid by each of the parties, and that each contributed one-half of the money and the labor expended in the building of the fence.

[1] On this state of facts, we think there was no room for any other inference than that the line indicated by the surveyor as the dividing line between the two holdings, and followed by the erection of a fence by the two parties, was agreed on by them as the true boundary. It is argued that the "agreed boundary" rule applies only where there is an uncertainty regarding the position of the boundary, and that in this case there was no such uncertainty, since the true location of the line could always have been determined by a correct measurement. But this condition exists in virtually every case in which the aid of the rule is sought. There is no occasion for asserting that a boundary has been established by agreement, unless the description in the conveyance in reality designates a different boundary. "It is only where the true location is subsequently ascertained that actions of this kind arise." Price v. De Reyes, 161 Cal. 484, 489, 119 Pac. 893. That Silva and Azevedo were, in fact, in doubt as to the place where the dividing line should run is apparent from the circumstances, and from their conduct. To properly locate, on the ground, the boundaries of a tract of somewhat irregular shape and containing 56 acres is a task calling for knowledge and skill of a more or less expert character. That the parties thought they needed the assistance of some one possessing the requisite ability is conclusively shown by their employment of a surveyor to locate and mark the division line between the two halves of the larger tract. The only purpose they could have had in so doing was to fix definitely, by proper measurement and marking, the boundary, which, until it was so ascertained and marked, must have remained uncertain in their minds. When, then, acting upon the information so given them, they joined in the construction of a substantial fence on the line, and proceeded, respectively, to improve and cultivate up to the fence, the only theory upon which their acts can reasonably be explained is that they had agreed upon the fence line as the true location of the west boundary of the land conveyed to Silva. It is true that both were mistaken in believing that the line so fixed was the true line. But this does not prevent the application of the rule. Sneed v. Osborn, supra; Biggins v. Champlin, 59 Cal. 113.

[2, 3] It is true, as has repeatedly been held, that adjoining owners cannot, by their mere agreement, establish a boundary other than the true one, where they know that the line attempted to be fixed is not, in fact, the true boundary. Nathan v. Dierssen, 134 Cal. 282, 66 Pac. 485; Lewis v. Ogram, 149 Cal. 505, 87 Pac. 60, 10 L. R. A. (N. S.) 610, 117 Am. St. Rep. 151; Mann v. Mann, 152 Cal. 23, 91 Pac. 994. In such cases the parties are merely endeavoring to transfer land from one to the other, an object that can be accomplished only by means of a conveyance. No such situation is presented here. Nor is the case parallel to Clapp v. Churchill, 164 Cal. 741, 130 Pac. 1061, where it was held that the doctrine of an agreed boundary line could not apply where one of the coterminous owners believed that a certain line marked the boundary, but there was no evidence of any such belief on the part of the other. In this case it is apparent that both Silva and Azevedo, thinking that the line fixed by the surveyor was the true boundary described in the deed, accepted such line as the division between their holdings, built a fence upon it, and occupied and improved up to the fence. We have here not only a continued acquiescence in the line so fixed, and an occupation in accordance with it for a period beyond that fixed by the statute of limitations, but the erection of substantial and permanent improvements upon the disputed piece by the defendant. It would be a manifest injustice to permit him to be ousted now merely because the plaintiffs have, by a new survey, discovered that their predecessor and the defendant were in error in the original establishment of the line. "If the position of the line always remained to be ascertained by measurement alone, the result would be that it would not be a fixed boundary, but would be subject to change with every new measurement. Such uncertainty and instability in the title to land would be intolerable." Young v. Blakeman, supra.

The judgment is reversed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

(178 Cal. 205)

Ex parte DEUSING. (Cr. 2161-2170.)

(Supreme Court of California. April 26, 1918.)

1. Breach of the Peace ⚷4—Complaint.

Complaint charging that defendant in named city and county of state, on or about given date, before filing of complaint, unlawfully, maliciously, and willfully disturbed peace, and quiet of named person by loud and unusual noise and tumultuous conduct, etc., *held* to state facts constituting public offense under Pen. Code, § 415.

2. Indictment and Information ⚷110(3)—Language of Statute.

It is sufficient to charge the offense of disturbing the peace in the language of the statute, Pen. Code, § 415.

In Bank. Applications for writs of habeas corpus by William C. Deusing, Kurt Wilckie, Mathew Isenberg, Henry Loeffler, Gustave

Lindemann, C. E. Schilling, C. C. Holzel, C. Hoffman, H. E. Frank, and B. L. Shubert. Denied.

Joseph P. Lacey, of Oakland, for petitioners.

PER CURIAM. These are applications for writs of habeas corpus. The petitioner in each case is held under a judgment pronounced upon a conviction in the police court of the city of Oakland of the crime known as disturbing the peace.

The judgment of the police court has been affirmed by the superior court of the county of Alameda. The sole ground of the applications for the writs is that the complaint in the police court wholly failed to state a public offense under the laws of the state of California.

[1, 2] The complaint in each case charged that the defendants did "in the city of Oakland and in the county of Alameda, and state of California, on or about the 24th day of February, A. D. 1918, and prior to the filing of this complaint, unlawfully, maliciously and willfully disturb the peace and quiet of N. B. Myran by loud and unusual noise and by tumultuous and offensive conduct; said and all of the acts of the said defendant in the premises were and are contrary to the statute in such cases made and provided, and against the peace and dignity of the people of the state of California." We are of the opinion that it must be held that such a complaint states facts sufficient to constitute a public offense under section 415 of the Penal Code. To our minds Ex parte Foley, 62 Cal. 508, is in point, and sustains our conclusion that it is sufficient to charge such an offense in the language of the statute.

In each of the above-entitled matters the application for a writ of habeas corpus is denied.

(178 Cal. 435)

WHITNEY v. SHERMAN. (L. A. 4144.)

(Supreme Court of California. June 24, 1918.)

1. QUIETING TITLE 🔑43 — PLEADING — DEFENSES.
In action to quiet title, where plaintiff sets up conveyance as basis for title, defendant cannot show that transaction was fraudulent, where he did not plead fraud.

2. JUDGMENT 🔑780(1)—LIEN.
Judgment is lien upon any interest that judgment debtor has in land at time of entry of judgment.

3. ESCROWS 🔑12—PASSAGE OF TITLE.
Under Civ. Code, § 1057, where deed to land is placed in escrow, no title passes until condition to be performed by grantee is so far performed that grantee is entitled to possession of deed; but where condition is one certain to occur, regardless of any act of the parties, title passes at time of deposit.

4. ESCROWS 🔑8(2)—ABANDONMENT—EFFECT.
Where both parties to deed in escrow abandoned transaction, subsequent delivery of deed by one obtaining equitable title from grantor was not a delivery in pursuance of escrow instructions, and passage of title did not relate back to time of delivery in escrow.

5. JUDGMENT 🔑788(1)—LIEN ON LAND — PRIORITY.
When judgment creditor records judgment in another county, in which there are lands of judgment debtor, he obtains a lien, but no rights as against outstanding unrecorded deeds or latent equitable titles of third persons.

6. EXECUTION 🔑272(1)—PURCHASERS—BONA FIDES.
Purchaser at execution sale on judgment recorded in another county than that in which rendered acquires title to lands sold, which is prior to any unrecorded deed or rights of equitable owners of which he has no actual or constructive notice.

7. DEEDS 🔑194(3) — PRESUMPTIONS — DELIVERY.
Date of recorded deed would at least put subsequent purchasers on inquiry as to time of delivery; presumption being that a deed is delivered on day of its date.

8. EXECUTION 🔑272(2) — CLAIMS BY THIRD PARTIES—PERSONS IN POSSESSION.
Possession of land is constructive notice to purchaser at sale under execution, sufficient to put him on inquiry as to rights of person in possession and those under whom he is claiming.

9. DEEDS 🔑195—PRESUMPTIONS—CONSIDERATION.
A conveyance, not impeached is presumed to have been supported by a sufficient consideration.

10. VENDOR AND PURCHASER 🔑238 — PURCHASER FROM BONA FIDE PURCHASER.
In an action to quiet title, where defendant claimed under a sale under execution, and plaintiff showed conveyance to third person by judgment debtor, prior to judgment, for a sufficient consideration, it was immaterial that there was no consideration paid by plaintiff to judgment debtor's grantee.

Department 1. Appeal from Superior Court San Diego County; W. A. Sloane, Judge.

Action to quiet title by J. H. Whitney against W. H. A. Sherman. Judgment for plaintiff, and defendant appeals. Affirmed.

Stutsman & Stutsman, of Los Angeles, for appellant. C. G. Selleck, of San Diego, for respondent.

SHAW, J. The defendant's appeal is from the judgment. The complaint states a cause of action to quiet the title of plaintiff to a parcel of land in San Diego county against the alleged unfounded claims of the defendant.

Both parties derive title from one G. H. Lewis. It was agreed at the trial that Lewis was the owner of the lots on August 22, 1911. Plaintiff's chain of title from Lewis is as follows: On August 22, 1911, Lewis signed and acknowledged a deed purporting to convey said lot to Roberta E. Hiles. The deed was not then delivered to the grantee, but, together with a contract of the same date by Lewis to sell the lots to Roberta E. Hiles, was deposited in escrow with the Marine National Bank, with written instructions by Lewis to the bank to deliver the deed to Hiles on payment of the full price in accordance with the terms of the contract. The contract provided that the price was $1,300, and that the buyer was to pay the same in monthly installments of $10 each, until the price was fully paid. Up to February 15, 1913, payments were made thereon amounting to $312.30. No more was ever paid. The escrow instructions provided that, if said buyer failed to make the payments as stipulated, all the papers in escrow were to be returned to Lewis. On February 16, 1913, Lewis and Hiles went to the bank and there abandoned the escrow, and all the papers in escrow, except the instructions, were then taken by Lewis and Hiles to the office of Mr. Mossholder, in San Diego, and left with him. The court below found that, prior to the recording of the judgment hereinafter referred to, Lewis sold his interest in the lots to his father-in-law, Slocum, for $1,000, which was paid to him in cash. There was evidence sufficient to support this finding. After the escrow was abandoned, Slocum in some manner transferred his interest in the lots to Whitney. On April 10, 1913, Hiles executed and delivered a deed purporting to convey the lots to plaintiff, Whitney. On April 19, 1913, Whitney executed a contract to sell the lots to Hiles for $1,073.73, payable in monthly installments of $10 each thereafter. Said sum was the estimated amount of principal and interest unpaid on the sale of August 22, 1911, by Lewis to Hiles. The deed of August 22, 1911, from Lewis to Hiles, was delivered to Hiles immediately before the execution of the deed by Hiles to Whitney on April 10, 1913, and it was recorded on April 21, 1913. The evidence shows that the delivery was made by Mr. Whitney, not by Lewis. The defendant's chain of title from Lewis is much simpler. On January 31, 1913, he recovered a judgment against Lewis in the superior court of Los Angeles county for $3,750. A certified copy of this judgment was duly recorded in the office of the county recorder of San Diego county on February 15, 1913, which, it must be noted, was one day prior to the abandonment of the Lewis-Hiles escrow. Execution was issued on this judgment, and pursuant to regular notice the lot was sold thereon to defendant on April 26, 1913, for $500 credited on the judgment. There was no redemption, and a sheriff's deed thereon was duly executed to defendant on April 30, 1914.

[1] The defendant does not claim that he has, by any pleading, set up in defense the charge that the deal whereby the interest of Lewis was sold to Whitney, the escrow deed delivered by Whitney to Hiles, the lots reconveyed by Hiles to Whitney, and the new agreement of sale executed by Whitney to Hiles, was a scheme carried out with the intent to defraud him, and therefore void as against him. The intimations to that effect in his brief must therefore be disregarded.

[2] His principal claim is that his judgment became a lien on the title of Lewis to the land prior to the acquisition of any right or interest in the land by Slocum, Hiles, or Whitney, and hence that his title under the execution sale thereon is paramount to the title of Whitney. The judgment became a lien on whatever title Lewis had in the land on February 15, 1913. The evidence shows that the sale by Lewis to Hiles was abandoned, and in effect canceled, and that the deed whereby it was to be consummated was taken by Lewis on February 16, 1913, and afterward delivered to Hiles. If Lewis held the beneficial interest, as well as the title, when he took the deed from escrow, the judgment would be a lien thereon, and the title of defendant under the sheriff's deed would prevail.

[3] The general rule regarding the passing of title by deeds put in escrow is stated in Civil Code, § 1057, as follows:

> "A grant may be deposited by the grantor with a third person, to be delivered upon performance of a condition, and, on delivery by the depositary it will take effect."

Under this rule no title passes until the condition is so far performed that the grantee is entitled to the possession of the deed. There is an exception to this rule where the condition upon which the deed is to be delivered is one which is certain to occur, regardless of any act of the parties, such, for example, as the death of the grantor. In those cases it has been held that the title to the property passes to the grantee at the time of the deposit of the deed in escrow, subject, however, to a life estate in the property in the grantor. Bury v. Young, 98 Cal. 450, 33 Pac. 338, 35 Am. St. Rep. 186; Husheon v. Kelley, 162 Cal. 660, 124 Pac. 231; Williams v. Kidd, 170 Cal. 637, 151 Pac. 1, Ann. Cas. 1916E, 703. But that exception, as was explained in Bury v. Young, "results unavoidably from the certainty of the event upon which the second delivery is made to depend and from the impossibility under the circumstances that the grantor would ever be able to recall or repossess himself of the deed." To the same effect see Prutsman v. Baker, 30 Wis. 650-652, 11 Am. Rep. 592; Cook v. Brown, 34 N. H. 460. In the present case the condition was not certain of fulfillment, and it depended upon the conduct of the grantee. To such a case the exception does not apply.

[4] The delivery of the deed in escrow became ineffectual for any purpose when the parties abandoned it. The subsequent delivery by Whitney in April after he had become an equitable owner of the interest of Lewis in the lots, was not a delivery in pursuance of the escrow instructions, and it became effective only from the time of such delivery. It passed the title of Lewis as of that date, and not before. It did not relate back to the time of the delivery in escrow.

[5-10] At the time of the recording of the judgment Slocum was the equitable owner of the title to the lots, subject to the rights of

Hiles under the escrow agreement. When the judgment creditor records his judgment in another county, in which there are lands of the judgment debtor, he obtains thereby a lien on the lands but no right in the lands as against outstanding unrecorded deeds or latent equitable titles of third persons. 2 Freeman on Judgments, § 357. If execution issues on such judgment and a sale takes place thereon, the execution purchaser will acquire title to the land, which will be prior to any unrecorded deed or rights of equitable owners of which he has no notice, actual or constructive. But if he has notice thereof he will take subject thereto. Foorman v. Wallace, 75 Cal. 552, 17 Pac. 680; Bank of Ukiah v. Petaluma S. Bank, 100 Cal. 590, 35 Pac. 170; Wilhoit v. Lyons, 98 Cal. 409, 33 Pac. 325. At the time the defendant purchased the land at the execution sale on his judgment, the deed of Lewis to Hiles, dated in August, 1911, was on record. It gave constructive notice of its contents to all subsequent purchasers. The date of that deed would at least put them on inquiry as to the time of delivery, the presumption being that a deed is delivered on the day of its date. Furthermore, Hiles took possession of the lots in August 1911, and remained in actual possession and occupancy from that time until the purchase by Sherman in April, 1913. At the time of the execution sale she was holding under a contract of purchase from Whitney, and her possession inured to the benefit of Whitney and operated to give constructive notice to any purchaser of the lots sufficient to put him on inquiry as to her rights, and those of Whitney, in the land. Morrison v. Wilson, 13 Cal. 500, 73 Am. Dec. 593; Dreyfus v. Hirt, 82 Cal. 625, 23 Pac. 193; Scheerer v. Cuddy, 85 Cal. 272, 24 Pac. 713; Beattie v. Crewdson, 124 Cal. 577, 57 Pac. 463.

There is no evidence tending to show that Sherman was not aware of the rights of the parties under the transfer from Lewis to Slocum at the time he made his purchase on the execution sale. He testified that he had no knowledge thereof at the time his judgment was recorded, but gave no evidence that he had not received actual notice thereof prior to his purchase. Under all these circumstances, the title of Lewis under his sheriff's deed is subject to the superior rights of Whitney. Slocum paid an adequate consideration at the time of his purchase from Lewis; the consideration of the sale from Slocum to Whitney has not been impeached, and is presumed to be sufficient. In any event, Whitney could rely upon the consideration paid by Slocum for the lots, and would be subrogated to his rights, even if he had received the lots as a gift. The delivery of the deed of Lewis to Mrs. Hiles, and her deed to Whitney, vested the title in Whitney, free from all rights of the defendant under the sheriff's deed. For these reasons we are of the opinion that the court below properly decided in favor of the plaintiff.

The judgment is affirmed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

(37 Cal. App. 331)

PEOPLE v. SOLDAVINI. (Cr. 729.)

(District Court of Appeal, First District, California. May 22, 1918.)

1. Criminal Law 🔑396(1)—Evidence Admissible by Reason of Admission of Similar Evidence.

Where defendant did not object to admission of letter to him from deceased containing veiled threats and calling defendant a traitor, reason for unfriendly relations being couched in ambiguous terms, and defendant denied he had ever done anything to deceased as a traitor, it was proper to permit state to show in rebuttal that defendant had made improper advances to wife of deceased, under Code Civ. Proc. § 1854.

2. Criminal Law 🔑1169(1)—Harmless Error—Evidence.

Even if admission of evidence was erroneous, a conviction will not be set aside, where an examination of the entire cause shows that no miscarriage of justice occurred.

Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Frank Soldavini was convicted of manslaughter, and he appeals. Affirmed.

C. V. Riccardi, of Los Angeles, and Jeff L. Maloy, of San Jose, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was charged by information with the murder of one Tacchi, alleged to have been committed on the 26th day of October, 1917, in Marin county. He was tried and convicted of manslaughter, an indeterminate sentence being imposed. From the judgment and from an order denying a new trial defendant appeals.

[1] The only question raised upon the appeal is whether the trial court erred in permitting the wife of the deceased to testify that the defendant had made improper advances to her several months previous to the homicide. During the trial there was introduced in evidence, without objection, a letter written by Tacchi to defendant, which contained veiled threats and in which Tacchi called the defendant "traitor," and from which it was apparent that ill feeling existed between them, the reason for the unfriendly relation being couched in ambiguous terms. The defendant, when asked what there was in the letter which made him feel so badly that he cried, replied, "There was there that I was a defamer and defaming his family and those things." Upon redirect examination the defendant denied that he had ever defamed Tacchi's family, or that he had ever done anything to him as a traitor. To rebut

this testimony it was proper to permit in evidence testimony to the effect that the defendant, several months prior to the homicide, had made improper advances to the wife of the deceased. It was also proper testimony to explain the insinuations contained in the letter as to the reason of the unfriendly relation between the deceased and defendant. Code Civ. Proc. § 1854.

[2] But even if the admission of the evidence in question were erroneous, the judgment should not be set aside, for an examination of the entire cause shows that no miscarriage of justice occurred.

Judgment affirmed.

(37 Cal. App. 261)

WHITE et al. v. WESTERN FISH CO. et al. (Civ. 2288.)

(District Court of Appeal, First District, California. May 16, 1918. Rehearing Denied June 15, 1918.)

1. APPEAL AND ERROR 🔑1011(1)—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

Findings of trial court on conflicting and contradictory evidence will not be disturbed.

2. APPEAL AND ERROR 🔑1013—REVIEW — FINDING OF DAMAGES.

Where testimony as to damages was conflicting, question was for trial court.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Gustin White and George Bogan, copartners, etc., against the Western Fish Company and Antonio Trapani. From judgment for plaintiffs against him, Trapani appeals. Affirmed.

Wm. M. Madden, of San Francisco, for appellant. Harry I. Stafford, of San Francisco, for respondents.

PER CURIAM. The appellant, Antonio Trapani, while driving his automobile at the intersection of Webster and Geary streets in the city of San Francisco one stormy night, collided with a taxicab owned by the plaintiffs. The trial court gave judgment against Trapani for $520.05, and from this judgment he appeals.

[1] The appeal presents nothing but the disputed question of fact whether the collision was due to the negligence of the plaintiff's driver or the defendant Trapani. The evidence, as is usual in such cases, is conflicting and contradictory. The trial court accepted the statements of plaintiff's witnesses. We have examined the record with care, and find no reason to disturb the findings of the trial court.

[2] Complaint is made that the damages awarded were too large, but on this subject also the testimony was conflicting, and it was a question for the trial court to determine.

The judgment is affirmed.

(37 Cal. App. 262)

PEOPLE v. SWENSON. (Cr. 741.)

(District Court of Appeal, First District, California. May 16, 1918. Rehearing Denied by Supreme Court July 15, 1918.)

1. CRIMINAL LAW 🔑1159(4) — REVIEW — FINDINGS OF FACT.

In a prosecution for attempting to commit a lewd act on the person of a child, jury's determination as to the truth or falsity of defendant's explanation of his presence at the place where the crime was charged to have been committed will not be disturbed on appeal.

2. CRIMINAL LAW 🔑829(1) — INSTRUCTIONS —INSTRUCTIONS COVERED.

In a prosecution for attempting to commit a lewd act, refusal to give stock instructions requested by defendant was not error, where such instructions were in effect given in different language.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Andrew Swenson was convicted of attempting to commit a lewd act, and he appeals. Affirmed.

Thomas P. Wickes and Karl F. Kennedy, both of San Francisco, for appellant. U. S. Webb, Atty. Gen., for the People.

PER CURIAM. The defendant was accused of committing a lewd act, as denounced in section 288 of the Penal Code, upon the person of a child 3½ years of age. He was convicted of an attempt to commit this crime. He was found in a basement with the child. Her clothes were down. She had a nickel, which she said he gave her. He contradicted this statement. He ran when discovered emerging from the basement, but was pursued and arrested.

[1] Various plausible explanations of his situation and conduct are offered by his counsel, upon which we are asked to say that the verdict is not sustained by the evidence. All these explanations were by the record presented to the jury. We cannot, nor have we any disposition to, usurp their functions in determining the truth or falsity of these explanations. It is also contended that the evidence failed to show an attempt to commit the crime. We think, however, that it is sufficient for this purpose.

[2] Some complaint is made of the refusal of the court to give certain stock instructions requested by the defendant; but these instructions were all given—in different language, it is true, but in effect—by the court in its charge to the jury.

The judgment is affirmed.

(178 Cal. 491)

MARYLAND CASUALTY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

(S. F. 8624.)

(Supreme Court of California. July 3, 1918. Rehearing Denied Aug. 1, 1918.)

1. MASTER AND SERVANT 🔑417(8)—AWARDS OF INDUSTRIAL ACCIDENT COMMISSION—REVIEW.

Irregularities or errors in mere matters of procedure do not affect jurisdiction of Industrial Accident Commission to make awards, and are not grounds upon which reviewing court may vacate award.

2. MASTER AND SERVANT 🔑417(8)—AWARDS OF INDUSTRIAL ACCIDENT COMMISSION—REVIEW.

On certiorari to review award of Industrial Accident Commission, court will not set aside award because of admission of incompetent testimony; there being enough competent evidence admitted to sustain award.

3. INSURANCE 🔑435—WORKMEN'S COMPENSATION—"OPERATING A FARM MACHINE."

An engineer, in charge of a caterpillar engine used to pull a disc harrow at night, would be "operating a farm machine," within policy of insurance carrier covering employés engaged in "general farm work, excluding the operation of farm machinery"; but deceased, who was assisting by means of a lantern in harrowing, and had nothing to do with engine at time of accident, would not.

4. INSURANCE 🔑146(3)—POLICY OF INSURER—CONSTRUCTION.

Uncertain provisions of policy of insurance carrier will be construed most strongly against it, in view of Civ. Code, § 1654.

In Bank. Proceeding under the Workmen's Compensation Act by Hulda V. Dobson for compensation for the death of her husband, in the employ of George C. Ellis. There was an award against the Maryland Casualty Company, insurance carrier, and it brings certiorari. Award affirmed.

John Ralph Wilson, of San Francisco, and Charles B. Morris, of San Bernardino, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

SHAW, J. This is a proceeding in certiorari under the Workmen's Compensation Act, to review an award made by the Industrial Accident Commission against the Maryland Casualty Company in favor of Hulda V. Dobson as compensation for the death of her husband, alleged to have occurred from an accident while in the employ of George C. Ellis. The award was made against the Maryland Casualty Company as insurance carrier for Ellis. Its claim is that the policy of insurance does not cover the accident which caused the death of Dobson.

The insurance policy was issued to Ellis by the Casualty Company of America. Afterward, and before the happening of the accident, the Maryland Casualty Company, by agreement with the original insurer, assumed all liability upon the policy, and Ellis accepted it as the insurance carrier. By the terms of the policy the insurer agreed to pay all sums due from Ellis under the Workmen's Compensation Law (St. 1911, p. 796) because of any injury to those of his employés mentioned in the policy. The sixth clause provides as follows:

> "This policy shall cover only employés of the employer, legally employed, whose remuneration is included in said declaration; but nothing in this policy shall be construed as excluding any employé who may become entitled to compensation under the provisions of said Workmen's Compensation Law, and all amendments thereto."

The declarations referred to are contained in a document attached to and made a part of the policy. The employés whose remuneration is therein stated, that are here involved, are therein described as those engaged in "general farm work excluding the operation of farm machinery (no blasting)."

The complainant asks that the award be annulled upon the following grounds: (1) That the commission granted a rehearing to Ellis on the ground of newly discovered evidence, in violation of its own rule requiring such evidence to be set out in detail in the application for a rehearing. (2) In taking further testimony without solicitation from either party. (3) In admitting and considering incompetent testimony relating to the meaning of the policy of insurance in question. (4) In determining that under said policy of insurance the plaintiff as insurance carrier for Ellis is liable to pay compensation for the death of said Dobson.

[1] With respect to the first and second grounds we need only say that irregularities, or errors in mere matters of procedure, do not go to the jurisdiction of the commission to make awards, and are not grounds upon which this court can vacate an award. These grounds relate entirely to matters of procedure.

[2] In like manner this court is unable to set aside an award because of the admission of incompetent evidence, provided there is enough competent evidence admitted to uphold the same. This disposes of the third ground.

[3] The fourth ground presents the only matter for serious consideration. The question is whether or not this court can say that the commission erred as a matter of law, upon the uncontradicted evidence, in determining that the plaintiff herein was liable under the terms of the policy for the compensation awarded. We think the evidence is sufficient to support the award.

In carrying on his farming operations, Ellis used a caterpillar engine, and at the time of this accident it was being used to pull a disc harrow in harrowing a field, in the nighttime. A man named Grimes was the engineer in charge of the caterpillar engine, and was operating it at the time. In going across the field it was necessary to have a light at the other side at the point he wished to reach, so as to guide the engineer on the way. He directed Dobson to stay at one side until he had reached the farther side, and to hold the light at the proper place to guide him on his return. Dobson did so, and, when the engine and harrow had returned, Dobson stepped to the left side of the caterpillar, waited until the disc harrows had got opposite to him, and then put his lantern on a tool box, which was on the disc. This happened about the time the engine was turning to go back. This turn swung the engine and harrow about, so that a bar attached to the harrow caught Dobson and threw him upon the discs, whereby he received the injury. It was no part of Dobson's duty to take care of the engine, except to assist at times in oiling it, and at the time of his injury he was not operating the caterpillar engine in any way, as above stated.

Implements ordinarily found upon a farm, such as plows, harrows, or wagons, are not usually spoken of as "machines" in these times, when such things as mowing machines, reaping machines, threshing machines, and various kinds of traction engines are in common use in doing farm work. The operation of a caterpillar engine to pull a harrow would undoubtedly be within the meaning of the phrase, and the engineer who performed that task would not be covered by this policy. But one who harrows or plows a field, or drives a wagon, is not ordinarily said to be running machinery. There might be various things incidental to harrowing a field, or other farm work, where motor power is in use, that would require the service of a man, or men, in addition to the man who operated the motor engine. The only machine used in such work, as that word is commonly understood, would be the engine. The man in charge of it would be operating a farm machine, but those assisting to do the work of harrowing the field would not be so considered, unless they had something to do with the engine itself. Dobson at times did do something about the machine, as when he filled one of the grease cups, although at such times it was not in motion; but he was not operating the machine when he was standing at one end of the field holding a lantern to guide the engineer on his return from the other end, nor when, the engine having returned, he was placing his lantern on the tool box of the harrow. He was assisting in the work of plowing the field, but was not assisting in the special part of the work requiring the operation of machinery.

[4] If, in view of the particular facts in this case, the phrase "general farm work, excluding the operation of farm machinery," is of uncertain import, then, in resolving such uncertainty, we are to be guided by the rule that in such a case the contract is to be interpreted must strongly against the party who caused the uncertainty to exist. Civ. Code, § 1654. This policy was drawn by the insurer. It caused the uncertainty to exist. It is obvious that the purpose of inserting the exception was to avoid the risks incidental to the operation of machinery, and not to avoid the risks incidental to ordinary farm work. We think, therefore, that the meaning of the phrase should be restricted so that it would include those who were actually engaged upon the machine, and not those who were assisting in general operations for which the machine furnished only the motive power. Giving it this meaning, it will be seen that it does not include the work upon which Dobson was engaged, and that he was not within the exception.

This conclusion makes it unnecessary to discuss the other propositions presented. The award of the commission was therefore properly made against the insurance carrier.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; RICHARDS, Judge, pro tem.

(178 Cal. 450)

LINDBLOM v. ROUND VALLEY WATER CO. (Sac. 2552.)

(Supreme Court of California. June 27, 1918. Rehearing Denied July 26, 1918.)

1. WATERS AND WATER COURSES 🔑38—CONTINUOUS FLOW.

It is not necessary to the existence of a water course that the flow be continuous through the year.

2. WATERS AND WATER COURSES 🔑38—WATER FROM RAIN AND SNOW—DEFINITION.

Water comprising the run-off from the usually and annually recurring fall of rain and snow, when running in a defined stream, constitutes a "water course," to which a riparian proprietor's rights attach.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Water Course.]

3. WATERS AND WATER COURSES 🔑38—DIVERSION—EFFECT.

If a stream were a water course, it would not lose that character by a mere diversion, however long continued, though the rights of a riparian owner might be subordinate to those of the appropriator.

4. WATERS AND WATER COURSES 🔑151—"FORFEITURE" BY APPROPRIATORS—"ABANDONMENT."

The "forfeiture" by nonuser, under Civ. Code, § 1411, of a right to appropriate water, is distinct from "abandonment," which depends upon proof of an intent permanently to relinquish the possession and enjoyment of a property right.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Abandonment; Forfeiture.]

5. WATERS AND WATER COURSES 🔑152(8)—NONUSER BY APPROPRIATOR—EVIDENCE OF ABANDONMENT.

Nonuser of appropriated water affords evidence from which the intent to abandon, to make out an abandonment, may be inferred; but it is merely evidence of such intent.

6. **Waters and Water Courses** 🔑151—**Nonuser by Appropriator—Statute.**

Under Civ. Code, § 1411, failure of appropriator of water for five years to apply it to a beneficial purpose ends the right, regardless of the question of intent, and, after partial failure, appropriator can hold as against one subsequent in right only maximum quantity he has used.

7. **Waters and Water Courses** 🔑144—**Right of Appropriator—Usufructuary Character.**

All that a water company could acquire by diverting or impounding the water of a stream was a usufructuary right, not an ownership in the corpus of the water, except perhaps so much as it actually reduced to possession in its reservoir.

8. **Waters and Water Courses** 🔑132—**Prescriptive Rights—Impounding for Storage.**

Prescriptive rights of appropriator of water do not extend to impounding of water for mere purpose of holding it in storage, which is not of itself a beneficial use.

9. **Waters and Water Courses** 🔑151—**Right of Appropriator—Forfeiture by Nonuser—Statute.**

If water company ceased for more than five years to apply to beneficial use part of water appropriated from stream and impounded in reservoir, under Civ. Code, § 1411, it cannot continue diversion and storage of water in excess of its legitimate needs; a riparian owner, who became such subsequent to acquisition of company's rights, complaining.

10. **Waters and Water Courses** 🔑143—**Right of Public Water Company—Diversion.**

A water company supplying a public use is entitled to divert and impound water in excess of its exact daily requirement at a given time in order to provide for loss or wastage, anticipated growth in demand, etc.

11. **Waters and Water Courses** 🔑152(8)—**Beneficial Use—Sufficiency of Evidence.**

In action to enjoin water company from cutting off flow of water of stream to mining property, evidence *held* not to sustain finding that for more than 40 years water company and predecessors had continuously applied all water dammed to beneficial purposes.

12. **Waters and Water Courses** 🔑151—**Forfeiture by Nonuser—Effect.**

Water company, which dammed stream but failed to make beneficial use of water impounded, a riparian proprietor subsequent in right complaining, cannot be required to use dam to keep constant supply running in stream, which previously was dry in summer, but need only allow escape, during months of natural flow, of surplus it does not require.

Department 1. Appeal from Superior Court, Plumas County; H. D. Gregory, Judge.

Action by E. O. Lindblom against the Round Valley Water Company. From judgment for defendant, plaintiff appeals. Reversed.

R. H. Cross and Arthur H. Brandt, both of San Francisco, for appellant. L. N. Peter, of Quincy, and W. H. Spaulding, of San Francisco, for respondent.

SLOSS, J. The defendant has for many years maintained a reservoir in Round Valley, Plumas county, impounding water by means of a dam at the head of North Canyon, a narrow ravine leading from the northerly end of the valley. Sales of water so stored have been made from time to time to consumers at various points below the dam. When this action was commenced, the plaintiff was in possession, under the then owner, of certain mining property situate in North Canyon, a short distance below the defendant's dam. Pending the suit, plaintiff has acquired title to such property. The action was brought upon the theory that plaintiff's land was riparian to a natural stream running through North Canyon, and that defendant was controlling water impounded by its dam in such manner as to invade plaintiff's riparian rights. Judgment was entered in favor of the defendant, and the plaintiff appeals.

It will not be necessary, for present purposes, to recite the allegations of the pleadings, or to refer to any of the findings, except those which are made the basis of attack by the appellant. These findings are, in effect, that there is no stream or water course in North Canyon, as alleged by the plaintiff, and that defendant and its predecessor have for more than 40 years last past continuously applied all of the water in the reservoir to useful and beneficial purposes.

[1-3] There is little conflict in the evidence. It appears that the reservoir site covers some 400 acres. The country is mountainous, the surface of the reservoir being at an elevation of over 4,000 feet. The fall of rain and snow on the surrounding hills drains naturally into Round Valley. Whether or not this water reaches the valley through well-defined streams—on this there is some conflict in the testimony—the record leaves no room for doubt that, before any dam was constructed, there was, in the winter and spring of each year, a discharge of a stream of water from the northerly end of the valley into and through North Canyon. This stream was of the character familiar in this state, and in other semiarid regions. It carried a substantial current of water during the season of rainfall, and thereafter while the snows in the surrounding mountains were melting; but the flow ceased entirely as the dry summer season advanced. In ordinary seasons water began to run in November or December, and ceased about June. The bottom of North Canyon bore every aspect of a well-defined stream channel. It is, of course, not necessary to the existence of a water course that the flow should be continuous throughout the year. Lux v. Haggin, 69 Cal. 255, 417, 418, 4 Pac. 919, 10 Pac. 674; Spangler v. San Francisco, 84 Cal. 12, 23 Pac. 1091, 18 Am. St. Rep. 158; Los Angeles Cem. Ass'n v. Los Angeles, 103 Cal. 461, 37 Pac. 375; Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424. The finding that North Canyon was not a water course was, apparently, based upon the theory that the waters running down the ravine were flood waters,

and hence not a part of the stream to whose flow the riparian owner was entitled. Gallatin v. Corning Irr. Co., 163 Cal. 405, 126 Pac. 864, Ann. Cas. 1914A, 74. But the record does not support this theory. The evidence is clear to the effect that the water running into Round Valley (and, except as intercepted by the defendant, down North Canyon) consisted of the run-off from the usual, and annually recurring fall of rain and snow. Such water, when running in a defined stream, constitutes a water course to which the riparian proprietor's rights attach. Miller & Lux v. Madera, etc., Co., 155 Cal. 76, 77, 99 Pac. 502, 22 L. R. A. (N. S.) 391, and cases cited. The first of the findings assailed must therefore be held to be contrary to the evidence. If North Canyon was, under natural conditions, a water course, it would not lose that character by a mere diversion, however long continued, although the rights of the riparian owner might be subordinate to those of the appropriator. We are brought, then, to the consideration of the second of the findings above mentioned, the one which declares that defendant has for many years applied all the water to useful and beneficial purposes.

A dam was first built across the mouth of North Canyon in 1861 or 1862. It was washed out soon after, and another, constructed to replace it, was also carried away. Thereafter a third dam was built by Judkins and Kellogg for the purpose of storing water for sale to mines in the vicinity. In 1876, the defendant purchased the rights of Judkins and Kellogg, and it has been in possession of the property ever since. During all the intervening period it has maintained the dam and the reservoir, and has sold water for the generation of power to mines at various points below the dam. During all this time it has claimed and exercised the right to control all the water coming into its reservoir. At times it has discharged surplus water into North Canyon through a pipe or, later on, through a spillway. But such discharge has been absolutely controlled by it and has been resorted to when it seemed advisable to lower the surface of the reservoir for the protection of the dam. In selling water to consumers defendant has acted as a public service corporation, receiving the rates fixed from time to time by the county board of supervisors.

The plaintiff went into possession of the property now owned by him some months before the commencement of the action. At first he took water from the defendant, paying the regular rates therefor. Thereafter he refused further payment, and the resulting controversy finally culminated in the institution of this action, in which he sought, among other things, an injunction restraining the defendant from cutting off the flow of water to his mining property.

[4-6] About 1883 the defendant had strengthened and enlarged the dam, thereby increasing the storage capacity of its reservoir. It was then serving water to a considerable number of mines, and their requirements were such as to fairly consume the flow which the reservoir could furnish. This state of facts continued, as is conceded by the appellant in its brief, for a sufficiently long period to give the defendant "an appropriative right to all the water draining from the Round Valley watershed to the full extent of the capacity of the reservoir." The appellant further admits, as, under the concession just quoted, he necessarily must that the defendant's diversion and impounding of the water was at one time under a right paramount to the rights of the plaintiff as a riparian proprieter on North Canyon. The sole contention in this regard is that the defendant has, by failing for five years to apply the whole of the water so impounded by it to a useful and beneficial purpose, lost the right it once owned and enjoyed. Section 1411 of the Civil Code provides that:

> "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases."

In Smith v. Hawkins, 110 Cal. 122, 42 Pac. 453, it was held that this section lays down a rule for the forfeiture of a right by nonuser. Such forfeiture is entirely distinct from abandonment, which depends upon proof of an intent to permanently relinquish the possession and enjoyment of a property right. Utt v. Frey, 106 Cal. 397, 39 Pac. 807. Nonuser affords evidence from which the intent to abandon may be inferred; but it is merely evidence of such intent. Under section 1411, however, nonuser ends the right regardless of the appropriator's intent. The section does not prescribe any length of time during which the nonuser must continue, but in Smith v. Hawkins the court, applying the analogy of the statutes relating to adverse possession and prescription, laid down the rule that the right was lost by a failure, for a period of five years, to apply the water to a useful or beneficial purpose. On a second appeal in the same case, the court restated the doctrine, and extended its application to a partial failure to apply water to a beneficial use, declaring that the appropriator could hold, as against one subsequent in right, "only the maximum quantity of water which he shall have devoted to a beneficial use at some time within the period by which his right would otherwise be barred for nonuser." Smith v. Hawkins, 120 Cal. 86, 52 Pac. 139.

[7-9] The theory underlying section 1411, as interpreted in these cases, is thus explained in the decision on the first appeal in Smith v. Hawkins:

> "Considering the necessity of water in the industrial affairs of this state, it would be a most

mischievous perpetuity which would allow one who has made an appropriation of a stream to retain indefinitely, as against other appropriators, a right to the water therein, while failing to apply the same to some useful or beneficial purpose." 110 Cal. 127, 42 Pac. 454.

The reasoning is as applicable to the situation of the parties in this case as it was to that of the opposing claimants in Smith v. Hopkins. There, as here, a valid appropriation had been made while the land below the point of diversion was still a part of the public domain. There, as here, a part of that land, bordering on the stream, had passed into the ownership of one claiming a superior right in the flow as against the prior appropriator who, it was asserted, had failed to apply the water to a beneficial use. The defendant's position is not strengthened by resting its right on the basis of prescription. All it could acquire, by diverting or impounding the water, was a usufructuary right (Wiel on Water Rights [3d Ed.] § 18), not an ownership in the corpus of the water, except, perhaps, so much thereof as it has actually reduced to possession in its reservoir. The matter here in dispute is, not the ownership of any particular quantity now impounded but the right to dam and control the water as it runs into and through Round Valley. Storage of water in a reservoir is not in itself a beneficial use. It is a mere means to the end of applying the water to such use. Kinney on Irrigation (2d Ed.) p. 1480. The defendant's prescriptive rights do not extend to the impounding of the water for the mere purpose of holding it in storage. If, then, the defendant has ceased for a period of more than five years to apply to a beneficial use any part of the water so retained and impounded by it, the considerations of public policy pointed out in Smith v. Hawkins, supra, demand that it shall not be permitted to continue the diversion and storage of the excess over its legitimate needs, and thus prevent the application of such excess to the needs of others who, if there had been no impounding by the defendant, would have been entitled to use it.

[10, 11] The evidence in this case fairly shows that for a period of more than five years before the commencement of the action the defendant had not applied to beneficial uses all of the water so impounded by its dam and reservoir. While there is some suggestion in the evidence that the defendant supplied water for irrigation, as well as for mining purposes, the record indicates very clearly that the service of water for irrigation was too trifling to be worth considering. Substantially the sole use was for mining purposes. As we have said above, this use was at one time sufficient to call for the entire capacity of defendant's works. But from about 1890 there was a marked decrease in the number of mines supplied by the defendant. Some of the mines were closed, and the demand on the defendant for water became and remained much less than it had been. The testimony elicited from defendant's own witnesses shows, without substantial conflict, that for many years the Round Valley Water Company had been selling considerably less than the amount of water which, on an average, its reservoir was capable of supplying each day through the year. We recognize, of course, that a water company supplying a public use is entitled to divert and impound water in excess of its exact daily requirement at a given time. Provision may be made to cover loss or wastage in transmission, and reasonably anticipated growth of demand. So, too, the company should be permitted to store a surplus to meet emergencies, such as a diminution of supply which may occur from time to time in years of light rainfall. But, making all allowance for these factors (none of which was fully developed in the evidence), the record as it now stands forces the conclusion that for more than the statutory period there had been an impounding and control of an amount of water substantially in excess of the reasonable requirements of the defendant. The finding that for more than 40 years last past the defendant and its predecessors had continuously applied all of the water to useful and beneficial purposes is therefore not sustained by the evidence.

[12] In so far as the right to any of the water had been forfeited by nonuser, the plaintiff would be entitled to have the amount so forfeited flow down the stream in its accustomed course. This does not mean that the plaintiff may claim any benefit from the maintaining by the defendant of its dam and reservoir. He is not in a position to demand that the defendant shall, by its artificial works, furnish a constant flow of water in North Canyon throughout the year. His only rights are those which he would have had under the natural conditions existing before the dam was erected, subject to the deduction of so much of the water as defendant has continuously applied to a beneficial use. In other words, he cannot require the defendant to discharge any water into the stream during those months in which there would be no flow if no dam had ever been built. He may merely insist that, during the months of natural flow, the defendant shall permit the escape into the canyon of the surplus of the natural flow over and above what is required to enable the defendant to meet its reasonable needs, measured by its maximum requirements during the five years preceding the commencement of the action.

The respondent contends that a certain deed made to the defendant by plaintiff's predecessors in interest granted, at least by necessary implication, the right to maintain the dam and reservoir in the manner in which they had been maintained, and estopped the plaintiff from objecting to the defendant's conduct. No right based upon this deed was set up in the defendant's answer, nor is there any finding bearing upon this claim. We do not, therefore, find it necessary to consider whether the deed, properly construed, has the effect claimed for it. If, upon another trial, the defendant desires to rely upon this ground of defense, it should make application to the court below for leave to amend its answer accordingly.

The judgment is reversed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

(178 Cal. 509)

PEOPLE v. MENDOSA. (Cr. 2179.)

(Supreme Court of California. July 9, 1918.)

1. Criminal Law 🔑711 — Arguments of Counsel—Limiting Time.

In a criminal case where there were but few witnesses and the testimony was brief, it was not error to limit defendant's argument to 15 minutes.

2. Criminal Law 🔑995(2) — Judgment — Requisites and Sufficiency.

In view of Pen. Code, § 1168, providing the court shall not fix the term of imprisonment, the judgment properly consists only of a recital of the offense and a designation of the prison to which the prisoner is committed.

3. Burglary 🔑49 — Judgment — Minimum Term.

Inasmuch as Pen. Code, § 461, prescribing punishment for burglary, provides no minimum term for burglary in the second degree, a judgment fixing a mimimum term for such offense is erroneous.

4. Criminal Law 🔑982 — Suspension of Sentence.

The court cannot suspend sentence for burglary and remand the defendant to the custody of the sheriff, for the latter is required by Pen. Code, § 1216, to forthwith deliver the defendant to the warden of the penitentiary, but a sentence may be suspended under section 1203 by allowing the defendant to go at large "under the charge and supervision of the probation officer."

In Bank. Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffen, Judge.

Albert Mendosa was convicted of burglary in the second degree, and he appeals from the judgment and from the order denying a new trial. Order denying new trial affirmed. Judgement reversed, with directions.

Charlotte F. Jones, of Seattle, Wash., for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted of burglary in the second degree, and appeals from the judgment and from the order denying his motion for a new trial.

The judgment pronounced upon such conviction was as follows:

"The said Albert Mendosa having been duly convicted in this court of the crime of burglary in the second degree, it is therefore ordered that said Albert Mendosa be punished by imprisonment in the state prison at San Quentin for a period of not less than one nor more than five years. It is further ordered by the court that the sentence be suspended and the defendant remanded to the custody of the sheriff, and confined in the county jail until the further order of the court."

The opinion of the District Court of Appeal of the First Appellate District was, in part as follows:

[1] "We are satisfied from a careful examination of the record that the evidence amply justified the verdict, that the court's instructions fully covered the case, and that there was no error committed in limiting defendant's argument to 15 minutes in view of the small number of witnesses examined and the brevity of their testimony. There is no merit in the contention that the conviction was not good in law.

[2, 3] "But the judgment based on the conviction and the order of suspension of judgment are open to serious objection. The crime was committed in August, 1917, subsequent to the going into effect of section 1168 of the Penal Code [St. 1917, p. 665], known as the 'indeterminate sentence' law, the constitutionality of which has been recently upheld in the case of In re Lee, 171 Pac. 958. That section provides that 'the court in imposing * * * sentence shall not fix the term of * * * imprisonment,' but that 'the period of the prisoner's confinement shall not exceed the maximum or be less than the minimum term of imprisonment provided by law for the public offense of which such person was convicted.' Under this section the judgment of the court properly consists of a recital of the offense of which the defendant stands convicted, a designation of the state prison to which he is committed, and nothing more. In the case at bar the court was in error in fixing a minimum term of one year, because section 461 of the Penal Code, which prescribes the punishment for burglary, provides no minimum term for burglary in the second degree. * * *

[4] "There was no authority in law for the action of the court in suspending the execution of the sentence and remanding the petitioner to the custody of the sheriff to be confined in the county jail. Where the penalty of the law is imprisonment in the state prison, it is the duty of the sheriff to forthwith deliver the defendant to the warden of the state prison. Section 1216, Pen. Code. If the court desires to suspend the execution of the sentence, the only way in which it can legally do so is by proceeding under section 1203 of the Penal Code, and that section expressly provides that in the event of such suspension 'the court shall place such person on probation and under the charge and supervision of the probation officer of said court, during such suspension.' The section clearly contemplates that the defendant, while on probation and conforming to the terms thereof, shall be at large and not in confinement."

We are entirely satisfied with this portion of the opinion and adopt the same as part of the opinion of this court.

This cause was ordered transferred to this court for the reason that we were not satisfied that the judgment of the District Court of Appeal was a proper judgment in view of the conclusion of the court as expressed in this opinion. It is apparent from what has been said that the judgment of the superior court was erroneous. Under the circumstances, there should be no new trial of this cause; but the superior court should be required to pronounce proper judgment upon the conviction legally obtained.

The order denying a new trial is affirmed. The judgment is reversed, with directions to the lower court to arraign the defendant for judgment and to thereupon proceed with the matter of the judgment in the manner required by law.

(178 Cal. 446)

MERCHANTS' NAT. BANK OF SAN FRANCISCO v. CARMICHAEL. (Sac. 2512.)

(Supreme Court of California. June 27, 1918. Rehearing Denied July 26, 1918.)

1. Account Stated 🔑1—Definition.

An "account stated" is a writing exhibiting the state of account between the parties and the balance owing from one to the other.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Account Stated.]

2. Account Stated 🔑7—Effect.

An "account stated," when assented to, expressly or impliedly, becomes a new contract.

3. Account Stated 🔑1—Acknowledgment of Amount Due under Water Contract.

Instrument, whereby water company acknowledged it had received from landowner on irrigation contract $7,000 as part payment, stating balance due was $4,126.65, truth of which landowner acknowledged, was not mere calculation of amount due as fixed by contract, which depended on number of acres in land, to be ascertained by survey, but was an "account stated."

4. Bills and Notes 🔑41—Instrument as Duebill.

Instrument, whereby water company acknowledged it had received $7,000 from landowner on contract for irrigation, stating balance due was $4,126.65, to which landowner assented, if not an account stated, was good foundation for action against landowner, being in effect a duebill.

5. Contracts 🔑108(2)—To Furnish Water—Public Policy.

Public water company's contract to furnish water for fixed sum and at fixed rate is not against public policy, but is enforceable between parties unless and until public authorities find cause to abrogate or modify it.

In Bank. Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by the Merchants' National Bank of San Francisco against D. W. Carmichael. From judgment for defendant, plaintiff appeals. Reversed.

Gavin McNab, Nat Schmulowitz, and H. S. Derby, all of San Francisco, for appellant. R. L. Shinn, A. L. Hart, and A. L. Shinn, all of Sacramento, for respondent.

SHAW, J. The plaintiff appeals from the judgment. The complaint states a cause of action to recover $4,126.65 upon a stated account alleged to have been made between D. W. Carmichael and the American Cañon Water Company, and afterwards transferred to the plaintiff. The defendant denies the making of the stated account, or of any agreement to pay the money sued for. The court made findings to the effect that no account had been stated by the said parties, and that no sum was found due to the water company from the defendant Carmichael, and that he never agreed to pay said sum of money. Thereupon judgment was given for the defendant. It is claimed that this finding is contrary to the evidence.

Carmichael was the owner of a tract of land containing 1,126.64 acres, more or less, which he proposed to subdivide and sell to purchasers in small tracts. He desired to make some arrangement whereby water could be furnished for irrigation and domestic use on said tracts. With this in view he and said water company, on December 16, 1912, entered into an agreement whereby the water company agreed that for a sum equal to $10 an acre for each acre of Carmichael's land, the area to be determined by a subsequent survey, which sum Carmichael thereby agreed to pay to said water company, it would execute to each of the expected buyers of tracts of said land a contract to furnish the tract bought by them with water perpetually, at the yearly charge of $4 per acre for irrigation and $1 a month for domestic use, the said right to be appurtenant to such tract so bought. The agreement recited that Carmichael had paid to the water company $7,000 of the sum agreed to be paid by him as aforesaid. The second agreement was as follows:

> "Sacramento, Calif. December 16, 1912.
>
> "This is to acknowledge that American Cañon Water Company has this day received from D. W. Carmichael on account of contract of even date herewith, for the furnishing of water on 1,126.64 acres of land on the Haggin grant, the sum of $7,000.00, gold coin of the United States of America as part payment of the said contract. That the balance due on said contract is the sum of $4,126.65.
>
> "American Cañon Water Company,
> "By O. G. Hopkins, Attorney.
>
> "I hereby acknowledge the foregoing to be a correct statement of the amount paid and the amount still due and unpaid on said contract.
> "D. W. Carmichael."

[1, 2] An account stated is defined as "an agreed balance of accounts; an account which has been examined and accepted by the parties." It is not necessary that there should be cross-demands between the parties, or that the defendant's acknowledgment that a certain sum is due from him to the plaintiff should relate to more than a single debt or transaction. Baird v. Crank, 98 Cal. 297, 33 Pac. 63. "An account stated is a document, a writing, which exhibits the state of the account between parties and the balance owing from one to the other, and when assented to, either expressly or impliedly, it becomes a new contract." Coffee v. Williams, 103 Cal. 556, 37 Pac. 504; Gardner v. Watson, 170 Cal. 574, 150 Pac. 994.

The first agreement created an indebtedness from Carmichael to the water company. On its face it showed that the amount of the original debt was $11,266.40, with a credit thereon of $7,000, which would leave a balance of $4,266.40.

The second agreement expressly states that the balance due on the original debt is $4,126.65. The evidence shows that the first contract is dated November 30, 1912, and that it was acknowledged on that day by the executing officers of the water company, that some time after that date the second agreement was prepared, and that both were finally executed by delivery on the same day, December 16, 1912. It is conceded that the second refers to the first. The recital in the second that the first is "of even date" with the second was a clerical error. The difference in the balance shown in the respective documents would appear to have been the result of error, or of payments made after the partial execution of the first. It is apparent from the terms of the second that its delivery, in contemplation of law at least, succeeded the delivery of the first. It assumes the pre-existence of the first agreement as a subsidiary contract. It does not itself create the original obligation, as claimed by respondent; it refers to the first agreement as the foundation thereof. The authorities cited by respondent to the effect that "an account stated cannot be made to create a liability when none existed before" are therefore not in point.

[3, 4] Nor does the second agreement constitute a mere calculation of the amount due as fixed by the terms of the first agreement, so as to bring it within the rule declared in cases like Jasper v. Lamkin, 162 Ala. 388, 50 South. 337, 24 L. R. A. (N. S.) 1237, 136 Am. St. Rep. 34, where it was held that a statement of the amount due for principal and interest on promissory notes, made by the holder thereof and assented to as correct by the maker, is not an account stated. Here the amount to become due was not fixed with certainty by the first agreement. It was made to depend on the number of acres in the tract of land, which was to be ascertained by a survey. The second agreement obviated the necessity for a survey or was the result thereof. In either case it differentiates this case from those referred to. But even if it could be said that the instrument cannot be sued on as an account stated, the plaintiff would still be entitled to recover. The complaint alleges its execution, a copy of it is made a part of the complaint, and there are allegations that defendant agreed to pay the amount stated therein, that payment had been demanded of him and that he has failed to pay the same or any part thereof. The instrument is an acknowledgment of a debt due, the law implies a promise to pay the same, and it is a good foundation for an action, being in effect a duebill.

[5] Respondent suggests that the first agreement was an attempt to bind a public water company by a contract to furnish water for a fixed sum and at a fixed rate, and intimates such a contract is against public policy and invalid. But such a contract is valid unless the proper public authority interferes. Unless the public authorities find cause to abrogate or modify such contract, and until they do so, it is valid and enforceable between the parties. Southern Pacific Co. v. Spring Valley Water Co., 173 Cal. 297, 159 Pac. 865, L. R. A. 1917E, 680. Moreover, it does not appear by anything printed in the briefs that the water company was engaged in supplying a public use. The court below erred in rendering judgment for the defendant.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; RICHARDS, Judge, pro tem.

(178 Cal. 425)

J. F. LUCEY CO. v. McMULLEN.

(S. F. 7036.)

(Supreme Court of California. June 20, 1918.)

1. Appeal and Error 🔑843(1)—Orders Reversible—Setting Aside Final Judgment.
On appeal from judgment and also from order refusing to set judgment aside, it is unnecessary to consider latter appeal, since matters presented thereon arise upon appeal from judgment.

2. Corporations 🔑268(1) — Suit Against Stockholder—Complaint—Sufficiency.
In action by judgment creditor against stockholder for balance due on stock, complaint *held* demurrable, since it was susceptible of no other construction than that there was no consideration for stock, so that transfer was void under Const. art. 12, § 11, and Civ. Code, § 359, declaring void stock issues not for money, labor, or property.

3. Pleading 🔑403(2)—Cure of Defects in Complaint—Answer.
Where defendant's answer cured defect in complaint in particulars in which it was assailed by demurrer, contention that complaint is insufficient is not available to defendant on appeal.

4. Corporations 🔑99(1)—Issuing Stock—Consideration.
If making of loan by defendant to corporation was valuable consideration for issue and transfer of stock to defendant, transfer would not be void under Const. art. 12, § 11, and Civ. Code, § 359.

5. Corporations 🔑271 — Liability of Stockholder to Creditor.
If defendant gave valuable consideration for stock, he was entitled, in suit to enforce his liability as stockholder, to finding ascertaining such value, since plaintiff creditor would only be entitled, at most, to have access to balance of subscription which remained unpaid.

6. Trial 🔑396(3)—Findings—Responsiveness to Issues.
In action by creditor against stockholder, findings that there was no consideration for transfer of stock by corporation to defendant and that stock was transferred as a bonus or a loan *held* not responsive to issues where there was no finding as to actual consideration and actual value of stock.

7. **Corporations** ⚷232(2) — **Liability of Stockholder to Creditor.**

Where a corporation becomes so financially embarrassed that it is necessary for it to issue and transfer some portion of its stock as a bonus for a loan, liability to creditors of receiver of stock so transferred depends upon whether there was fraud and whether consideration for issuance of stock was equal to full face value of stock.

In Bank. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by the J. F. Lucey Company, a corporation, against R. J. McMullen. From a judgment for plaintiff, and from an order refusing to set aside such judgment, etc., defendant appeals. Judgment reversed.

Dudley Kinsell and Vance McClymonds, both of Oakland, and Mastick & Partridge and H. F. Chadbourne, all of San Francisco, for appellant. Herbert L. McNair, of Los Angeles, and McNair & Stoker, of San Francisco, for respondent.

RICHARDS, Judge pro tem. [1] This is an appeal from a judgment in favor of plaintiff and also from an order refusing to set aside said judgment and enter a judgment for the defendant. As to this latter appeal it is unnecessary to consider it separately, since the same matters presented thereon arise upon the appeal from the judgment. Hayne, New Trial and Appeal, § 199. The action was one brought by the plaintiff as a judgment creditor of the Oakland-McKittrick Oil Company, a corporation, and also as the assignee of two other judgments against said corporation, and is one in which the plaintiff seeks to recover from the defendant an amount sufficient to satisfy these several judgments for which the said defendant is alleged to be liable by virtue of the fact that the defendant was, at the time the indebtedness represented by said judgments arose, a stockholder of the said Oakland-McKittrick Oil Company, holding 25,000 shares of its capital stock of the par value of $1 per share. The complaint proceeds to allege upon information and belief:

> "That the said defendant paid no sum of money or other thing of value to said Oakland-McKittrick Oil Company, or to any other person, or at all, for said 25,000 shares, or for any part thereof, and that all of said 25,000 shares were issued directly to the said defendant by said Oakland-McKittrick Oil Company without the said defendant paying or the said Oakland-McKittrick Oil Company receiving any consideration therefor whatever; that said defendant is still the owner and holder of said 25,000 shares, and has never paid any consideration for the same, and that there is now due and owing from the said defendant to said Oakland-McKittrick Oil Company the full sum of $25,000, the par value as aforesaid of said stock, for the same."

The complaint prays for the application of a sufficient portion of all defendant's alleged unpaid subscription to pay his said judgments and for general relief. To this complaint the defendant presented a demurrer, which the court overruled, whereupon the defendant answered the several counts of the complaint, denying that he did not pay full consideration for said stock, and averring that said stock at the time of its transfer to him was fully paid up stock of said corporation, and as a further and separate defense alleged that the said defendant received said stock in the course of a certain transaction in which he had loaned to the said Oakland-McKittrick Oil Company the sum of $3,500 upon its promissory note secured by a chattel mortgage and assignment of lease, and that as part of the consideration for said loan and as a bonus therefor the said corporation had issued to the defendant and he had received the aforesaid shares of the fully paid up stock of the corporation; that said stock at no time had any value whatsoever and was finally sold for delinquent assessments levied thereon. Upon the trial of the cause the court made the following finding of fact:

> "That on the 30th day of November, 1910, the defendant herein became the owner of 25,000 shares of the capital stock of said Oakland-McKittrick Oil Company of the par value of $25,000; that said defendant paid no sum of money or other thing of value to said Oakland-McKittrick Oil Company, or to any other person, or at all, for said 25,000 shares, or for any part thereof, and that all of said 25,000 shares were issued directly to the said defendant by said Oakland-McKittrick Oil Company without the said defendant paying or the said Oakland-McKittrick Oil Company receiving any consideration therefor whatever; that said 25,000 shares were issued by said Oakland-McKittrick Oil Company to said defendant as a bonus to said defendant for making a loan of $3,500 to said Oakland-McKittrick Oil Company, to secure which loan said Oakland-McKittrick Oil Company gave to said defendant a chattel mortgage upon its property and assets; that said defendant is still the owner and holder of said 25,000 shares of stock, and has never paid any consideration for the same; and that there is now due and owing from said defendant to said Oakland-McKittrick Oil Company the full sum of $25,000, the par value of said stock, for the same."

The court made no finding as to whether said stock was ever of any value, nor did it find what, if any, was the value of the security pledged to the defendant for his said loan. As a conclusion of law the court found that the defendant was indebted to the Oakland-McKittrick Oil Company in the sum of $25,000, covering the entire par value of said stock, and hence was liable to the plaintiff for the sum of $6,772.40, the full amount of its said claim, for which judgment was accordingly entered.

[2] The first question presented by the appellant upon this appeal is that his demurrer to the complaint should have been sustained. This point we deem to be well taken. The unequivocal language of the plaintiff's complaint above quoted is susceptible of no other construction consistent with the rules of pleading than that no consideration was either paid or received for or on account of the transfer of the stock in question to the defendant. If this be so, the case falls

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

squarely within the reasoning and authority of Kellerman v. Maier, 116 Cal. 416, 48 Pac. 377, wherein it is decided that such a transfer of stock of a corporation is void under section 359 of the Civil Code, which embodies the terms of article 12, § 11, of the state Constitution, the court in that case holding that certificates of shares of stock of a corporation issued in violation of this section of the Code and provision of the Constitution are void, and that parties receiving them did not thereby become shareholders, nor make themselves liable to creditors as for an unpaid subscription.

[3] The record, however, discloses that the defendant in his answer denied that said stock was issued to him without any consideration paid or received therefor, and in support of said denial sets up the actual transaction in the course of which he received said stock from the Oakland-McKittrick Oil Company, and affirmatively alleges that said stock was transferred to him as a bonus for making a loan of $3,500 to the corporation, and as a part of the consideration for said loan, and further avers that said stock was issued to him and received by him as fully paid up stock of said corporation. In making these allegations the answer ekes out the insufficiency of the complaint in which it was assailed upon demurrer. This being so, the point is no longer available to the defendant upon appeal. Cohen v. Know, 90 Cal. 266, 27 Pac. 215, 13 L. R. A. 71; Kreling v. Kreling, 118 Cal. 421, 50 Pac. 549; Savings Bank, etc., v. Barrett, 126 Cal. 413, 58 Pac. 914.

[4-6] But if the respondent can escape the peril of this attack upon the insufficiency of its complaint, it is only to fall upon the horns of the dilemma presented by the findings of the court. The court found the fact to be as the plaintiff had alleged it to be, that no consideration had been paid or received for the transfer of said stock to the defendant, and that the defendant was liable to the corporation for the full sum of $25,000, the par value of said stock. The court also, however, found the facts attending the transfer of the stock to him to be that the defendant had been delivered said stock as a bonus for making a loan to the corporation issuing it. From the facts thus found this dilemma arises: If no consideration existed for the issue and transfer of this stock to the defendant, then such issue and transfer would be void upon the authority of Kellerman v. Maier, supra. On the other hand, if the making of the loan was a valuable consideration for the issue and transfer of the stock, then its issue and transfer would not be void as in violation of the section of the Civil Code and the provision of the Constitution above quoted (California Trona Co. v. Wilkinson, 20 Cal. App. 694, 130 Pac. 190), but in such event the defendant would have been entitled to have the actual consideration for which the stock was taken ascertained and applied to his subscription to said stock, and as a payment in whole or in part of his liability thereon, and the creditors of the corporation would only be entitled, at the most, to have access to whatever balance of the subscription remained unpaid in order to realize upon their claims. It was therefore incumbent upon the trial court to find what actual value the stock had, if any, and what actual consideration, if any, existed for its issuance and transfer to the defendant. McKee v. Title Ins. Co., 159 Cal. 206, 113 Pac. 140. The findings of the court are silent upon this phase of the case. Hence they are not only fatally doubtful and uncertain, but do not respond to the issues presented by the pleadings herein.

[7] The case, however, presents other aspects which should be viewed and determined for the purposes of such amendment of the pleadings as may be necessary and of another trial. The defendant in his answer averred that the stock in question was issued to him as a bonus for a loan by him to the corporation of the sum of $3,500, that at the time of its issuance to him as such bonus stock by said corporation it was represented to him by the official agents thereof that said corporation was financially embarrassed and indebted to various persons and in need of an immediate loan of the sum of $3,500 to take care of and discharge the pressing obligations of said corporation, and that if said defendant would make to it said loan for such purposes, the said corporation would in consideration thereof, and as a bonus therefor issue to said defendant 25,000 shares of the fully paid up capital stock of said corporation, and that, relying upon said representations, said defendant did make said loan, and took from said corporation said stock as a bonus therefor upon such understanding and agreement; that said stock at the time of said transaction had no market value, or any value whatsoever, and that the transfer of said stock and the whole thereof to him was made for a full consideration and for the highest market value obtainable therefor. These averments of fact present a logical problem which has for its major premise the legal question as to the extent of the liability to creditors of a corporation of persons taking bonus stock of such corporation under circumstances similar to those presented by the defendant's pleading in the instant case. In the cases of Vermont Marble Company v. Declez, 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143, and Herron v. Shaw, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265, it was held that as to stockholders of a corporation to whom had been issued its stock for money or for property having a defined value less than the par value of the stock the creditors of the corporation could have recourse against such stockholders for the difference between the purchase price of the stock and its par value

even though as between the corporation and such stockholders it had been agreed that it should be taken as fully paid up stock. In the case of Harrison v. Armour, 169 Cal. 787, 147 Pac. 1166, it was held that where, in a transaction between a corporation and a person who was the holder of certain patent rights of undetermined value, wherein certain shares of the stock of the corporation had been issued in full payment for such patent rights and upon the express or implied agreement that such stock should be so issued and transferred as fully paid up stock, creditors of the corporation could not have recourse against such stockholder for any unpaid balance of the par value of said stock in the absence of an affirmative showing of fraud in the transaction, and that in cases where the stock is not sold for cash, but is issued in return for real or personal property having no defined value, the rule is that where the corporation and the stockholder have agreed upon a given valuation for the property transferred, such valuation is binding and conclusive unless it is fraudulent in purpose and effect. In the case of Garretson v. Pacific Crude Oil Co., 146 Cal. 184, 79 Pac. 838, wherein the plaintiff, as one of the stockholders of a corporation, brought an action to set aside a transaction between the corporation and another stockholder whereby the former had issued to the latter a large block of its stock of the par value of $1 per share in payment for certain oil leases which the evidence showed to have a probable value equal to about 10 cents per share of the stock, and also showed the stock to have had at the time of the transaction an actual market value not in excess of 10 cents per share, the court held the transaction to be an entirely legitimate one as between the corporation and the stockholder obtaining such stock and one not to be assailed by other stockholders without affirmative proof of fraud in the transaction. In the cases of Vermont Marble Co. v. Declez and Herron v. Shaw, supra, and in other cases where the principle therein enunciated has been applied, the transaction for the transfer of the corporate stock in each case arose at a time in the life of the corporation when it was beginning or preparing to begin the business for which it was formed and was issuing its stock in return for the money or property which was to form its capital. A different situation, however, arises when a corporation, after it has been for some time engaged in doing business, has become so involved or financially embarrassed as to find it necessary, in order to meet its obligations or obtain money or property essential to the further conduct of its operations, to issue and transfer some portion of its stock at less than its face or par value, but as fully paid up stock, as bonuses for loans or in payment of obligations already accrued.

The following cases state the rule which has been applied to corporations issuing their stock as fully paid up stock under conditions analogous to those above indicated: In the case of Fogg v. Blair, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104, the St. Louis & Keokuk Railroad Company had been engaged in constructing its railroad through certain portions of Missouri, and in so doing had become indebted in large amounts to a considerable number of persons on account of such work, and in order to pay for such construction caused to be issued certain bonds and also certain amounts of its stock which were delivered to those of its creditors taking said bonds, at a considerably less value than the par value thereof, but in full payment and settlement of such claims for construction. In the action brought by other creditors of the corporation against those taking such stock under said conditions to recover for the unpaid amount of the par value thereof it was held that such suit could not be maintained on behalf of such creditors without averment and proof of bad faith on the part of those engaging in such a transaction and without showing that the stock of the corporation when issued under such circumstances had in fact at the time of its issuance any other or higher actual value than that at which it was taken in the transaction, and that in the absence of such averments the complaint in the action was bad. In the case of Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227, the facts of the case showed that a corporation finding its original capital impaired by loss or misfortune, for the purpose of recuperating itself and producing new conditions for the successful prosecution of its business, sought to issue additional bonds and stock for these purposes, and found that on account of its condition its bonds could not be negotiated without the use of the stock as a bonus to those taking the same and as fully paid up stock. In the action on the part of creditors of the corporation to have recourse against those taking said stock under such circumstances to the extent of the par value thereof, the court held that no such cause of action existed in the absence of averments and proof showing actual or inferable fraud in the transaction, and that the consideration for its issuance was not equal to its full actual value at the time of its issuance and transfer. In so holding the Supreme Court of the United States gave its full assent to the doctrine adopted in this state in the cases of Vermont Marble Co. v. Declez, supra, and Herron v. Shaw, supra, but held that it was not applicable to every case where the stock of a corporation had been issued for less than its par value, nor was it to be given application to cases where, after the corporation had been for some time a going concern, the stock was so issued for a consideration other than money and of undetermined value, where no element of bad faith entered into the transaction, and where the stock was not shown to have any greater actual value at the time of the issuance and transfer than that for which it was taken as fully paid up stock. See, also, Seaboard Nat. Bank v. Slater (C. C.) 117 Fed. 1003. These cases have direct application to the case at bar. The defendant, as an affirmative defense in his answer, set forth the circumstances under which the stock in question had been issued and delivered to him. These showed that the corporation, being financially embarrassed and indebted to several persons and in immediate need of money to meet its pressing obligations, solicited and received from him a loan of the sum of $3.500, giving some personal securities therefor and agreeing to issue and issuing to him this stock as a bonus for such loan and as the fully paid up stock of the corporation; that said stock, when so issued, did not have any actual market value, and that in making said loan to it said corporation received from said defendant the full actual value of said stock, and that the making of said loan to said corporation enabled it to meet certain of its obligations and continue the prosecution of its business. These averments presented issues of fact to which, if found in favor of the defendant, the foregoing principles of law would be applicable. The court made no finding upon them, although the defendant offered evidence in their support sufficient to have required such findings. In thus failing to make any finding upon these issues or upon the question as to the good faith of the transaction which was involved therein, we think the trial court was in error requiring a reversal of the judgment from which this appeal was taken.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; MELVIN, J.; SLOSS, J.

(37 Cal. App. 324)

PEOPLE v. BENNETT. (Cr. 590.)

(District Court of Appeal, Second District, California. May 20, 1918.)

1. ASSAULT AND BATTERY 🔑92—ASSAULT WITH DEADLY WEAPON—EVIDENCE.

In a prosecution for assault with a deadly weapon, evidence *held* to sustain a verdict of guilty.

2. ASSAULT AND BATTERY 🔑56—"ASSAULT WITH DEADLY WEAPON"—ELEMENTS.

The pointing of an unloaded gun at the prosecuting witness, accompanied by a threat, without any attempt to use it otherwise, is not an "assault with a deadly weapon," and cannot sustain a conviction for assault, for want of present ability to commit a violent injury on the person threatened in the manner attempted.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assault with Dangerous or Deadly Weapon.]

3. CRIMINAL LAW 🔑364(1) — EVIDENCE — RES GESTÆ.

In a prosecution for assault with a deadly weapon, where defendant, while choking another woman at the ranch of the prosecuting witness, pointed a gun at prosecutrix, and made a threat, and, after leaving, returned and fired a shotgun through the screen door, all such acts constituted one transaction, and were provable as part of the res gestæ.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Thomas Bennett was convicted of assault with a deadly weapon, and from the judgment, and a denial of a new trial, he appeals. Affirmed.

Earl A. Bagby, of Visalia, for appellant. U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

JAMES, J. The defendant was charged with the crime of assault with a deadly weapon. The jury returned a verdict finding him guilty as charged in the information. He appeals from the judgment and from an order denying a motion for a new trial.

[1] The crime, as described in the information, consisted in the firing of a shotgun at Maggie Scuffi in the county of Tulare in September, 1917. The complainant testified that she resided on a ranch at the time in question, and residing with her was a woman called Mrs. Bradley; that on the day of the alleged assault defendant drove up to the gate in front of the ranch house and asked for Mrs. Bradley; that the latter went out to the buggy, and, after some moments had passed, complainant heard Mrs. Bradley say, "My God, Tom, don't;" that she went to the door, and saw that the defendant had Mrs. Bradley by the throat, choking her; that the complainant then started to go to the assistance of the woman, when defendant pointed a shotgun at her face and said, "If you come another step, we will all go together"; that in the meantime Mrs. Bradley had gotten hold of the barrel of the gun and forced it up, and that complainant rushed in and also seized the weapon; that the two women begged the defendant to give up the gun, but that he refused, although upon the solicitation of Mrs. Bradley he did take a shell out of the gun; that Mrs. Bradley then turned and walked into the house. Complainant testified further as follows;

"Then I said a few words to him about threatening to burn my property and do me harm that way, and then he drove out of the yard and started to go towards town, and I went into the house, and after I turned to go into the door he turned back again and drove in front of my place, and just a minute I looked through the door that he had just passed through, in front of the door, and had the gun pointed at an angle, and I stepped into a room where Mrs. Bradley had fell down crying, and he shot the gun through the screen."

The testimony of witness Mrs. Bradley was corroborative of that given by the complainant.

Defendant testified at the trial, admitting his presence at the Scuffi ranch on the day in question, and also admitting that he discharged a shotgun on that occasion. He stated that he went there for the purpose of persuading Mrs. Bradley to leave the home of Maggie Scuffi, as he did not think it a fit place for her. When asked why he discharged the weapon, he stated that he did it to "put the fear of God in the heart of Maggie Scuffi." He denied having aimed the gun at the door, stating that he aimed it upward, but that, as the mare hitched to the buggy suddenly started, the muzzle of the gun was pulled down.

From this brief statement of the evidence, it will at once be perceived that there was no lack of proof to sustain the verdict as found by the jury; in fact, it would be difficult to reconcile any other verdict than that returned with the evidence adduced before the jury.

In support of his appeal defendant relies mainly upon alleged errors of the trial judge committed in the giving and refusing of instructions. The court, we think, sufficiently advised the jury as to the law to be taken into consideration in arriving at a verdict. The defendant in several paragraphs points out specific objections made to the instructions as given and to alleged error in refusing certain instructions offered on the part of the defendant.

It is argued in the brief that the jury was not sufficiently apprised of the elements of offense of assault with a deadly weapon; that the jury was not sufficiently apprised that in order to constitute the offense it was necessary for it to find beyond a reasonable doubt that the defendant had the ability to do the bodily injury attempted; that the jury was not sufficiently apprised of the purpose for which evidence of the acts of the defendant prior to the time of the alleged assault was admitted; that the crime of simple assault, included within the charge of assault with a deadly weapon, was not sufficiently defined. Examining the charge as given by the court, we find that the jury was instructed very fully as to the necessity that the proof should show the commission of the offense beyond all reasonable doubt, and that the presumption of innocence attached at every stage of the case and "to every fact essential to a conviction." The crime of simple assault was defined in the language of the Code in the instructions. The jury was told that the charge made by the information included within it the lesser offense of assault.

[2] An instruction was also given pertinent to the facts of the occurrence in the yard preceding the time that the defendant drove away and before he fired the shot. That instruction advised the jury that:

> "The pointing of an unloaded gun at the prosecuting witness accompanied by a threat, without any attempt to use it otherwise, is not an assault with a deadly weapon, and cannot sustain a conviction for an assault for want of present ability to commit a violent injury on the person threatened in the manner attempted."

The fact appeared to be, as testified to by the defendant himself, that at the time he first pointed the gun at Maggie Scuffi it was not loaded, as he had discharged it while on his way to the place when he fired at a rabbit. He testified that he reloaded it as he drove out of the yard before the shot was fired through the screen door. The point that the court did not specifically advise the jury as to the limited purpose for which the evidence of the occurrence was admitted is without force.

[3] We think that the acts of the defendant while at the ranch of Maggie Scuffi on the day of the alleged assault were so closely connected as to constitute one transaction; that proof of all of such acts was proper to be made, as showing the res gestæ. By the instruction of the court the first part of the controversy, whereat the gun was only pointed at Maggie Scuffi, was eliminated from consideration.

It is our opinion that the defendant was rightly convicted on abundant proof, and that he had a fair trial.

The judgment and order are affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

(37 Cal. App. 327)

BLAKE v. CRAIG et al. (Civ. 2376.)

(District Court of Appeal, First District, California. May 21, 1918.)

1. Bills and Notes ⚷468 — Default — Pleading.

In action on a note under which holder could declare whole amount due if interest remained unpaid for 30 days, where complaint alleged that principal and interest was due, and filing mark showed complaint was filed more than 30 days after alleged default, default was sufficiently shown.

2. Bills and Notes ⚷129(2)—Maturity—Nonpayment of Interest.

Where holder of note had option to declare entire amount due on default in payment of interest, mere filing of complaint for entire amount was sufficient notice that holder had availed himself of option to deem obligation due.

Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Foreclosure proceeding by Zeila O. Blake against Frank Craig, Hattie B. Craig, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. H. Barrows, of San Francisco, for appellants. Harry F. Sullivan, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment of foreclosure of a mortgage, and is taken on the judgment roll alone.

[1] From the allegations of the complaint it appears that, if any of the quarterly in-

stallments of interest falling due under the terms of the note set forth in the complaint should remain unpaid for 30 days, the principal should forthwith become due at the election of the holder of the note. It also appears from the complaint that a certain installment of interest was not paid when due, but that pleading does not allege that 30 days had elapsed since said interest became due, or that the plaintiff had elected to deem the whole note due and payable, and it is contended by the defendants on this appeal that for these reasons their demurrer to the complaint should have been sustained. The complaint, however, alleges that the principal, with a certain amount of interest, was due and unpaid; and by turning to the filing mark on the complaint it is learned that in fact the complaint was filed more than 30 days after the alleged default in the payment of the interest. This fact is also shown by admissions in the defendants' answer.

[2] As to the omission of the plaintiff to aver that she had elected to regard the whole amount of the principal as due on the failure of the defendants to pay the interest within 30 days after a certain installment thereof became due, we think it sufficient to say that the filing of the complaint was of itself a sufficient notice that the plaintiff had availed herself of the option to deem the obligation due.

There is no merit in the defendants' point as to their special defense, nor in the objection to the amount of counsel fee allowed by the court.

The judgment is affirmed.

We concur: BEASLY, Judge pro tem.; MURASKY, Judge pro tem.

(37 Cal. App. 245)

WILSON v. LONDON GUARANTEE & ACCIDENT CO., Limited. (Civ. 2396.)

(District Court of Appeal, First District, California. May 15, 1918.)

1. INSURANCE 🔑435 — LIABILITY INSURANCE—ACCIDENT NOT COVERED.

Policy against liability imposed by law on insured, contractor for carpentry and mason work on telephone company's building, and resulting from negligence of contractor or subcontractor engaged in work, did not cover accident to passenger in street through negligence of employé of independent contractor.

2. INSURANCE 🔑514 — LIABILITY INSURANCE—FAILURE OF INSURED TO DEFEND—RESORT AGAINST INSURER.

Where liability insurer, notified of suit, refused to defend, and insured suffered default, and had motion to set it aside denied, on appeal, in action against insurer, court cannot make contract of insurance for him covering liability, nor assist him to avoid effects of his own neglect to defend, though policy provided he would not interfere with litigation.

Appeal from Superior Court, City and County of San Francisco; W. M. Conley, Judge.

Action by Robert Henry Wilson, as executor of the last will and testament of James A. Wilson, deceased, against the London Guarantee & Accident Company, Limited, a corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

Hugo D. Newhouse, James Alva Watt, and Watt, Miller, Thornton & Watt, all of San Francisco, for appellant. Linforth & Herrington and Walter H. Linforth, all of San Francisco, for respondent.

BEASLY, Judge pro tem. The essential facts of this case, as they appear to us, are very simple. The defendant, on July 24, 1906, wrote for the plaintiff's testator, James A. Wilson, and for the Pacific States Telephone & Telegraph Company, what is called an "Owner's Contingent Liability" accident insurance policy. It was provided therein that:

> The defendant company "hereby agrees to indemnify Pacific States Telephone & Telegraph Company and James A. Wilson * * * against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered while this policy is in force by any person or persons during the continuance of the work described in the schedule, and resulting from the negligence of any contractor or subcontractor engaged in such work."

The schedule referred to contained the following statement:

> "All work under supervision of James A. Wilson who lets contract and does carpenter and mason work himself. This policy covers contracted work only."

This provision was inserted for the purpose of bringing Wilson within the terms of this owner's policy. The building involved belonged to the telephone company, not to Wilson. One of the contracts on the building was let to the Roebling Construction Company. On the 15th day of November, 1906, and while this latter company was performing work on the building, one of its employés negligently let a heavy plank fall from the window of the building into the street. The plank struck the foot of O. R. Cole, who was passing along the street at the time, and crushed three of his toes. Cole recovered judgment against Wilson. Wilson paid the judgment and sued the defendant on the policy. The trial court decided against him, and he appeals from the judgment.

A great many questions are argued in the briefs of this case and were presented at the oral argument; but it seems to us that the answer to a single question, if in the negative, is decisive of the case, and that question is, whether this accident is covered by the policy.

[1] We think it is not. It will be observed that the policy insured against liability imposed by law upon the assured and resulting from the negligence of a contractor or subcontractor engaged in work on the build-

ing. It was stated at the argument that it was difficult to imagine a case which would be covered by this policy. That may be true, but we are not called upon to do more than decide whether the facts of this case bring it within the terms of the policy. The Roebling Construction Company was an independent contractor. There is nothing in the record to show that it occupied any other position than any other independent contractor. This being so, the law imposed no liability upon Wilson for the negligence of the construction company or its employés. There are other provisions in this policy, but none which extend its protection to Wilson beyond that afforded him by the clause thereof quoted.

It is not improper, perhaps, in this connection, to state the reasons why Wilson did not defeat the claim of Cole, as upon the record in this case it seems he ought to have been able to do. Cole was injured on the 15th day of November, 1906. On or about the 17th of February, 1907, he began his action against Wilson and the Roebling Construction Company and served Wilson with the summons and complaint. Wilson forwarded these papers to the insurance company. On the 19th day of February, 1907, the company returned the summons and complaint to Wilson, and notified him in writing that it refused to defend the action, and denied all liability. This accident not being covered by the policy the insurance company was strictly within its rights in refusing to defend it. Wilson did not appear in the action at once, and on the 1st day of March, 1907, his default was entered, and on the 29th day of March, 1907, judgment was taken against him in the sum of $6,300. From then until the 15th day of June, 1907, nearly three months later, he took no steps whatever in the action, but on the last-mentioned date served upon Cole's attorneys a notice of motion to set aside the default and the judgment based thereon upon the grounds, among others, that the default was entered on account of his excusable neglect. Voluminous papers were filed upon this motion, and it was finally denied. Wilson appealed to the Supreme Court, and that court sustained the trial court. Thereupon he paid the judgment, as has been said, and began this action against the defendant.

[2] No good reason appears in the record why he should not have defended the case. His contention that he could not do so because of a provision in the policy to the effect that he would not interfere with litigation, but would leave the conduct of the same to the insurance company, does not excuse him, because the insurance company promptly notified him that it would not defend the action, and it was his duty to himself, and he had the legal right of course to make the legal defense which, according to his affidavit of merits filed upon the motion to set aside his default, he was advised and believed he had. This court cannot make a contract of insurance for him at this late day covering this liability, nor can it assist him to avoid the effects of his own remissness in not defending the action begun against him, by giving him a judgment against the insurance company to which his policy does not entitle him.

The judment is affirmed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

(37 Cal. App. 259)

MATTHEWS v. MATTHEWS. (Civ. 2424.)

(District Court of Appeal, First District, California. May 16, 1918.)

1. Divorce 🔑245(2) — Alimony — Modification of Amount.

On an application for modification of an allowance of alimony, a showing that the wife had acquired an interest in improved real property from which she derived an income was sufficient to sustain a decrease of the allowance.

2. Divorce 🔑286 — Alimony — Modification—Discretion of Court.

On an application by the husband for modification of the allowance of alimony, where evidence of an agreement as to the amount and that it was proper was conflicting, the modification was within the sound discretion of the court, and will not be disturbed.

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Suit by Eleanor Matthews against Hugh Matthews for divorce. From an order modifying an interlocutory decree as to alimony, plaintiff appeals. Affirmed.

Algernon Crofton, of San Francisco (Gillogley, Crofton & Payne, of San Francisco, of counsel), for appellant. I. I. Brown, of San Francisco, for respondent.

PER CURIAM. Appeal from an order modifying an interlocutory decree of divorce in respect to allowance of alimony. It appears from the record that on November 3, 1915, Eleanor Matthews, the plaintiff, obtained an interlocutory decree of divorce from her husband, Hugh Matthews, upon the ground of extreme cruelty. Summons was served personally upon defendant, who made no appearance. By the decree the defendant was ordered to pay to the plaintiff $125 monthly as a permanent allowance, beginning November 8, 1915. On April 22, 1916, the defendant moved to modify the decree in this respect. On June 27, 1916, the court made an order reducing the allowance to $100, and from this order the plaintiff appeals.

Three points are urged for reversal: (1) That the court had no power to modify the decree, unless it appeared on the hearing of the motion that the circumstances of the parties had changed since the original decree was made. (2) That the parties had entered into an agreement with reference to alimony, which the court had no authority to modify. (3) That the decree should not have been modified, for the reason that the amount allowed therein was and is proper.

In support of his position the attorney for appellant has furnished us with an instructive and carefully prepared brief upon the legal questions involved and upon which he relies for reversal; but we are of the opinion that all of these points resolved themselves into questions of fact, which, under conflicting evidence, having been determined adversely to appellant, such determination is conclusive here.

[1] The question whether there was a sufficient change in the circumstances of the parties accruing since the decree was amply shown by the evidence. It affirmatively appears that plaintiff had acquired an interest in improved real property from which she derived an income.

[2] With reference to the existence of the agreement relating to the amount of alimony to be allowed, no evidence was presented aside from the affidavits of plaintiff and defendant. These were conflicting on the subject. The existence of the agreement, therefore, merely presented another question of fact. True, there is no express finding on the subject; but this must be presumed, in the absence thereof, in support of the judgment.

What we have said with reference to the foregoing questions applies with equal force to the third point relating to the question of proper allowance. As above shown, a different and changed condition in the circumstances of the parties had occurred since the rendition of the decree. All of these questions were, under conflicting evidence, addressed to the sound discretion of the court. There is no claim or showing that this discretion was arbitrarily exercised or abused.

For the reasons given, the order appealed from is affirmed.

(37 Cal. App. 310)

BURDELL et ux. v. ST. LUKE'S HOSPITAL. (Civ. 2308.)

(District Court of Appeal, First District, California. May 20, 1918. Rehearing Denied by Supreme Court.)

CHARITIES ⚷45(2) — NEGLIGENCE — LIABILITY.

A hospital not run for profit, and which in fact did not make any profits, was not liable to a pay patient for negligence of its employés, where no negligence was shown in employment of incompetent employés.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Victor O. Burdell and Helen E. Burdell, husband and wife, against the St. Luke's Hospital, a corporation. Judgment for defendant, and plaintiffs appeal. Affirmed.

Samuel T. Bush, of San Francisco, for appellants. Chas. S. Wheeler and John F. Bowie, both of San Francisco, for respondent.

ZOOK, Judge pro tem. In this action for personal injuries alleged to have been sustained by plaintiff Helen E. Burdell through the negligence of defendant's servants the court directed a judgment for defendant, from which plaintiffs appeal.

The evidence showed that plaintiff, Mrs. Burdell, entered defendant's hospital as a paying patient and was charged the regular rates of the hospital for the services rendered to her. The injuries complained of were alleged to have been sustained through the negligence of nurses employed by the hospital, but no evidence was offered to show that defendant was negligent in employing incompetent or careless nurses, or in omitting to use due care in the selection of its staff. The articles of incorporation of defendant stated that the purpose for which it was formed was the founding and maintenance of a hospital in San Francisco for the relief and care of such sick persons as might desire its benefits, and that its object was not pecuniary profit. It also appeared from the evidence that the hospital buildings were the gift of charitable persons to the corporation; that poor and needy persons, without distinction of race or creed, were admitted to the hospital and treated without charge, the percentage thereof varying from 7 to 15 per cent. of the total number of patients; that although the other patients paid fees for the services rendered them, no profit was made, or attempted to be made, from that source; that in the four years preceding the trial the expenses of operating the hospital exceeded the amount taken in as fees by more than $18,000, a large part, but not all, of which was the money lost by taking in poor patients; that the trustees charged with the conduct of the affairs of the hospital served without pay, and that the only persons receiving any compensation were the hospital staff, consisting of the superintendent, nurses, and attendants.

Upon this showing the lower court was clearly correct in directing a verdict for defendant under the rule laid down in Thomas v. German Gen., etc., Soc., 168 Cal. 183, 141 Pac. 1186, where it is said that:

> "Where one accepts the benefit of a public or of a private charity he exempts by implied contract the benefactor from liability for the negligence of the servants in administering the charity, if the benefactor has used due care in the selection of those servants."

The fact that plaintiff paid the regular rates charged by the hospital for paying patients does not take the case out of the operation of this rule, for it is apparent that the rates were not charged with a view of making a profit from her, and the moneys received from paying patients were not in fact sufficient to meet even the ordinary operating expenses of the hospital, without considering any interest upon the amount invested in the buildings. It is clear, therefore, that plaintiff was to some extent the beneficiary of the charity for which defendant corporation was organized, and comes within the rule quoted.

Judgment affirmed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

(37 Cal. App. 270)

BRADLEY CO. v. BRADLEY. (Civ. 2364.)

(District Court of Appeal, First District, California. May 16, 1918. Rehearing Denied by Supreme Court July 15, 1918.)

1. ABATEMENT AND REVIVAL 🔑5—CONCURRENT ACTIONS.

An action in ejectment and an action to enforce an alleged trust as to the same land may be maintained concurrently.

2. JUDGMENT 🔑256(2)—EQUITY—FINDINGS.

In ejectment where defendant filed cross-complaint to quiet title, judgment for defendant on cross-complaint cannot stand unless verdict is expressly adopted by court and findings made in conformity therewith, although parties stipulated that fate of issues raised by the cross-complaint should be governed by verdict.

3. JUDGMENT 🔑251(1)—PLEADINGS.

In ejectment to recover two parcels of land, where defendant filed cross-complaint to quiet title as to only one, a judgment in favor of defendant quieting title in both pieces could not be entered.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the Bradley Company, a corporation, against Emma R. Bradley, formerly Emma R. Buxton. Judgment for defendant. From an amended judgment and an order refusing to set it aside, plaintiff appeals. Reversed.

See, also, 165 Cal. 237, 131 Pac. 750; 173 Pac. 1011, 1013.

Stoney, Rouleau & Stoney and Orville C. Pratt, Jr., all of San Francisco, for appellant. Charles Baer, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from an amended judgment in an action in ejectment and from an order refusing to vacate such judgment.

A brief statement of the facts involved will be conducive to a clearer understanding of the three appeals now pending in this court between these parties in regard to certain property which is the subject of their contention.

Prior to the 10th day of November, 1906, and to the commencement of any of the actions (three in number) pending between these parties, plaintiff's assignor, Richard Bradley, was the owner of two pieces of real property situated in San Francisco. On the date mentioned Bradley made a conveyance of one of these parcels—designated in the record as the Gough street property—to the defendant, who was at that time single and bore the name of Mrs. E. R. Buxton. The conveyance was in trust for certain purposes, and the property was to be reconveyed to Bradley upon demand. Thereafter, desiring to procure a decree establishing title to these two pieces of property under the so-called McEnerney Act, and appreciating that it would be more economical to attain this object by one action rather than two, Bradley conveyed to the defendant the parcel of land designated in the record as the Butchertown lot, with the alleged understanding in this instance, as in the other, that the property would be reconveyed to him. Prior to these transactions the defendant was engaged to marry Bradley, and they were in fact married about three years after the conveyance to her of the Gough street property. Later they became estranged, and Mrs. Bradley commenced an action for divorce against her husband. About this time she denied her trust relation to the properties, claiming to be the owner of both parcels, and that as to the Gough street piece she had paid Bradley a certain sum for it. On April 9, 1911, Bradley's assignee (plaintiff) commenced an action against the defendant to enforce the alleged trust as to this parcel. Thereafter, in June, 1911, the plaintiff, not being content to rest on that equitable suit alone, and believing too that a certain deed made by the defendant reconveying the lots ought under the attending circumstances be deemed to have been delivered to Bradley, in which event the equitable suit would fail, commenced a second suit—the present one—counting on a legal title to both lots.

[1] That it is proper to maintain these two actions concurrently is not disputed. O'Connor v. Irvine, 74 Cal. 435–441, 16 Pac. 236; South S. B., etc., Co. v. S. B. Nat. Bank, 127 Cal. 245–247, 59 Pac. 699. In a third suit, filed February 27, 1915, plaintiff sought to enforce the trust as to the Butchertown parcel and to compel its reconveyance by defendant. The status of this case is not before us.

As to the trust suit, which was filed first, a demurrer to the complaint was sustained, but upon appeal the order sustaining the demurrer was, in 1915, reversed. 165 Cal. 237, 131 Pac. 750.

The present action, being the second one commenced, was tried first; the trial being had before the court sitting with a jury. The verdict went for the defendant, and judgment thereon was entered in her favor on April 7, 1914. On October 6th of that year the trial judge signed an order amending this judgment, which order was not filed or entered in the judgment book until June 21, 1915. In the meantime the parties went to trial in the trust suit, involving the equitable ownership of the Gough street property. Judgment therein went for the plaintiff, and the same was entered in June, 1915. The appeals are here on separate records, and will be separately considered.

With this introductory statement we will now review the record in the first action tried, namely, the action in ejectment covering both pieces of property.

The complaint in this action was in form an ordinary complaint in ejectment, in which it is alleged that on and ever since the 20th day of January, 1908, the plaintiff was the owner and entitled to the possession of the two parcels of land already several times referred to, and that on that date the defendant unlawfully and without right or title entered into possession of the premises and ejected the plaintiff, and has ever since unlawfully withheld the possession thereof from the plaintiff. The prayer was for the restitution of the premises and for damages. In defendant's third amended answer and cross-complaint she first denied the material averments of the complaint, and alleged that she is the owner and in possession of the property involved. She next set forth a matter of special defense, which is unimportant on this appeal. Finally, by way of cross-complaint, she alleged that there was another action pending between the same parties covering the Gough street property, referring to the action to enforce a trust as to that parcel. She also made the usual averments appropriate to an action to quiet title, setting forth in part that the plaintiff asserted a claim to that property adverse to her title, that such claim was wholly without right and was subject to her title, and that she was the owner of the property and entitled to the possession thereof, and prayed that her title be quieted. To this cross-complaint the plaintiff filed an answer, denying the material allegations thereof.

The cause was tried, and after the testimony was all in and the court had instructed the jury it was stipulated by the parties, at the suggestion of the trial judge, as we understand the matter, that the fate of the issues raised by the cross-complaint and answer thereto should be governed by the verdict of the jury upon the issues framed by the complaint and answer; that the verdict on these issues should be regarded as a determination in favor of the prevailing party on all the issues raised by all the pleadings. The jury found for the defendant. One week later, on April 7, 1914, and after a discussion with counsel for the plaintiff as to the scope of the stipulation, counsel for the defendant caused a judgment to be entered in favor of defendant in accordance with the tenor of the verdict and without reference to the intent, whatever it may have been, of the stipulation. Six months later, however, and without notice to the plaintiff, counsel for the defendant obtained from the trial judge an order amending the judgment, incorporating therein the stipulation entered into by the parties at the conclusion of the trial. The amended judgment was made to read in accordance with the prayer of defendant's cross-complaint, and her title to both pieces of property was quieted against all claims of the plaintiff. Eight months after the order amending the judgment was made and fourteen months after the original judgment was entered, the amended judgment was filed. Thereafter, a motion to set aside the amended judgment having been denied, this appeal was taken.

Notwithstanding the issues that the pleadings may be said to have raised, a review of the record shows that the case was tried exclusively upon the issues framed by the complaint and answer, the important one being as to whether or not the defendant had reconveyed the property to Bradley. Plaintiff showed that the defendant, being the legal owner of the two parcels of property on May 5, 1908, did about that time put in a safe deposit box, to which she gave Bradley access by sending him a key thereto, a deed of conveyance to him of those parcels duly acknowledged; that thereafter Bradley on two different occasions looked at the deed, held it in his hands, and replaced it in the box, from which it was thereafter taken and destroyed by the defendant. The latter, on the other hand, testified that she bought the Gough street property from Bradley for a valuable consideration, and that the deed of conveyance claimed by plaintiff to have been delivered to Bradley by her was put in the box as stated, but with the understanding that it was to be deemed delivered to him only in case he survived her. She further testified that this arrangement had been rescinded on account of a loss of confidence in Bradley which she suffered after her marriage to him, whereupon she removed and destroyed the deed.

It appears that some evidence crept into the record briefly disclosing the circumstances pro and con under which the parcels of property were conveyed to the defendant, but the sole contested question in the case in its last analysis was as to whether or not from the facts narrated it should be held that there had been a delivery to Bradley of the deed which had been placed by the defendant in the safe deposit box. No evidence was introduced for the purpose of showing, nor was the case tried on the theory, that the defendant had and plaintiff did not have the equitable title to the property

The record affirmatively shows that throughout the trial no mention was made of the equitable issue raised or purported to be raised by the amended answer and cross-complaint of the defendant and plaintiff's answer thereto, until just before the case was submitted to the jury, when the suggested stipulation heretofore referred to was made by the parties. Under these circumstances it would appear, granting that the stipulation is as broad in its scope as claimed by the defendant, that plaintiff's consent thereto was an excusable inadvertence. Indeed, its possible scope was, apparently, not understood by either party until shortly after the verdict, when it occurred to defendant's counsel that perhaps they were entitled to a judgment in the terms of the amended judgment, and they asked for a stipulation permitting such a judgment to be entered; but counsel for the plaintiff took the position that such a judgment would not be supported by the evidence, that therefore it would be nugatory, and, if entered, they would at once appeal from the same. Defendant's counsel at the time acquiesced in this view, and caused to be entered a judgment in accord with the verdict of the jury. Six months later, however, counsel for defendant, without notice to plaintiff, procured an amended judgment in conformity with the terms of the stipulation referred to, and fourteen months thereafter caused the same to be filed; a decision having meanwhile been rendered in the trust suit in favor of plaintiff.

From what has been said it follows that the verdict on defendant's cross-complaint, if given the scope claimed for the stipulation, is not supported by the evidence in the case.

[2] But there is another point fatal to the amended judgment. Granting that the court could amend the original judgment without notice and while an appeal was pending, granted that on the pleadings the issue as to plaintiff's equitable claim was presented to the jury for its consideration, and granting that there was evidence on such issue, upon which a verdict in favor of the defendant could have been based, still we think the part of the judgment giving defendant the relief prayed for in her cross-complaint cannot be sustained, for the reason that the issues which it raised, and the relief therein demanded, were purely equitable, so that the verdict on the cross-complaint was merely advisory. The authorities on this question are numerous and uniform. They are all to the effect that in an equity case, or on an equitable issue, the verdict of the jury must be expressly adopted by the court in some unmistakable manner, and findings made by it in conformity to such verdict or in rejection of it, or else the judgment will be reversed as having nothing to support it in such a case or on such an issue. See Warring v. Freear, 64 Cal. 54, 28 Pac. 115; Learned v. Castle, 67 Cal. 41, 7 Pac. 34; Haggin v. Raymond, 67 Cal. 302, 7 Pac. 721; Bell v. Marsh, 80 Cal. 411, 22 Pac. 170; Cummings v. Ross, 90 Cal. 68, 27 Pac. 62. An inspection of the record in the present case discloses that no such findings were ever made by the court; and it appears that they were never waived by the appellant, and that the court did nothing in the way of adopting the verdict of the jury so as to give its judicial sanction to the decision. Under these circumstances that part of the amended judgment which gave effect to the stipulated verdict on the cross-complaint has no legally sufficient findings to support it, and it must be reversed for want of such findings.

[3] Finally, it remains to be noted that the cross-complaint, in terms, sought to have the title quieted to the Gough street property only, and no relief could therefore be granted thereunder so far as the Butchertown parcel was concerned. The amended judgment purports to grant such relief. Furthermore, even if such relief were permissible under the pleadings, there is no evidence in the record to sustain it. As to this lot the defendant did not claim to have bought it, as she did with reference to the Gough street lot; and the uncontradicted evidence is that it was conveyed without consideration to defendant by Bradley for the purpose of permitting one decree to be obtained covering both lots, as before stated, and upon the obvious understanding that she should reconvey it to him when that object had been accomplished.

The judgment and order are reversed.

We concur: BEASLY, Judge pro tem.; ZOOK, Judge pro tem.

(37 Cal. App. 263)

BRADLEY CO. v. BRADLEY. (Civ. 2374.)

(District Court of Appeal, First District, California. May 16, 1918. Rehearing Denied by Supreme Court July 15, 1918.)

1. Trusts ⚿43(3)—Parol Evidence.

Under the statute of frauds, generally parol evidence cannot be received to prove a deed absolute on its face was given in trust for the benefit of the grantor.

2. Trusts ⚿92½—Parol Evidence.

Where, by means of an oral promise made without any intention of performing it, one obtains an absolute deed without giving consideration therefor, the statute of frauds does not bar relief.

3. Trusts ⚿103(1)—Constructive Fraud.

If a grantee by means of a parol promise to reconvey obtains an absolute deed without consideration from one to whom he stands in a confidential relation, the breach of the promise is constructive fraud, although at the time it was made there was no intention not to perform.

4. TRUSTS ⚷44(2) — SUFFICIENCY OF EVIDENCE.

In action to have trust declared in land, evidence *held* to sustain finding that conveyance was made with understanding that property was to be held in trust.

5. TRUSTS ⚷110—CONFIDENTIAL RELATIONS —EVIDENCE.

In action to have trust declared in land, evidence *held* sufficient to sustain finding that confidential relation existed between plaintiff and defendant at time plaintiff delivered an absolute deed to defendant, who orally promised to reconvey.

6. TRUSTS ⚷103(1)—SPECIAL CONFIDENCE.

Special confidence creating a trust relation may exist in cases where there does not exist the relationship of husband and wife, parent and child, guardian and ward, counsel and client, etc.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the Bradley Company, a corporation, against Emma R. Bradley, formerly Emma R. Buxton, also known as E. R. Buxton. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 173 Pac. 1009, 1013.

Charles Baer, of San Francisco, for appellant. Stoney, Rouleau & Stoney and Orville C. Pratt, Jr., all of San Francisco, for respondent.

KERRIGAN, J. This is an appeal by the defendant from a judgment in favor of plaintiff declaring defendant an involuntary trustee of certain real property and ordering an accounting.

The facts pertinent to this appeal, outside of those stated in the course of this opinion, are fully set out in case No. 2364, 173 Pac. 1009, bearing the same title as the present one and this day decided by this court, and to which reference is made.

The complaint alleges, and the court found, that one Richard Bradley, respondent's predecessor in interest, owned a lot on Gough street, in San Francisco, on November 10, 1906; that he desired to borrow money on said property, and, in order to do so without appearing himself as the borrower, he made a conveyance thereof to the defendant in order that she might borrow money upon it for him; that on said date, without receiving any consideration therefor, he conveyed the same to her by a grant, bargain, and sale deed, and that she orally promised and agreed to take and hold said property in trust for him, and to borrow money by mortgage upon it, and on demand to reconvey it to him; that at said time and for a period prior thereto defendant was and had been the confidential agent of Bradley; and that said conveyance was made in implicit reliance upon the confidential relations existing between Bradley and the defendant. The complaint also averred that defendant refused to reconvey, and had repudiated said trust, and prayed that defendant be declared an involuntary trustee, and that she be compelled to account for the rents and profits of said real property. Other details are set forth in the complaint, but the foregoing is sufficient for a consideration of the case. The facts alleged are specifically denied by the answer, which avers that the conveyance was made for the purpose of transferring to the defendant the title to said property in fee simple absolute without any conditions, qualifications, or limitations, and not for the purposes alleged in plaintiff's amended complaint. As just shown, the theory of plaintiff's case was based upon the existence of a confidential relationship between Bradley and the defendant. As to this it is to be noted that at the time of the conveyance they were not husband and wife, but were married about three years later.

[1-3] Under the statute of frauds it is the general rule that parol evidence cannot be received to prove that a deed absolute on its face was given in trust for the benefit of the grantor. Where, however, by means of an oral promise made without any intention of performing it, one obtains an absolute deed without giving any consideration therefor, it is a case of actual fraud, and the statute of frauds is not a bar to relief. Feeney v. Howard, 79 Cal. 525–527, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162. But this case does not fall within that exception to the general rule. It is claimed, however, that it falls within the exception to the rule declared in Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189, to the effect that, if a grantee by means of a parol promise to reconvey obtains an absolute deed without consideration from one to whom he stands in a confidential relation, the breach of the promise is constructive fraud, although at the time it was made there was no intention not to perform. Dimond v. Sanderson, 103 Cal. 97–102, 37 Pac. 189. See, also, Feeney v. Howard, supra; Adams v. Lambard, 80 Cal. 426, 22 Pac. 180. The law, from considerations of public policy, presumes such transactions to have been induced by undue influence.

With the law as thus stated, the parties to this appeal are in accord, the only serious dispute between them being as to whether or not the evidence in this case sustains the finding of the trial court, to the effect that at the time of the conveyance in question there existed a confidential relationship between Bradley and the defendant.

[4] Before considering that point, it may be well to say that the evidence in the record abundantly supports the finding of the trial court that the conveyance was made by Bradley to the defendant upon the understanding that the property was to be held in trust and to be reconveyed to the grantor upon demand. Bradley lived in Porterville; the de-

fendant in San Francisco, where the property was situated. According to the former's testimony, after the conflagration in San Francisco in the year 1906, he felt disposed to do what he could to aid in the rehabilitation of the city, and accordingly decided to build upon the lot in question, but did not have the ready money with which to do so. Being connected with a bank in Porterville, he deemed it ill-advised to appear in the capacity of a borrower, so he made a grant, bargain, and sale deed of the lot to the defendant, upon the understanding that she would borrow a certain sum of money from the Hibernia Bank on her note, giving as security therefor a mortgage on the property, and at any time thereafter, upon demand, would reconvey it to him. According to the remainder of the evidence, including numerous letters from defendant to Bradley, addressed to him at Porterville, it appears that she succeeded in obtaining the suggested loan, and then proceeded, according to an evident arrangement between them, to superintend the construction of the proposed building according to plans and specifications submitted to and adopted by Bradley. All the contracts for the erection of the building were submitted to him by defendant for his approval. Many of the payments on account of the work were made by his personal checks. Other payments were made by her out of the borrowed money, and none were made without his knowledge and consent. After the building was finished the rents to be charged for the various stores and flats into which it was divided, and the selection of an agent to care for the property, were decided by him. Contemplated reductions in rent were submitted by defendant to him. In this connection she said in one of her letters: "Let me know your prices." In another she said:

> "After attending to a little business of my own I went to the Hibernia Bank to look after your business"—referring to the Gough street building.

In a third letter speaking of certain alterations in the structure, she wrote:

> "He asked my opinion but I could not commit myself, but told him he should have to notify you. * * * It is hard for me to do or say anything when you are the one to be suited."

These are but instances of many similar expressions by the defendant in her letters to Bradley covering a period of about two years. During that time all her acts and conduct with reference to the property were consistent with the claim of Bradley, and inconsistent with her present claim of ownership.

[5, 6] Coming now to the assertion of defendant that the evidence does not sustain the finding of the court that at the date of the conveyance defendant was Bradley's confidential agent, and that he was induced to make the deed by the confidence which he reposed in her, and the belief thereby engendered that she would perform her promise to reconvey to him upon demand, a letter written by her to Bradley prior to the conveyance shows that at that time Bradley must have reposed great confidence in the defendant and that they entertained for each other a strong affection. That this condition existed at the time of the conveyance in November, 1906, is shown in nearly all of her many letters written while the building on Gough street was in course of construction and thereafter. While those letters were, in part, of a business nature and business-like, they still indicate that the relations between the parties were close, intimate, and confidential. According to her own testimony, for several years prior to the conveyance she and Bradley were engaged to be married, and they in fact were married in March, 1909. From the facts narrated it certainly cannot be held that their relations were not confidential, nor that defendant was not the confidential agent of Bradley at the very time of the conveyance of the property. There are certain relationships from the existence of which the law infers special confidence, such as those of husband and wife, parent and child, guardian and ward, counsel and client, etc.; but it also exists in numerous cases where the facts proven will warrant the inference. Brown v. Mercantile T. & D. Co., 87 Md. 377, 40 Atl. 256; Thomas v. Whitney, 186 Ill. 225, 57 N. E. 808, 810; Stepp v. Frampton, 179 Pa. 284, 36 Atl. 177, 179. If these parties had been married at the time of the creation of the trust, the law would have presumed the relationship to be confidential, and the oral trust, therefore, enforceable; yet here the evidence shows that the confidence reposed was greater before than after marriage. We think that the trial court's conclusion that there existed at the time of the conveyance a confidential relationship between the parties is abundantly supported by the evidence.

The judgment is affirmed.

We concur: BEASLY, Judge pro tem.; ZOOK, Judge pro tem.

(37 Cal. App. 268)

BRADLEY CO. v. BRADLEY. (Civ. 2461.)

(District Court of Appeal, First District, California. May 16, 1918.)

TRUSTS ⚷183—BREACH OF TRUST—REMEDY OF TRUSTEE.

Trustee who fraudulently refuses to reconvey property to its legal owner, and who repudiates a trust, is not entitled to use or occupy any part of the trust property free of charge.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the Bradley Company, a corporation, against Emma R. Bradley, formerly

Emma R. Buxton. From a judgment in its favor granting part of the relief demanded, plaintiff appeals. Modified and affirmed.

See, also, 173 Pac. 1009, 1011.

Stoney, Rouleau & Stoney and Orville C. Pratt, Jr., all of San Francisco, for appellant. Charles Baer, of San Francisco, for respondent.

KERRIGAN, J. In this action plaintiff sought to have the defendant declared an involuntary trustee for the plaintiff of certain real property described in the complaint, and to compel a conveyance thereof to the plaintiff, and an accounting for its rents and profits since February 28, 1910. On the main issue in the case judgment went in favor of the plaintiff, ordering in its favor a conveyance of the property. Defendant appealed therefrom, and said judgment has this day been affirmed by this court. Plaintiff also took an appeal from said judgment, being dissatisfied with that portion thereof which, as the result of the accounting had, awarded to the defendant the sum of $800.21, and gave to her a lien upon the real property for that amount, and this is the appeal which is now before us.

The sole point made by plaintiff is that this provision of the judgment is not supported by the findings.

Summarized, the findings show that prior to February 28, 1910, the defendant held the property described in the complaint in trust for the plaintiff; that on that date she repudiated her trust; that since that time down to June 18, 1915, when the court's decision was made and filed, she had received as rents for the property certain sums of money, and had made various disbursements on account thereof, with which she was duly debited or credited; that aside from the collection of these rents by her she had during the period mentioned occupied and used a flat constituting part of the real property; and that the reasonable value of such use and occupation was the sum of $1,600. The court, however, in its conclusions of law did not charge her with this $1,600.

In this regard, we think, the court committed an error as a matter of law, and that the judgment, instead of awarding to the defendant as the result of the account so taken the sum of $800.21, should, upon the findings in favor of the plaintiff, have decreed the payment to it by the defendant of the sum of $799.79.

It would seem to be too clear to require the citation of authority that a trustee, who "fraudulently refuses" to reconvey property to its legal owner and who repudiates the trust, is not entitled to use or occupy any part of the trust property free of charge; but, if the citation of authority be deemed necessary, see Fricker v. Americus Mfg. Co., 124 Ga. 165, 52 S. E. 65; sections 2273, 2275, Civil Code.

Defendant does not controvert this as a correct statement of a legal principle, but contends that plaintiff is not in a position to avail itself of this rule of law on the face of the record. There is no merit in her contention in this behalf that the findings relied upon by plaintiff are of probative facts. They are true ultimate facts. It is clear from these findings, which are quite full, that the court struck an erroneous balance by failing to charge the defendant with the rental value of over five years of that part of the trust property which she occupied in defiance of and to the exclusion of plaintiff.

It appearing from the face of the record that the court committed error in not charging the defendant with the amount which it found to be the value of her use and occupation of part of the premises, and that the error is susceptible of correction by this court without requiring a new trial of the issues, it is ordered that the judgment appealed from be modified in the following particulars, namely: That the conveyance to the plaintiff ordered by the judgment shall be made free and clear of any lien in favor of the defendant; that the portion of said judgment which decrees that the defendant owes nothing to plaintiff and that the plaintiff is indebted to the defendant in the sum of $800.21 shall be stricken out; and that said judgment shall provide that the plaintiff shall recover from the defendant the sum of $799.79. As thus modified, the judgment is affirmed.

We concur: BEASLY, Judge pro tem.; ZOOK, Judge pro tem.

(178 Cal. 470)

HUNT v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (L. A. 5490.)

(Supreme Court of California. July 1, 1918.)

1. COUNTIES ⚿65—OFFICERS—TERM—STATUTES—"TENURE."

Los Angeles County Charter, making office of county treasurer an appointive office in classified service of county, and providing that all persons in classified service, "whether holding by election or by appointment, shall hold their positions until discharged, reduced, promoted or transferred," does not affect term of office of county treasurer elected before charter went into effect; article 12, § 56, and Const. art. 11, § 7½, providing that charter shall not affect "tenure of office" of officer so elected, the word "tenure" meaning the fact, manner, or means.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Tenure.]

2. COUNTIES ⚿67—OFFICERS—REMOVAL.

Los Angeles County Charter, making office of county treasurer an appointive office in classified service of county, and providing method of removal from office of person in classified service, is not applicable in its provisions as to removal of such persons, to a county treasurer elected prior to adoption of charter, who, having been elected under general laws of state, may be removed before expiration of term under Pen. Code, § 758 et seq., providing for removal of officers from office.

3. STATUTES ⚿64(7)—PARTIAL INVALIDITY.

The fact that Pen. Code, § 770, providing for an appeal to Supreme Court from a judgment or decree of removal from office under sections 758–772, providing removal of civil officers otherwise than by impeachment, was declared unconstitutional, does not invalidate the remaining provisions of sections 758–772; the unconstitutional section being an independent provision.

In Bank. Application for writ of prohibition by John N. Hunt against the Superior Court of the County of Los Angeles and others. Alternative writ heretofore issued discharged, and proceeding dismissed.

Arthur Keetch, of South Pasadena, and A. I. McCormick, of Los Angeles, for petitioner. Thomas Lee Woolwine, Dist. Atty., and George E. Cryer, Chief Deputy Dist. Atty., both of Los Angeles, for respondents. A. J. Hill, County Counsel, and Robert B. Murphy, Asst. County Counsel, both of Los Angeles, amici curiæ.

ANGELLOTTI, C. J. By this proceeding a writ of prohibition is sought to restrain the superior court of Los Angeles county from trying petitioner, the treasurer of said county, on a written accusation presented by the grand jury of said county, charging him with willful misconduct in office, as such treasurer. The proceeding against him was instituted under the authorization given by section 758 et seq. of the Penal Code of the state, a general law of the state providing for the accusation and trial in the superior court of public officers for misconduct in office, and a judgment of removal from office in the event of conviction. The proceeding against petitioner was strictly in accord with the provisions of these sections. The claim is that this state law has no application to petitioner by reason of the alleged fact that he is an appointive officer, holding his office under the provisions of the county charter of the county, which provides the sole means and method by which appointive officers may be removed, thereby superseding the Penal Code provisions. If this claim be well based the superior court is without jurisdiction of the proceeding against petitioner. The attorneys for the respective parties have presented with great ability their respective views as to the validity under our Constitution of any county charter provisions purporting to provide an exclusive method by which county officers may be removed, and also as to the true meaning of the complex and confusing provisions of the Los Angeles county charter in regard to the matter of the removal of officers and employés. They have ignored certain suggestions of the county counsel of Los Angeles county filed by him as amicus curiæ, which, in view of the allegations of the petition for prohibition, appear to us to be well based and to necessarily lead to the conclusion that the charter provisions relied on have no application to petitioner, and that as to him the general law of the state as to removal from office for misconduct in office is applicable.

The county charter was framed and adopted under the provisions of section 7½ of article 11 of our Constitution, going into force in June, 1913. Up to that time the county had operated under the general laws of the state relative to counties and their government. At that time petitioner was the treasurer of such county, having been regularly elected to the office under such laws, at the general election in November, 1910, for a term of four years commencing on the first Monday of January, 1911, and, according to our statutes and decisions, to hold thereafter until his successor was legally selected and had qualified. By the charter certain offices which were previously elective, including that of treasurer, were made appointive offices, the appointment to be made by the board of supervisors. By provisions contained in the article on civil service, officers elected by the people and certain other positions were placed in what was called the "unclassified service," which was free from civil service supervision. It was then provided that "the classified service shall include all other positions now existing or hereafter created," which would include the office of treasurer. As to the classified service the article contains various provisions which it is claimed establish a method of discharge, removal, and reduction in rank. Section 37 (in this article) provides:

> "All persons in the county or township service holding positions in the classified service as established by this article, at the time it takes effect, whether holding by election or by appointment, and who shall have been in such service

for the six months next preceding, shall hold their positions until discharged, reduced, promoted or transferred in accordance with the provisions of this article. * * *"

It is apparently petitioner's theory that he is holding his office solely under the provisions of this section, and without any other appointment or qualification whatsoever. He simply alleges his election as hereinbefore stated, his qualification under such election and entering upon his duties in January, 1911, that he continued as such treasurer to the taking effect of the charter, and that "ever since the time said charter took effect * * * has continued to be and to act as such treasurer of said county, and is now such treasurer, under and by virtue of the provisions of said charter," and during all said time has held a position in the classified service of the civil service of said county. There is no suggestion that he has been appointed to the office by the board of supervisors, or that, having been so or in any other way appointed, he has qualified under such appointment.

[1, 2] Section 37 of article 9 of the Los Angeles Charter, considered without regard to other provisions of the charter and the provisions of our Constitution relative to such charters, might be taken as lending support to a theory that a person holding an office by election at the time the charter took effect, which office was made appointive by the charter, and placed in the classified service, continued to hold such office thereafter under the charter without the necessity of further appointment or qualification. But section 11 of article 3 of the Charter clearly requires an appointment by the board of supervisors of "all county officers other than elective officers." And section 56 of article 12 of the Charter provides as follows:

> "Nothing in this charter is intended to affect, or shall be construed as affecting the tenure of office of any of the elective officers of the county or of any district, township or division thereof, in office at the time this charter goes into effect, and such officers shall continue to hold their respective offices until the expiration of the term for which they shall have been elected unless sooner removed in the manner provided by law. * * * But the successors of each and all of such officers shall be elected or appointed as in this charter provided, and not otherwise."

And section 7½ of article 11 of the Constitution declares that it shall be competent in such a charter "to provide" "for sheriffs, county clerks, treasurers, * * * auditors, * * * for the election or appointment of said officers," etc., with the express provision "that any such charter shall not affect the tenure of office of the elective officers of the county, * * * in office at the time such charter goes into effect, and such officers shall continue to hold their respective offices until the expiration of the terms for which they shall have been elected, unless sooner removed in the manner provided by law." The word "tenure" denotes in law the fact, manner, or means of holding, and as applied to the holding of an office has been held synonymous with "term of office." The words "shall not affect the tenure of office," etc., used in the constitutional provision, prohibit not only the shortening of the tenure or term of office of any of the officers described, but also the extension of such tenure or term of office. To provide that such an officer shall continue to hold indefinitely after the expiration of the term for which he is elected, until removed for cause, is necessarily to provide that his tenure or term of office shall be extended, which would be in direct conflict with the constitutional provision. We think, however, that the charter taken as a whole clearly contemplates that as to elective officers made appointive by its provisions, appointment of successors must be made at the expiration of the respective terms for which they were elected. Whether section 37 of article 9 of the Charter is effective to give such elected officers any preferred right in the matter of the appointment is a question not here involved and need not be discussed. But it does seem plain to us that until the appointment and qualification of a successor to an elective officer in office at the time the charter went into effect, such elective officer continues to hold his office solely by virtue of his election. His tenure of office is that prescribed by the general laws under which he was elected, and under those laws he holds, unless removed in accordance therewith, until the appointment of a successor in the manner provided by the charter, and the qualification of such successor. Such tenure cannot be affected by any provision of the charter as to removal, and as to that matter the general laws of the state still apply.

[3] In view of what we have said but one other point remains for consideration. Section 770, Penal Code (contained in the chapter entitled "Removal of civil officers otherwise than by impeachment," and including sections 758 to 772), providing for an appeal to the Supreme Court from a judgment or decree of removal from office "under any provision of this chapter," was held to be unconstitutional in People v. McKamy, 168 Cal. 531, 143 Pac. 752. It was held therein that in view of certain provisions of our Constitution no appeal to the Supreme Court or to a District Court of Appeal could be authorized by the Legislature in such a case, the same not being one "prosecuted by indictment or information." It is contended that this section was so essential to and a part of the scheme provided by the chapter for the removal of officers by accusation that the whole chapter must now be held to be invalid. This very question was the sole question presented to us by an application for transfer from the District Court of Appeal of the Second Appellate District of the matter of Hamilton v. Superior Court, L. A. No. 5375. This application was denied September 20, 1917, without any opinion being

filed. The court concluded that the section purporting to give a right of appeal in such cases was an entirely independent provision, the invalidity of which in no way affected the validity of the remaining provisions of the chapter. To this conclusion we adhere.

The alternative writ of prohibition hereinbefore issued is discharged, and the proceeding dismissed.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; WILBUR, J.; RICHARDS, Judge pro tem.

(178 Cal. 811)

LEWIS v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (L. A. 5489.)

(Supreme Court of California. July 1, 1918.)

In Bank. Application for writ of prohibition by Walter A. Lewis against the Superior Court of the County of Los Angeles and others. Alternative writ discharged, and proceeding dismissed.

Edwin A. Meserve and Shirley E. Meserve, both of Los Angeles, for petitioner. Thomas Lee Woolwine, Dist. Atty., and Geo. E. Cryer, Chief Deputy Dist. Atty., both of Los Angeles, for respondents.

PER CURIAM. This proceeding is in all material respects the same as Hunt v. Superior Court, L. A. No. 5490, 173 Pac. 1097, this day decided, the petitioner herein being the auditor of Los Angeles county.

For the reasons given in the opinion filed in the Hunt Case, the proceeding must be dismissed. The alternative writ of prohibition heretofore issued herein is discharged and the proceeding dismissed.

(178 Cal. 466)

MESMER & RICE et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 8462.)

(Supreme Court of California. July 1, 1918.)

1. MASTER AND SERVANT 🔑404—WORKMEN'S COMPENSATION ACTS—EVIDENCE.

Where, in the proceeding before the Industrial Accident Commission, it was agreed that the commission's physician examine the servant and report whether his disability was due to injury or disease, his report founded in part on the reports of assistants *held* competent evidence under the agreement.

2. MASTER AND SERVANT 🔑417(5)—REVIEW—APPLICATION—PRESUMPTION.

Where an application to the Industrial Accident Commission to have evidence stricken was never formally acted upon, it must be assumed to have been denied.

3. MASTER AND SERVANT 🔑417(8) — WORKMEN'S COMPENSATION ACT—EVIDENCE—EXCLUSION OF CUMULATIVE EVIDENCE.

An award of the Industrial Accident Commission cannot be set aside for error of procedure in admitting incompetent evidence which was merely cumulative, where there was other evidence ample to support the findings.

In Bank. Application by George Walter Wilson to the Industrial Accident Commission for award for injuries alleged and suffered in course of his employment by Mesmer & Rice. From an award for applicant, Mesmer & Rice and the Georgia Casualty Company made application for review against the Commission and George Walter Wilson. Award affirmed.

Redman & Alexander, of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, and R. T. Lightfoot and Lee Utley, both of Los Angeles, for respondents.

ANGELLOTTI, C. J. The Industrial Accident Commission, in a proceeding duly instituted by respondent Wilson, made an award in his favor against petitioners as compensation for injuries alleged and found to have been suffered by him in the course of his employment by petitioner Mesmer & Rice. Petitioners seek by means of a writ of review to have this award annulled.

On the trial before the commission it was stipulated that Wilson received an injury, and that such injury arose out of and happened in the course of his employment. The only question apparently was as to the nature, extent, and duration of the disability caused thereby. The claim of petitioners before the commission was that the disability for which compensation was sought was due to a certain disease with which it was claimed Wilson was afflicted, rather than to the injury confessedly received by him at the time of his accident. A great deal of evidence was introduced before the referee by the respective parties on this issue, and it is not claimed here that there was not sufficient evidence to support the conclusion that the disability for which compensation was awarded was due to the injury. The claim is that the award is void because made before all the evidence was taken, and because of the reception of evidence of unsworn reports of certain doctors, without notice to petitioners.

It appears that, at the close of the taking of the evidence before the referee, it was suggested by Wilson's attorney that the physician of the commission examine Wilson and determine definitely for the information of that body whether his disability was due to the disease. This suggestion was acceded to by the attorney for the petitioners. The record fairly shows that, although the latter at first requested that the examination should be made under certain specified conditions, including the holding of the applicant in a hospital under the direction of Dr. Southworth "for a period of six or eight weeks, or such time as Dr. Southworth should determine," it was finally understood that Wilson was to submit himself to an examination by Dr. H. E. Southworth, the physician of the commission, who was to take whatever measures he might deem necessary to reach a conclusion, and that his report was to be made to the referee, to be used by the Industrial Accident Commission in arriving at a conclusion, and that upon such examination and report being made the case was to be submitted for decision. Such, in effect, was the order of the referee, expressly assented to by all parties. The report of Dr. Southworth was presented, accompanied by the reports to him of two doctors whom he had in consultation with him in the case. One report (from Dr. Ide) was a report of certain symptoms of Wilson as shown by an examination, without any expression of conclusion except as to prospect of recovery and idea of proper treatment. The other (from Dr. Johnson) was simply a report of the result of a Wasserman test, the answer being "negative." The written report of Dr. Southworh stated that Wilson had been under his attention for "the past many days" in a hospital, that he had Drs. Ide and Johnson in consultation and inclosed their reports to him, that a urinalysis revealed nothing abnormal, that during the time of his observation he was unable to associate any systemic disorder which might produce local head symptoms such as complained of by the patient, and that he was of the opinion that the disturbance is local and the result of injury.

[1] There is no good basis for a claim that the award was made before all the evidence had been taken. As we have seen, the undertaking of all parties was that the matter was to be submitted for decision upon receipt of the report of Dr. Southworth. No further evidence was to be taken. Petitioner's real grievance is that Dr. Southworth submitted to the commission with his own report, and as a part thereof, the reports to him of two assistants whom he had called in to make certain examinations, and to give to him the result of those observations for his own use in coming to a conclusion, and that these reports were thus made evidence in the proceeding. It cannot fairly be disputed that, in view of the understanding that he was to take whatever measures he deemed necessary to reach a conclusion, he had the right to employ assistance to make certain observations as to Wilson, including a serological examination, and to report the result for his information in observing Wilson, and in coming to a conclusion. This he did, and upon their reports to him and his own personal observation of the case, continued "for many days," he made his own report to the commission. There can be no doubt that his report was, in view of the understanding of the parties, competent evidence to be considered by the commission, and that it, together with the evidence actually introduced on the hearing before the referee, furnished full support for the conclusion of that tribunal.

[2, 3] We may assume for the purposes of this decision that the written reports of Drs. Ide and Johnson to him, which he submitted with his report, were not competent independent evidence for the consideration of the commission, and that the application of the petitioners to the commission made March 15, 1917 (two months before the award was made), that the same be stricken out and withdrawn from the record, should have been granted. This application apparently was never formally acted on and must be assumed to have been denied. But the failure of the commission to reject the incompetent evidence could not affect its jurisdiction to make the award. The proceeding in review is not an appeal. The award "cannot be set aside for errors of procedure only, or for insufficiency of the evidence, where there is substantial evidence to support the findings, or for rulings upon the admission or exclusion of evidence, amounting only to error and not affecting the jurisdiction." Massachusett Bonding, etc., Co. v. Industrial Accident Commission, 168 Pac. 1050. Independent of the evidence alleged to be incompetent, there was ample evidence to support all the findings. This is not disputed. So it cannot be claimed that the commission was without jurisdiction to make the award because of an absolute want of proper evidence to support the findings of fact essential to such jurisdictions, as was the case in Carstens v. Pillsbury, 172 Cal. 578, 158 Pac. 218, and Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 324, 153 Pac. 24. The situation here is not such, in our opinion, as to warrant an annulment of the order upon the principles stated in the opinions in those cases. At most, we have here a refusal on the part of the commission to strike out incompetent evidence which was merely cumulative of other evidence, and in no way essential to support the conclusion of the commission. It may further be noted that, in view of the report of Dr. Southworth, the other reports were of no substantial importance.

The award is affirmed.

We concur: SLOSS, J.; SHAW, J.; MELVIN, J.; WILBUR, J.; RICHARDS, Judge pro tem.

(173 Cal. 500)

BARNES v. DISTRICT COURT OF APPEAL, SECOND APPELLATE DIST.

(L. A. 5629.)

(Supreme Court of California. July 3, 1918.)

1. ATTORNEY AND CLIENT ⟹52 — DISBARMENT—PROCEEDINGS.

Code Civ. Proc. §§ 290, 291, providing that, if disbarment proceedings are upon information other than that of the court, accusation must be in writing and verified, refers back to section 289, which provides that proceedings under section 287, subds. 2, 3, and 4, specifying grounds of disbarment, may be taken on information of another, and has no application to section 287, subd. 1, specifying as ground of disbarment conviction of crime involving moral turpitude.

2. ATTORNEY AND CLIENT ⟹39—DISBARMENT —CONVICTION OF CRIME.

Under Code Civ. Proc. § 287, subd. 1, providing that an attorney may be disbarred for conviction of crime involving moral turpitude, an attorney may be disbarred for conviction of such crime, although conviction is not had in a court of state disbarring him.

In Bank. Application by E. M. Barnes for writ of review against the District Court of Appeal, Second Appellate District. Proceedings dismissed, and order affirmed.

E. M. Barnes, of Los Angeles, in pro. per. Bowen & Bailie, of Los Angeles, for respondent.

SHAW, J. This is a proceeding to review and annul an order of the District Court of Appeal of the Second District directing that the name of E. M. Barnes be removed from the roll of attorneys, and that his license to practice law in this state be revoked.

Barnes was admitted to practice in this state by an order of the Supreme Court made in the year 1880. On March 21, 1910, he was convicted in the District Court of the United States for the district of Alaska for the crime of mailing an obscene and lascivious letter. In February, 1918, after due notice to him in that behalf, an attorney acting for the Bar Association of Los Angeles County, appeared in said District Court of Appeal and moved for an order disbarring Barnes from practice in this state as an attorney, basing the motion upon the ground that Barnes had been convicted, as aforesaid, of said crime, and that a copy of the record of said conviction had been filed with said court. Barnes, although having been served with said notice, failed to appear in opposition to the motion, and thereupon the District Court made the order now sought to be annulled removing him from the roll of attorneys.

The complainant claims that the District Court of Appeal has no jurisdiction to make an order removing or disbarring an attorney because of his conviction by a court outside of this state of a crime involving moral turpitude, unless an accusation is made against him in writing, duly verified by oath of some person, as prescribed by sections 290 and 291 of the Code of Civil Procedure.

Section 287 prescribes five grounds for the removal or the suspension of an attorney after his admission to practice. The first ground is the only one here involved. The introductory clause and the first subdivision of the section read as follows:

> "An attorney or counselor may be removed or suspended by the Supreme Court, or any department thereof, or by any District Court of Appeal, or by any superior court of the state, for either of the following causes, arising after his admission to practice:
>
> "1. For conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence."

Sections 288 and 289 are as follows:

> "288. In case of the conviction of an attorney or counselor of a felony or misdemeanor, involving moral turpitude, the clerk of the court in which such conviction is had shall, within thirty days thereafter, transmit to the supreme court a certified copy of the record of conviction."
>
> "289. The proceedings to remove or suspend an attorney and counselor, under the first subdivision of section two hundred and eighty-seven, must be taken by the court on the receipt of a certified copy of the record of conviction. The proceedings under the second, third, or fourth subdivisions of section two hundred and eighty-seven may be taken by the court for the matters within its knowledge, or may be taken upon the information of another."

Then follow sections 290 and 291, the former providing that, "if the proceedings are upon information of another, the accusation must be in writing"; the latter that the accusation must be verified by the oath of some person to the effect that the charges therein contained are true.

It will be seen that the provisions of section 287 vest in the district court jurisdiction to make an order such as that complained of upon the ground that the attorney has been convicted of a crime involving moral turpitude, and that in such cases the record of conviction is conclusive evidence. Jurisdiction is thereby given positively. The only question which permits of doubt is the manner of its exercise. Section 288 does not require the clerk of the court in which a conviction is had to transmit a certified copy of the record to the District Court of Appeal. Consequently the jurisdiction of the District Court of Appeal to disbar an attorney for that cause does not depend upon the transmission of such copy by the clerk of the court in which the conviction is had. Obviously section 288 applies only to crimes committed in this state and to convictions in the state courts. The Legislature would have no authority to require the clerk of a court in another state, or of a court of the United States sitting in this state, to perform any act whatever, and the scope of that section must be confined to the officials of this state. The jurisdiction of the District Court to disbar for this cause under section 287 does not depend upon the procedure given in section 288, but, as we have said, is given to it in positive terms and without qualification.

[1] Section 289, in prescribing the procedure for a removal under subdivision 1 of section 287, requires the court to which such jurisdiction is given to take the proceedings necessary for that purpose upon the receipt of a certified copy of the record of conviction. No accusation is necessary in such a case; for the provisions of sections 290 and 291 requiring a written accusation when the proceedings are "upon the information of another" refer only to the provisions of section 289 on that subject, and that provision applies exclusively to proceedings to disbar or suspend under the second, third, and fourth subdivisions of section 287, and do not apply to subdivision 1. There being no other provision of the Code prescribing the procedure to be followed in the District Court of Appeal for the removal of an at-

torney under subdivision 1 of section 287, the case falls within the scope of section 187, which provides that, when jurisdiction is conferred upon any court by the Code, and the course of proceeding is not specifically pointed out by the Code, or by statute, such court may adopt any suitable process or mode of proceeding which may appear most conformable with the spirit of the Code. It appears from the record here that the authenticated copy of the record of the District Court of the United States for the District of Alaska showing the conviction of Barnes of the aforesaid crime was duly filed in the District Court of Appeal. This, under section 289, was sufficient to give that court jurisdiction to proceed. Thereupon, following section 187, the court proceeded to adopt a mode of proceeding, that is, when an attorney, one of its officers, presented to it a proposed notice of motion to remove Barnes for that cause, to be made on February 5, 1918, it authorized the service of such notice on Barnes and directed that it be served at least three days before the time fixed therein for the making of the proposed motion. This notice was duly served upon Barnes, and in pursuance thereof the motion was made. It cannot be said that as a matter of law the period of three days was so unreasonable or oppressive that the court thereby deprived itself of jurisdiction to proceed. It is not contended that such is the case. It follows that the court had jurisdiction to make the order and that the proceeding adopted was sufficient to give jurisdiction of the person of Barnes.

[2] There is no force in the argument that the provision of section 287 for disbarment on the ground that the attorney has been convicted of a crime involving moral turpitude is confined to convictions had in the courts of this state. The language of section 287 is general, and it vests concurrent jurisdiction thereof in the Supreme Court, the District Courts of Appeal, and the superior courts. No provision whatever is made for the filing of a copy of the record of conviction in any court except the Supreme Court. The reasons which induced the Legislature to prescribe this as a ground for disbarment are as potent when applied to a conviction in a court of another state, or in a court of the United States, as when applied to a conviction in the courts of this state. It was not because of the particular court which adjudges the attorney guilty, or the place where it sits, that the Legislature saw fit to make that a cause for disbarment, but because of the bad moral character of such attorney, which the Legislature deemed was conclusively proved by such record of conviction. No reason appears for the conclusion that the section should be held to apply only to convictions in the courts of this state.

The proceeding is dismissed, and the order of the District Court is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; MELVIN, J.; RICHARDS, Judge pro tem.

(178 Cal. 483)

THOMAS v. BIRCH et al. (L. A. 4248.)

(Supreme Court of California. July 3, 1918.)

1. CORPORATIONS 🔑116—STOCK—OPTION TO BUY—CONSIDERATION.

An agreement whereby plaintiff gave defendant privilege for limited time of purchasing stock at given price was a mere grant, without consideration, of an option to buy, and was not binding upon either party, although stock was delivered in escrow.

2. ESCROWS 🔑1—NECESSITY OF BINDING CONTRACT.

There must be a binding contract to support an escrow.

3. FRAUD 🔑35—ACTION FOR DAMAGES—WAIVER.

Plaintiff, who was induced by fraud to give an option terminable at pleasure for purchase of his stock, will, where he discovered fraud before option ripened into a binding contract and did not exercise his right of revocation, be deemed to have waived the fraud.

In Bank. Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by J. D. Thomas against A. Otis Birch and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Clyde Bishop, H. C. Head, and Williams & Rutan, all of Santa Ana, and Trippet, Chapman & Biby, of Los Angeles, for appellant. George H. Woodruff, Clyde C. Shoemaker, and Hunsaker & Britt, all of Los Angeles, and E. E. Keech, of Santa Ana, for respondents.

SLOSS, J. A demurrer to the second amended complaint having been sustained, and the plaintiff declining to amend further, judgment was entered in favor of the defendants. The plaintiff appeals.

The complaint in question alleges that during 1910 and 1911 the plaintiff was the owner of 650 shares of the capital stock of Menges Oil Company, a corporation having an outstanding capital stock of 90,000 shares. The defendant Birch was a director of said corporation, and its president and general manager. As such officer, he employed the defendant Good as superintendent, and Birch and Good were in actual charge and control of the operation of the company's property. The Menges Oil Company was the owner of 20 acres of land in Orange county, and was engaged in producing oil and gas, and in developing new wells thereon. On February 7, 1911, the corporation had partially developed said land by drilling four wells, which were then producing about 400 barrels of oil per day. The land, with the machinery and equipment belonging to the corporation, and the oil and gas produced by the four wells, made the outstanding stock worth not less than $2 per share. For some months prior to February 7, 1911, the corporation had been engaged in drilling an additional well, designated as well No. 5. During these months all of the profits derived from the four producing wells, amounting to about $75,000, were expended in drilling well No. 5. On or about said 7th day of February, 1911, well No. 5 had been drilled to a depth of about 4,000 feet, and was actually finished and completed, but was not open for production, "though it had been actually bored into and had reached a very rich and productive oil sand, capable of producing oil to the average amount of 2,600 barrels of oil per day, for many years thereafter, of the average value of $1.25 per barrel, and also large quantities of gas of the value of at least $500 per day, but that plaintiff did not then know of said completion and great value of said well No. 5." The defendants Birch and Good had personal control of well No. 5, and had actual knowledge of the facts regarding the well and its value. Birch, together with members of his family, owned a majority of the stock of the corporation, and thereby exercised actual control thereof. The defendants, knowing the value of the property of the corporation, and of well No. 5, conspired together to mislead and defraud the minority stockholders, including the plaintiff, and induce them to sell their stock to Birch for an inadequate consideration. For this purpose they instructed the other employés of the corporation to give to the stockholders no information regarding the condition of the property, and particularly of well No. 5. At meetings of the stockholders and directors of the corporation held shortly prior to February 7, 1911, Birch, for the purpose of inducing the plaintiff and other stockholders to sell their stock, stated that it would be necessary to levy large assessments upon the stock of the corporation in order to enable it to continue its development work. At the time of such statements the debts and expenses caused by the drilling of well No. 5, and placing it in a condition to produce oil and gas, had been paid out of the funds of the corporation. In order further to conceal the true value of well No. 5, and prevent the plaintiff and other minority stockholders from ascertaining its true productive value, the defendants represented that such value was very uncertain and problematical, and that the said well would probably be of very little value, thereby causing the plaintiff and other minority stockholders to believe that their stock was worth no more than $2 per share. The defendant Birch further represented to plaintiff and other minority stockholders that if they would sell their stock at $2 per share they would receive its reasonable value, and would avoid the necessity of paying assessments, and thereby said Birch would be enabled to induce an oil operator of large means to purchase the stock, and furnish the corporation with sufficient capital to develop its property. All of said statements were false and fraudulent, as defendants well knew, and were made with the purpose of inducing the plaintiff and other minority stockholders to sell their stock at $2 per share. Plaintiff and such other minority stockholders believed said statements, and were thereby misled and defrauded. In order to inform himself as to the condition of the property, the plaintiff, about and just prior to February 7, 1911, made inquiries of one Porter, the secretary of the corporation, regarding the condition of the property, including well No. 5, and was informed by Porter that the value and productiveness of said well No. 5 were very uncertain and problematical, and that the value of plaintiff's stock was $2 per share, all of which statements plaintiff believed and acted upon in the sale of his stock. The statements so made by Porter "were made from information and statements given to him by the said defendants" for the purpose of having them given to the plaintiff, and Porter made the statements to the plaintiff in good faith. The defendants instructed the drillers and other employés of the corporation not to give the plaintiff or other minority stockholders any information relative to the condition of the property, and they did not give any such information. By said action the plaintiff and other minority stockholders could not gain any information as to the true condition and value of well No. 5 at the time plaintiff sold his stock, and for many months thereafter.

The pleading goes on to allege that plaintiff had long been associated with the defendant Birch, and had faith in his integrity, and believing his statements, agreed on February 7, 1911, to sell his 650 shares to Birch, or others represented by him, for $2 per share, "said sale being conditioned upon the payment of one-fourth of said amount on or before the 18th day of April, 1911, and giving a note for the balance of said purchase price, * * * the said note and stock to be held in escrow until final payment was made," and if payments were not made, the stock to be returned to plaintiff. The shares were then, in fact, worth $50 each by reason of the boring and development of well No. 5. On or about April 18, 1911, Birch, in accordance with the agreement for the sale of the stock, made payment therefor, and took the stock, which had been deposited in escrow. Plaintiff could not, at said time, i. e., on or about February 7, 1911, ascertain the facts as to the true condition of well No. 5, because until the well was opened for production no one but those engaged in the drilling could know whether the well had been drilled into productive oil sands. The defendant Birch obtained an agreement for the purchase of the last outstanding minority stock of the corporation about March 13, 1911, and immediately thereafter, i. e., on or about March 20, 1911, the defendants opened well No. 5 for production, and permitted oil and gas to flow therefrom, "but that said defendants did not permit the fact that said well had been opened for production to become known until some time thereafter, and that this plaintiff did not learn of said fact until on or about the 10th day of April, 1911, and that the great value of said well and the greatly increased value of the property of said corporation did not become known to this plaintiff until after he had learned of the opening of said well No. 5 for production as aforesaid; that immediately upon the said opening of said well No. 5 for production it commenced to produce more than 2,600 barrels of 28 gravity oil per day, of the value of more than $1.25 per barrel, and gas of the value of not less than $500 per day, and that ever since the said time said well has continued to produce oil and gas in said quantities and of said value."

It is further alleged that the plaintiff had no knowledge or information of any of the fraudulent acts and concealments on the part of the defendants until April, 1913, when he was told thereof by Porter and other minority stockholders. About the same time he was also informed by a man who had been in the employ of the corporation during the drilling of the well that at the time of the purchase from plaintiff the defendants knew that well No. 5 had been drilled into rich oil sand, and that the defendants were then preventing the well from producing oil and gas, and concealing its true condition. This, it is averred, was the first information procured by plaintiff as to the fraudulent acts and concealments on the part of the defendants.

After acquiring the stock of plaintiff and others, Birch and his associates caused the corporation to transfer all of its property to another corporation, the Birch Oil Company, owned and controlled by the defendants, and on or about August 19, 1911, caused the Menges Oil Company to be dissolved. Thereby it became impossible for the plaintiff to rescind the sale of his stock. The complaint sets up a further transfer of the property under the direction of Birch, for the purpose of impeding plaintiff in his efforts to recover his stock. The prayer of the complaint is for damages in the sum of $31,200, based upon the difference between the purchase price and the alleged true value of $50 per share.

The demurrer specifies a number of grounds, and the respondents argue earnestly in support of each. In our view, one ground of demurrer, at least, is well taken, and the others do not call for discussion.

We have given a rather full statement of the complaint for the purpose, primarily, of showing that the plaintiff's charges of fraud, however frequently reiterated and variously phrased, all revolve around the central point of the condition, the productivity, and the value of well No. 5. The essence of plaintiff's claim is that he consented to sell his stock at $2 per share because he was kept in ignorance of the fact that well No. 5 was capable of producing oil and gas in such volume as to make the stock of the company worth $50 per share.

[1-3] The "agreement" which, as the complaint alleges, the plaintiff was induced to make on February 7, 1911, did not at that time deprive him of any interest in the stock. It is alleged that plaintiff agreed to sell his shares to defendant at $2 each, upon the condition of the payment on or before April 18, 1911, of one-fourth of the purchase price, and the giving of a note for the balance, the note and the stock to be held in escrow. There was, so far as the complaint shows, no agreement by Birch to buy or to pay. He was merely given the privilege, for a limited time, of purchasing the stock at a given price. It is not alleged that he gave any consideration for this right. The transaction was, in other words, a mere grant, without consideration, of an option to buy the stock. So long as Birch did not exercise the option by making the payment within the time limited, he had assumed no obligation, and the so-called agreement was therefore not binding upon either party for want of mutuality. 13 C. J. 331. "An agreement for an option not based upon consideration is simply a continuing offer which may be revoked at any time." 21 Am. & Eng. Encyc. 929. The rights of the parties (pending payment or notification of acceptance on the part of Birch) are not affected by the allegation that the stock was placed in escrow. There must be a binding contract to support an escrow (Fitch v. Bunch, 30 Cal. 208; Miller v. Sears, 91 Cal. 282, 27 Pac. 589, 25 Am. St. Rep. 176; Holland v. McCarthy, 173 Cal. 597, 602, 160 Pac. 1069), and plaintiff could recall his stock from the depositary so long as he had the right to revoke his offer of sale. A binding contract arose for the first time when Birch, on April 18, 1911, made payment and took the stock. But the plaintiff's own pleading alleges that on April 10, 1911, eight days before payment of the purchase price, he learned that well No. 5 had been opened for production, and the further allegations, fairly construed, amount to an admission that he then learned all about the well and its value and the effect of its development upon the value of the shares. At that time it was still within his power to revoke the option and retain his stock. Instead of so doing, he allowed the defendant to go on and consummate the purchase, took the agreed price, and then, after a lapse of some three years, charges fraud in a transaction which he voluntarily carried into effect, after full knowledge of the facts. This he cannot do. Strong authority may be cited for the view that, even if there had been a contract of purchase and sale, binding upon both parties,

the seller could not, where he discovered the fraud while the contract remained wholly executory, deliver the property and receive the purchase price, and still maintain an action for damages for the fraud. McDonough v. Williams, 77 Ark. 261, 92 S. W. 783, 8 L. R. A. (N. S.) 452, 7 Ann. Cas. 276; Thompson v. Libby, 36 Minn. 287, 31 N. W. 52; Baird v. Mayor of N. Y., 96 N. Y. 567, 576. In Thompson v. Libby, supra, the court said:

> "To allow a person who has discovered the fraud while the contract is still wholly executory to go on and execute it, and then sue for the fraud, looks very much like permitting him to speculate upon the fraud of the other party. It is virtually to allow a man to recover for self-inflicted injuries."

It is not necessary, for the purposes of the present case, to go so far. Whatever may be the rule where the parties have entered into a contract which upon its face binds both, it should certainly be held that a party who has been induced by fraud to give an option terminable at his pleasure must, if he discovers the true state of facts before the option has, by acceptance or payment, ripened into a binding contract, exercise his right of revocation, or else be deemed to have waived the fraud.

It follows that the complaint failed to state a cause of action, and on this ground, without regard to other points made by the respondents, the ruling of the court below must be upheld.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SHAW, J.; RICHARDS, Judge pro tem.

(178 Cal. 505)

WHITING-MEAD COMMERCIAL CO. v. INDUSTRIAL ACCIDENT COMMISSION. (L. A. 5581.)

(Supreme Court of California. July 3, 1918.)

1. MASTER AND SERVANT 🔑371—WORKMEN'S COMPENSATION—INJURIES "ARISING OUT OF EMPLOYMENT."

Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself and not acts of service, are incidental to the service, and injury sustained in their performance arises out of the employment.

2. MASTER AND SERVANT 🔑373—WORKMEN'S COMPENSATION—INJURIES "ARISING OUT OF EMPLOYMENT."

Where a servant employed in wrecking buildings was burned while lighting a cigarette by the match igniting a turpentine soaked bandage on his hand, the injury was one arising out of the employment; the indulgence in tobacco satisfying a natural want and being necessarily contemplated by the employer.

In Bank. Proceedings under the Workmen's Compensation Act (St. 1913 p. 279), by Miguel Duarte, opposed by the Whiting-Mead Commercial Company employer. There was an award by the Industrial Accident Commission, and the employer brought a writ of review, and the award was affirmed, and the matter was transferred to the Supreme Court. Award affirmed.

R. L. Horton, of Los Angeles, for petitioner. Christopher M. Bradley, of San Francisco, for respondent.

SLOSS, J. The District Court of Appeal for the Second Appellate District issued a writ of review to test the validity of an award of compensation made by the Industrial Accident Commission. The proceeding resulted in a judgment affirming the award. Upon application of the employer the matter was transferred to this court. Our further examination has led us to a concurrence with the conclusions of the District Court of Appeal. We, therefore, adopt the opinion of that court, prepared by Works, Judge pro tem., as a correct statement of the facts and an adequate treatment of the questions of law arising on those facts. The opinion reads as follows:

> "The Whiting-Mead Commercial Company was engaged in the business of wrecking houses, and Miguel Duarte was one of its workmen. While at work on one of the company's jobs Duarte ran a nail into the palm of his right hand, but the wound was not so severe as to cause him to cease his work, although the hand had to be bandaged. Twice during the day, once at noon and once at about 3 o'clock, the bandage was soaked with turpentine by an agent of the company in an endeavor to alleviate the pain caused by the nail wound. Soon after the second application of the turpentine, Duarte temporarily ceased his labor and struck a match for the purpose of lighting a cigarette. The saturated bandage was ignited by the match, and the hand was seriously burned. Duarte applied to the Industrial Accident Commission for compensation on account of the disability resulting from the burn, and an award was made in his favor. The petitioner now asks that the award be annulled.
>
> "At the time he was burned Duarte was in the course of his employment as a workman of the company, but it is contended that the injury did not arise out of the employment. There are many decided cases which bear more or less directly upon the question here presented. In one of them (Martin v. Lovibond & Sons, 7 B. W. C. C. 243), a drayman employed by a firm of brewers was run down by an automobile and killed. His hours of employment were from 8 in the morning until 9 in the evening, or later. During his working hours he took no meals at home. On the day of his death he left his team at the side of the street, and crossed the way for the purpose of refreshing himself at a public house with a glass of beer. He was in the public house about two minutes. While crossing the street to return to his dray he was killed. Compensation was allowed. In two cases (Archibald v. Ott, 77 W. Va. 448, 87 S. E. 791, L. R. A. 1916D, 1013; Keenan v. Flemington Coal Co., 5 F. 164, St. of Sess.), compensation was awarded for the result of accidents suffered while employés had left the actual performance of their work to procure drinking water. In another case (Carinduff v. Gilmore, 7 B. W. C. C. 981), a girl who was employed on the top of a threshing machine stopped her work to partake of refreshment provided by her employer, and suffered an injury while so engaged. Compensation was awarded. In one case (Northwestern Iron Co. v. Industrial Commission, 160 Wis.

633, 152 N. W. 416), it was held that an employé, injured while warming himself during a labor which subjected him to the cold, is entitled to compensation. In at least three cases (Cook v. Manvers Main Collieries, 7 B. W. C. C. 696; Elliott v. Rex, 6 W. C. C. 27; Zabriskie v. Erie R. Co., 86 N. J. Law, 266, 92 Atl. 385, L. R. A. 1916A, 315), compensation was allowed for injuries suffered by employés during absence from actual work in response to calls of nature. In a California case (Brooklyn Mining Co. v. Industrial Accident Commission, 172 Cal. 774, 159 Pac. 162), a miner was proceeding from one working place in a mine to another, passing over the surface of the ground from shaft to shaft in order to reach the second point. The day was very hot, and he paused in the shade of an ore bin to rest. The bin collapsed and killed him. Compensation was awarded.

[1, 2] "From these cases there is deducible a rule which is thus stated in one of them (Archibald v. Ott): 'Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. A man must breathe and occasionally drink water while at work. In these and other conceivable instances he ministers unto himself, but in a remote sense these acts contribute to the furtherance of his work. * * * That such acts will be done in the course of employment is necessarily contemplated, and they are inevitable incidents. Such dangers as attend them, therefore, are incident dangers. At the same time injuries occasioned by them are accidents resulting from the employment.' Are we to place the use of tobacco in this list of ministrations to the comfort of the employed? Is its use necessarily contemplated in the course of such an employment as that in which Duarte was engaged? The petitioner, in answering these questions in the negative, places great dependence in the argument that tobacco is used to appease a self-created appetite and not a natural appetite. The argument does not appeal to us. In an endeavor to determine what indulgences of human beings are responsive to the demands of natural, what to unnatural, appetites, we should be carried to the depths of biological and physiological research. Such labor is not necessary. We have the tobacco habit with us, and must deal with it as it is. It will not do to say that mankind would be better for a lack of the weed, even if that statement be true. Tobacco is universally recognized to be a solace to him who uses it, and it may be that such a one, unless he finally shakes off the habit, cannot perform the labors of his life as well without it as with it. In the present war one of the constantly recurring calls upon the public of the world is for tobacco for the comfort of the participants in the conflict. Nor are the books without their cases to the substantial effect that the employer must expect the employed to resort to the use of tobacco as a necessary adjunct to the discharge of his employment. McLauchlan v. Anderson, 48 Sc. L. Rep. 349, 4 B. W. C. C. 376; Manson v. Forth & Clyde S. S. Co., [1913] W. C. & I. Reps. 399; Chludzinski v. Standard Oil Co., 176 App. Div. 87, 162 N. Y. Supp. 225.

"The award is affirmed."[1]

The case of Haller v. City of Lansing (Mich.) 162 N. W. 335, L. R. A. 1917E, 324, may be cited as an additional authority supporting the views expressed above.

The award is affirmed.

We concur: MELVIN, J.; ANGELLOTTI, C. J.; RICHARDS, Judge pro tem.

WILBUR, J. I concur. In concurring I think it proper to say that although petitioner claims in its answer and argument that the applicant should have been denied compensation on the ground that his injury was the result of his own willful misconduct in violating a rule of the employer prohibiting workmen from smoking, the record contains no evidence tending to show the existence of any such rule, and we cannot, therefore, question the validity of the commission's finding that the injury was not caused by the willful misconduct of the employé.

(37 Cal. App. 404)

VANDELINDER v. ROBERTS et al.

(Civ. 2252.)

(District Court of Appeal, Second District, California. May 31, 1918. Rehearing Denied by Supreme Court July 29, 1918.)

1. APPEAL AND ERROR 🔑995 — REVIEW — FINDINGS OF FACT.

Appellate courts are not permitted to disturb a judgment where the determination of the facts is the issue presented, except where the evidence to the point is all one way, when the question becomes one of law as to what judgment is indicated.

2. EVIDENCE 🔑249(1) — ADMISSIONS — JOINT CONTRACTORS.

Where defendant indorsed and transferred to plaintiff a note in consideration of the transfer to defendant of an option owned by plaintiff and H., letter written by H. to defendant, containing statement as to corporation to be organized to handle the option, and to pay the note from the proceeds of stock to be sold, etc., was not admissible as against plaintiff; the note being plaintiff's sole property.

Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Action by R. D. Vandelinder against Andrew J. Roberts and F. M. Roberts. From judgment for plaintiff, defendants appeal. Affirmed.

Charles S. Darden, of Los Angeles, for appellants. Phil. M. Chandler, of Los Angeles, for respondent.

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[1] Prior to the action of the Supreme Court on rehearing the District Court of Appeal denied a rehearing and handed down the following per curiam opinion:

"In its petition for a rehearing of this cause the employer again insists upon a distinction between those cases in which an employé pauses in his work to perform some necessary and natural act and those in which the cessation of work is for an indulgence in some act merely pleasant or convenient to the employé, or, as petitioner puts it, to satisfy the demands of an unnatural appetite. In denying the application for a rehearing it is perhaps well for us to say that there may be this difference between the two classes of cases: In those of the second class mentioned, including cases of indulgence in the habit of smoking, the employer may have the right to forbid indulgence during working hours by reasonable rules and regulations. We cannot see that there is any further distinction between the two classes. In this case the business of the employer was not conducted under any such rule or regulation.

"The application for a rehearing is denied."

JAMES, J. Appeal is taken from a judgment in favor of the plaintiff for the principal sum of $750, the alleged debt being one represented by the promissory note of defendant Andrew J. Roberts, which note was indorsed by the second defendant to the plaintiff. It is alleged in the complaint that the plaintiff and H. L. Hutchinson, in August, 1913, were the owners of an option to purchase certain real property and that this option was sold and transferred to defendant F. M. Roberts in consideration of the transfer to the plaintiff of the promissory note first mentioned. The defendants set up several defenses, the substance of which is that an arrangement was consummated between plaintiff, Vandelinder, and F. M. Roberts for the formation of a copartnership to handle the property described in the option agreement, and that the parties mentioned were to form a corporation for the disposal of the property, and that a newspaper published by defendant F. M. Roberts was to advertise the land among the negro population; further, that as a part of the consideration Hutchinson and Vandelinder were to pay debts of F. M. Roberts then existing against his newspaper plant in the sum of $750, which they did not do; and, further, that it was understood and agreed that the maker of the note here sued upon would not be required to pay the same in money.

[1] The only contention made on behalf of appellants requiring consideration here is that the evidence was insufficient to support the findings and judgment of the court. Unfortunately for appellants, when we consider the transcript of the testimony, we are at once confronted with the fact that there was some substantial testimony to support all of the findings made by the trial judge. As the record reads on the printed page, it does appear that there was a great deal of evidence offered on behalf of defendants which tended strongly to support their defense. Statements made by Hutchinson in the presence of the defendants, before trial, were corroborative of defendants' claims. However, plaintiff, Vandelinder, testified positively and directly that he had originally paid $500 of his own money for the option; that Hutchinson had no real interest therein; and that there was no agreement or understanding waiving payment of the note or making the same conditional. He testified that the option contract was made and delivered to defendant F. M. Roberts. The question here is not whether we would have come to the same conclusion as the trial judge did upon the evidence as it is shown in the transcript. Appellate courts are not permitted to disturb a judgment where the determination of the facts is the issue presented, except where the evidence to the point is all one way; the question then becomes one of law as to what judgment is indicated therefrom.

[2] The point that the court erred in refusing to admit a letter signed by Hutchinson alone, which expressed the condition that out of stock to be issued by the corporation which was to be formed $750 worth was to be sold to cover the note to the plaintiff seems to be without merit. The note sued upon was admittedly indorsed to plaintiff, Vandelinder. It was his property; so that any statement made by Hutchinson to defendant F. M. Roberts could not bind the plaintiff. Furthermore, the statement made in this letter was not inconsistent with an understanding that Vandelinder should be paid the face of the note. It seems that the proposed corporation, in aid of which formation the efforts of F. M. Roberts were to be contributed, was never organized.

The judgment is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

(37 Cal. App. 435)

PEOPLE v. SANSOM. (Cr. 598.)

(District Court of Appeal, Second District, California. June 4, 1918. Rehearing Denied by Supreme Court Aug. 1, 1918.)

1. CRIMINAL LAW 🔑97(1)—ATTEMPT TO PASS FORGED CHECK—PLACE OF OFFENSE.

Under Pen. Code, § 27, providing that all persons who commit any crime in whole or in part within the state are liable to punishment under its laws, where defendant from Mexico mailed forged check on Arizona bank to bank in California, which sent check for collection to bank in Arizona, he was guilty of forgery by attempt to pass check, knowing its true character, and with intent to defraud, denounced by section 470.

2. INDICTMENT AND INFORMATION 🔑190—INFORMATION CHARGING OFFENSE—CONVICTION OF ATTEMPT.

If forged check mailed by defendant from Mexico to bank in California for collection from bank in Arizona on which it was drawn had failed to reach bank in Arizona, under Pen. Code, §§ 1159, 664, defendant could have been convicted, under information charging uttering of check, of attempt to commit offense of uttering.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

H. B. Sansom was convicted of uttering a forged check, and, from the judgment and an order denying his motion for a new trial, he appeals. Affirmed.

Guy Eddie and Chas. R. Morfoot, both of Los Angeles, for appellant. U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

CONREY, P. J. Forgery—the defendant appeals from the judgment, and from an order denying his motion for a new trial.

The information in this case charges that, on or about the 18th day of October, 1917, at the county of Los Angeles, state of California, the defendant had in his possession a check in writing for the payment of money, and then and there, knowing the same to be a forged check, did willfully, etc., utter, publish, and pass the said check with the name of Alice G. Sowle falsely signed thereon as true and genuine, with the intent then and there and thereby to cheat and defraud the said Alice G. Sowle, the Bank of Bisbee, a corporation, and the Continental National Bank, a corporation.

At all times mentioned herein Alice G. Sowle had on deposit in the Bank of Bisbee the sum of $5,512.76. The check in question called for that sum, and was made payable to the order of Continental National Bank. On the 17th day of September, 1917, the defendant, under the name of Herndon McNeil, opened an account in the Continental National Bank. On or about the 18th day of October, 1917, the Continental National Bank received by mail the check in question, together with a letter signed by the defendant under the name Herndon McNeil. That letter was dated Tia Juana, Mexico, October 16, 1917, and instructed the bank as follows:

> "I hand you a check of Alice G. Sowle for $5,512.76 payable to yourselves, which kindly collect and credit my account with the proceeds. Mail the receipt for the check and advice of payment to me at General Delivery, Los Angeles."

The bank forwarded the check to the Bank of Bisbee, Ariz., and that bank refused payment on the ground that the check was forged. The evidence shows that in fact it was forged.

We will state defendant's principal ground of appeal in the words of his counsel, as follows:

> "It is the contention of the defendant that no crime was committed within the jurisdiction of the state of California, for the reason that as far as the proof shows the check was mailed from Tia Juana, Mexico, and, if forged, was presumptively forged there and sent to the bank in Los Angeles, with such instructions to the said bank as would require the said bank as the agent of the defendant to mail the check to Arizona for collection, so that there could be no uttering of the said check in California, and that the uttering did not take place until the check was presented to the Bank of Bisbee, in the state of Arizona, for payment. So that neither one of the elements necessary to constitute the offense as charged in the information against this defendant was consummated or carried out in California. Defendant raised the question of venue on a motion for an instructed verdict in the trial of this cause and by a motion in arrest of judgment and for a new trial. All of these motions were denied."

The bank did not keep the envelope in which it received the letter from the defendant, and there is no testimony stating what place of mailing was shown by postmark on the envelope.

Defendant contends that the court erred in instructing the jury that the mailing of the check by the bank at Los Angeles to Bisbee, Ariz., constituted an uttering of the check in California. The instruction is as follows:

> "If you believe the evidence of the prosecution, that under such evidence the Continental Bank was the agent of the defendant, and if you have a reasonable doubt whether or not such bank did any overt act toward passing or uttering the forged check, if any, you must give the defendant the benefit of that doubt, if any. If, however, you believe beyond all reasonable doubt that the defendant, knowing the said check to be false, forged and counterfeited, mailed the same to said Continental Bank at Los Angeles, Cal., with the intent and design that said bank should pass and utter the same by causing it to be presented to the Bank of Bisbee, of Bisbee, Ariz., and if you further believe beyond all reasonable doubt that the said Continental Bank, upon receiving the said false, forged, and counterfeited check, if any, did in Los Angeles county, state of California, place the same in the United States mails, addressed to the Bank of Bisbee, at Bisbee, Ariz., with postage prepaid, and with the intent and for the purpose of causing the same to be presented to the said Bank of Bisbee, then you are instructed that you should find the defendant guilty, and that it is wholly immaterial whether any one was defrauded or not, and is likewise immaterial where the defendant was when he caused said forged check to be placed in possession of the said Continental Bank, if he did so."

Section 27 of the Penal Code of California provides that "all persons who commit, in whole or in part, any crime within this state" are liable to punishment under the laws of this state. In People v. Botkin, 132 Cal. 232, 64 Pac. 286, 84 Am. St. Rep. 39, the case then before the Supreme Court was stated as follows:

> "Defendant, in the city and county of San Francisco, state of California, sent by the United States mail to Elizabeth Dunning, of Dover, Delaware, a box of poisoned candy, with intent that said Elizabeth Dunning should eat of the candy and her death be caused thereby. The candy was received by the party to whom addressed, she partook thereof, and her death was the result. Upon these facts may the defendant be * * * tried for the crime of murder in the courts of the state of California?"

The court then quoted section 27 of the Penal Code, and stated its conclusion as follows:

> "The acts of defendant constituted murder, and a part of those acts were done by her in this state. Preparing and sending the poisoned candy to Elizabeth Dunning, coupled with a murderous intent, constituted an attempt to commit murder, and defendant could have been prosecuted in this state for that crime, if, for any reason, the candy had failed to fulfill its deadly mission. That being so, those acts being sufficient, standing alone, to constitute a crime, and those acts resulting in the death of the person sought to be killed, nothing is plainer than that the crime of murder was in part committed within this state. The murder being committed in part in this state, the section of the law quoted declares that persons committing murder under those circumstances 'are liable to punishment under the laws of this state.' The language quoted can have but one meaning, and that is: A person committing a murder in part in this state is punishable under the laws of this state, the same as though the murder was wholly committed in this state."

[1, 2] So here, when the defendant caused his agent to send, and it did send, the forged check to the Bank of Bisbee to be paid by that bank, and the check so sent was received by the Bank of Bisbee, then, if not before, he was guilty of forgery by an attempt to pass the check, knowing its true character, and

with intent to defraud. Pen. Code, § 470. And if for some reason the check had failed to reach the Bank of Bisbee, defendant could have been convicted, under the information in this case, of an attempt to commit the offense. Pen. Code, §§ 1159, 664; People v. Oates, 142 Cal. 12, 75 Pac. 337. "That being so, those acts being sufficient, standing alone, to constitute a crime," and those acts resulting in the actual completion of the crime charged, "nothing is plainer than that the crime of" forgery "was in part committed within this state," and the defendant is liable to punishment as provided by section 27 of the Penal Code, because he did commit, in part, a crime within this state. We think that the instruction in question was a correct statement of the law.

The judgment and order are affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

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37 Cal. App. 381

WOOD & TATUM CO. v. BASLER.

(Civ. 1847.)

(District Court of Appeal, Third District, California. May 29, 1918. Rehearing Denied by Supreme Court July 26, 1918.)

1. BROKERS ⊂⊃41—RIGHT TO COMMISSIONS—RATIFICATION OF ACTS.

The principal ratifying, with agreement to pay the stipulated commission, the broker's sale on terms different from those originally authorized, such agreement is enforceable.

2. BROKERS ⊂⊃54—RIGHT TO COMMISSIONS—ABILITY OF CUSTOMER—ESTOPPEL.

The principal accepting the customer procured by the broker is estopped, in the absence of fraud of the broker, to deny his ability and willingness to complete the purchase.

3. EVIDENCE ⊂⊃474(13)—CONCLUSIONS—PECUNIARY ABILITY.

A customer procured by broker may testify that he is able to pay his portion of the purchase price, a matter peculiarly within his knowledge.

4. EVIDENCE ⊂⊃502—CONCLUSION—PECUNIARY ABILITY—CROSS-EXAMINATION.

The adverse party deeming the testimony of a customer procured by a broker, that he is able to pay his part of the purchase money, a conclusion or mere opinion of the witness, it is open to him to test it on cross-examination as to the facts.

5. BROKERS ⊂⊃85(7)—ACTION FOR COMMISSION—EVIDENCE.

For the purpose of showing what specifications of supposed infirmities in title were directed to the principal's attention, the written opinion of the customer's attorney as to the title is admissible in a broker's action for commissions.

6. INTEREST ⊂⊃46(1) — COMMISSIONS — DUE DATE—DEMAND.

Within Civ. Code, § 1917, allowing interest from the time money is due, broker's commissions, payable on demand, are due when demand is made.

7. INTEREST ⊂⊃67—COMMISSIONS—PRESUMPTION—DEMAND.

Relative to time from which to compute interest, it will be presumed broker's commissions, simply shown to have been demanded, were demanded the last moment before filing complaint.

Appeal from Superior Court, Sacramento County; Z. B. West, Judge.

Action by the Wood & Tatum Company against W. H. Basler. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Elliott & Atkinson and R. Platnauer, all of Sacramento, for appellant. Dunn & Brand, of Sacramento, for respondent.

BURNETT, J. The action was for the recovery of a broker's commission for the sale of certain real property, and plaintiff had the judgment from which the appeal has been taken.

Plaintiff, being a real estate firm, entered into a written agreement with defendant on December 13, 1911, whereby the former secured an option for the purchase of certain real property, and the next day this was supplemented by another agreement signed by defendant, providing that:

> "In consideration of the services to be rendered and the expense to be incurred by the Wood & Tatum Co.. in promoting the sale of the real property hereinafter described, I hereby employ said Wood & Tatum Co. to sell and to have the exclusive right to sell for me all that certain real property," etc. * * *

The property and the terms of sale were therein described, and in the last clause it provided:

> "And I agree to allow said Wood & Tatum Co. a commission of five thousand dollars out of the purchase price of said property."

By virtue of these agreements, W. G. Wood, president and manager of plaintiff, endeavored to form a syndicate to purchase the property, and he took three well-known citizens to the property and introduced them to defendant as prospective purchasers with himself. Finally, the four agreed to purchase the land on somewhat different terms from those presented in the original agreement of sale, and a written notification of this was given to defendant by said Wood. As to this, the latter testified:

> "At the time I served the notification on Mr. Basler, I paid him $600. Prior to the time of this notification I told him that I was syndicating the property; that I was interesting a number of gentlemen for its purchase. I explained to him that I had these various gentlemen interested, and that I had figured on making them purchasers. I told him the prospective purchasers were Mr. Mitau, Mr. Snell, Mr. Lindley, and myself. That was before the notification of April 22d."

The written notification appears in the transcript, and to it is attached the following:

> "Approval. I hereby approve the sale of my property above described and acknowledged receipt of deposit of six hundred dollars and agree upon receipt of the balance of initial installment to convey the same to purchaser with a perfect title, free and clear of incumbrances, except as above.
>
> "I also agree to pay Wood & Tatum Co. on demand a commission of five thousand dollars.
>
> "W. H. Basler."

It is upon this promise to pay that the action was brought.

We may say, generally, that we find nothing in the proceedings opposed to good conscience or to public policy. Regarding the evidence, as we are required under the rule, we conclude that there was no overreaching, no misrepresentation, no concealment, nor fraudulent conduct in any respect on the part of respondent.

[1] We can see no reason why it was not entirely competent for the parties to voluntarily change the terms of sale, as seems to have been done, and we recognize no legal obstacle to the enforcement of the agreement as finally reached. Nor do we think there is any merit in the contention that no consideration exists for the promise to pay the $5,000.

The consideration results from the services performed in securing purchasers for the land upon terms that were agreeable to and ratified by appellant. It is a matter of no consequence that in the beginning somewhat different terms were contemplated. The ratification by appellant of the contract made by respondent was the same in effect as though prior to the performance of the services a similar change in the contract of sale had been agreed upon by plaintiff and defendant. If A. authorizes B. to sell the former's property for $10,000 and promises to pay him a commission of $1,000, and the latter secures a purchaser for $9,500, and A. approves the sale and agrees to pay B. a commission of $900, could there be any doubt of the sufficiency of the consideration for the promise? Of course, if Basler had not appoved of the change in the terms of sale, it could not be maintained that the agent had earned any commission, but we have no such case.

[2] As to the extent of the services required of an agent to entitle him to his commission, the rule is well settled and no elaboration is called for. We find in the record ample evidence to show that the parties were able, willing, and ready to complete the purchase, and the failure of the consummation of the sale was due to the neglect of appellant to perfect his title. And, it may be added that appellant is estopped from objecting to the qualifications of the proposed purchasers for the reason that the evidence brings the case clearly within the principle announced in 4 R. C. L. p. 309, as follows:

> "Once the customer procured by the broker is accepted by the employer, the latter is thereafter estopped from denying the purchaser's ability or willingness to complete the contract, inasmuch as he is not bound to accept the offer of such person without a reasonable opportunity to inquire and satisfy himself in relation to it. Consequently his acceptance should estop him from denying anything against this claim except fraud on the part of the broker in inducing the acceptance."

See, also, Carrington v. Smithers, 26 Cal. App. 460, 147 Pac. 225.

As we have seen, plaintiff notified defendant of the sale of the property, and informed him who were the purchasers. These parties were all known to the defendant. Defendant knew that plaintiff was trying to form a syndicate of these parties to take over the land, and he knew at the time of the notification of the sale just what interest in the property each one of these parties was to purchase. With knowledge of these things, defendant accepted the deposit of $600, approved of the sale in writing, and promised to pay the said commission of $5,000. He thereby accepted said purchasers upon his own responsibility, and could not thereafter dispute their capacity and disposition to make the purchase.

[3, 4] Some of the rulings of the court are criticized, but they are hardly of sufficient moment to justify specific notice.

We can see no objection to the action of the court in permitting the proposed purchasers to testify that they were able to pay their respective portions of the purchase price of the property. That was a matter, of course, peculiarly within the knowledge of the witness, and the testimony simply amounted to a statement by the witness that he owned available money to apply to such purpose. There is no practical difference between asking a witness whether he is able to pay $1,000 for the property and whether he has $1,000 available for such purpose.

If appellant deemed the statement a conclusion or a mere opinion of the witness, it was open for him to test it on cross-examination as to the facts. And, we may add that this was done with at least some of the parties. The ruling was in line with the case of Healy v. Visalia R. R. Co., 101 Cal. 593, 36 Pac. 125, and other decisions.

[5] An objection is urged because the written opinion of an attorney as to the title of and to the property was received in evidence. But it was the duty of the proposed purchasers, if they desired to require of defendant to convey a perfect title, to call his attention to the defects that he might have an opportunity to correct them. But the purchasers were dependent upon their attorney for such information, and the said opinion was admissible for the purpose of showing what specifications of supposed infirmities were directed to the attention of appellant. It does not explicitly appear that this opinion was read or shown to appellant, but it is a fair inference that his attorney was made acquainted with its contents in order that the proper correction might be made. It is not claimed that said opinion was binding upon appellant, or that the court might not have found, contrary to such opinion, that there was a good title, and therefore the proposed purchasers were in default. As to this, however, it may be said that appellant virtually admitted that a suit was necessary to adjust the matter, and that he would have his attorney attend to it. It may be added that no attempt was made to dispute the soundness of said opinion as to the defects in the title, and the case seems to have been tried

upon the theory that said imperfections were conceded, and that no effort was ever made by appellant to remedy the situation. Indeed, his defense to the action was based upon entirely different grounds.

Some other points are made, but with the exception of one to be noticed, they are without substantial merit.

[6, 7] As we have seen, the promise was to pay $5,000 on demand. It would not be due, therefore, until demand was made or suit was brought. There is evidence in the record that a demand was made upon appellant, but the precise time does not appear. It would therefore probably be presumed that it was not made until the last moment before the filing of the complaint. Trumpler v. Cotton, 109 Cal. 257, 41 Pac. 1033.

Hence interest should have been computed from this date, which was September 24, 1914 (section 1917, Civ. Code; Taber v. Piedmont Heights Building Co., 25 Cal. App. 230, 143 Pac. 319). But the court allowed interest from December 22, 1912. This was error, and the judgment is excessive to the extent of $614.10.

However, it is not necessary to reverse the judgment on account of this error. It is true that there is no finding of any demand or when the complaint was filed, but it is entirely clear from the transcript that the complaint was filed on said date, to wit, September 24, 1914, and it is a mere matter of computation to determine the amount of the interest from that date.

The judgment is therefore modified so as to provide for the recovery of $5,000 and of $283.90 interest, instead of $898, and as thus modified it is affirmed, neither party to recover costs.

We concur: CHIPMAN, P. J.; HART, J.

(37 Cal. App. 429)

LUTTON v. RAU et al. (Civ. 2156.)

(District Court of Appeal, Second District, California. June 4, 1918. Rehearing Denied July 1, 1918.)

1. Appeal and Error 🔑907(4)—Presumptions.

On appeal on the judgment roll with a meager statement of facts, the court must assume that the evidence was sufficient to support the determination of the judge as to all matters except those specifically covered by the stipulation of facts.

2. Landlord and Tenant 🔑79(2)—Assignment of Lease—Liability.

An occupant of real property, holding possession by bare assignment of the lessee, assumes to the lessor only such obligations as arise out of the privity of estate as distinguished from those arising upon privity of contract.

3. Landlord and Tenant 🔑208(2)—Payment of Rent—Covenant.

A covenant to pay rent runs with the land in whosesoever hands it may be.

4. Landlord and Tenant 🔑208(2)—Assignment of Lease—Liability for Rent.

An assignee of a lessee, in the absence of express contract, remains liable only for the payment of rent during the period of his occupancy, and may terminate his liability by reassignment.

5. Landlord and Tenant 🔑231(2)—Actions for Rent—Evidence—Admissibility.

In an action for rent against the tenant's assignee, an assignment from such assignee to a third person was properly excluded, since it would not aid plaintiff in making out his claim against the defendant.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by William Lutton against William F. Rau and others. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Ray Howard, of Los Angeles, for appellant. Cates & Robinson, of Los Angeles, for respondent.

JAMES, J. In this action judgment of nonsuit was entered against the plaintiff, who has appealed. The suit was brought for the purpose of enforcing a demand for rent alleged to be held against the respondent Rau as assignee of the codefendants named herein of a lease to certain storerooms located in the city of Los Angeles. The lease was made by the assignor of plaintiff with defendants Roggy & Runge, a copartnership. It was alleged that this lease was afterwards assigned to respondent, who entered upon and occupied the premises, and who later attempted to assign his rights to other persons. It was to recover rents accruing subsequent to the last alleged assignment that the action was brought. Judgment by default was entered against the lessees Roggy & Runge.

[1] The appeal being presented upon the judgment roll and a meager statement of facts, we must assume that the evidence was sufficient to support the determination of the trial judge and insufficient to support the issues tendered by the plaintiff in his complaint as to all matters except such as are specifically covered by the stipulation of facts.

[2] We are required to assume, then, under the pleadings and judgment, that when Roggy and Runge assigned to respondent Rau, Rau entered into no contract, either with his assignors or the lessor, affirmatively binding himself to fulfill the covenants of the lease, other than such obligations as would by implication be imposed upon him because of his entry and assuming possession of the leased premises. It is well-established law that an occupant of real property, holding possession by bare assignment of the lessee, assumes to the lessor only such obligations as arise out of the privity of estate as distinguished from those arising upon privity of contract. Washburn on Real Property (6th Ed.) vol. 1, §§ 682, 683; also section 1205, vol. 2.

[3] A covenant to pay rent is deemed to be a covenant running with the land; that is, covenant concerning the land itself, in whosesoever hands it may be. Allen et al. v. Culver, 3 Denio (N. Y.) 284; Salisbury v. Shirley, 66 Cal. 223, 5 Pac. 104; Bonetti v. Treat, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151.

[4] An assignee of a lessee, in the absence of express contract, remains liable only for the payment of rent during the period of his occupancy, and may terminate his liability by reassignment. Tiffany on Landlord and Tenant, vol. 1, pp. 987, 988; Fletcher et al. v. McFarlane, 12 Mass. 43.

[5] The only reference to evidence received or offered at the trial is that found in one paragraph of the stipulated statement of facts. It appears that the plaintiff offered in evidence a written assignment made by respondent to one Tyler, wherein it was recited that respondent Rau, upon a certain consideration, assigned to Tyler all his interest in "lease of room at No. 524 South Spring Street, together with," etc. We are obliged to look to the judgment of nonsuit, which contains recitals not presented in the form of findings of fact, in order to be apprised that this alleged assignment was actually offered in evidence. In the recitations referred to it is set out that the assignment was offered, and that an objection thereto was sustained. Conceding that the record is in sufficient form to properly present the objection, we are of the opinion that no error was committed in refusing to allow the instrument of assignment to be introduced in evidence. We do not think that, under the authorities hereinbefore cited, the production of such an assignment would aid the plaintiff in making out his claim against the defendant for rent which accrued subsequent to the date of the transfer of possession of the premises from respondent to the last holder.

The judgment is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

(37 Cal. App. 133)

McMANUS v. RED SALMON CANNING CO. (Civ. 2384.)

(District Court of Appeal, First District, California. May 2, 1918.)

1. Appeal and Error 🔑907(1) — Presumption—Evidence.

Where the court refused to pass on certain issues on the mistaken assumption that plaintiff had no standing in court under a former decision, it could not be presumed that there was no evidence on other issues or that the evidence produced was unfavorable to plaintiff.

2. Death 🔑8 — Action for Wrongful Death—What Law Governs.

An action for wrongful death is governed by the law of the jurisdiction where the tort was committed.

3. Death 🔑35 — Transitory Action — Wrongful Death.

An action for wrongful death is a transitory action, which may be maintained in any jurisdiction where defendant is found unless such forum in enforcing the remedy would conflict with express provisions or general policy of law of its own jurisdiction.

4. Courts 🔑95(2) — Rules of Decision — Statutory Action—Construction of Laws of Other State.

In considering a statutory remedy, such as an action for wrongful death created by the law of a foreign jurisdiction, the court will adopt the construction of the statute given to it by the courts of that jurisdiction.

5. Statutes 🔑174, 175—Wrongful Death—Foreign Statute—Construction.

If a foreign statute giving an action for wrongful death has never been construed in the foreign state, the court of another jurisdiction will construe it as it would a like statute of its own state.

6. Death 🔑32—Wrongful Death—Right of Action—Foreign Statute.

Section 1185, Comp. Laws Alaska 1913, codified under Act Cong. Aug. 24, 1912, § 19, gives a right of action for wrongful death to the personal representatives of a decedent for the benefit of the estate, any recovery to be administered as other assets, and applied to creditors and expenses of administration.

7. Death 🔑35—Action—Foreign Statute —Conflict with State Statute.

Section 1185, Comp. Laws Alaska 1913, codified under Act Cong. Aug. 24, 1912, § 19, giving a right of action for wrongful death to the personal representatives for benefit of estate, the proceeds to become assets of the estate, is contrary to the policy of the laws of California.

8. Death 🔑95(3) — Action for Wrongful Death—Damages.

The California statutory action for wrongful death was created for the benefit of decedent's relatives having the right to look to him for support, and damages thereunder are limited to their actual pecuniary loss.

9. Death 🔑9—Foreign Statute—Repeal.

Section 1185, Comp. Laws Alaska 1913, codified under Act Cong. Aug. 24, 1912, § 19, giving an action for wrongful death, was repealed by Laws Alaska 1913, c. 45, §§ 1, 4, as to cases between employer and employé, which provide remedy for an employé's wrongful death in accord with spirit of California law.

10. Death 🔑35 — Death of Employé — Foreign Law—Construction.

Laws Alaska 1913, c. 45, §§ 1, 4, providing a remedy for employé's wrongful death according to the spirit of the California law, not construed in any Alaska case, will be construed following the California statute as an act for compensation of dependents.

11. Appeal and Error 🔑1178(8)—Remand —Amendment—Necessary Allegation.

Where action for wrongful death brought under the Alaska statutes was disposed of on an erroneous ruling on a question of jurisdiction alone, plaintiff, as a matter of substantial justice, should be permitted to amend to supply a necessary allegation if possible.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action for wrongful death by Peter McManus, Jr., as administrator of the estate of John McManus, deceased, against the Red Salmon Canning Company. Judgment for defendant, and plaintiff appeals upon the judgment roll. Reversed, and cause remanded for further proceedings.

F. R. Wall, of San Francisco, for appellant. F. V. Keesling and T. G. Crothers, both of San Francisco, for respondent.

ZOOK, Judge pro tem. This is an appeal upon the judgment roll from a judgment for defendant in an action for the wrongful death of plaintiff's intestate, John McManus. The complaint alleges that defendant, a California corporation, hired decedent at San Francisco, as a seaman and also to do shore work for it on a voyage to Alaska; that on July 17, 1915, while decedent was working in a pile-driving crew for defendant near Naknek, Alaska, he was struck by a block that fell from defendant's pile driver, and was killed; that the accident was caused by defendant's negligence in using a block and strap known to it to be defective; that, under two statutes of Alaska, which are pleaded at length, an action for wrongful death may be brought by the personal representative of the decedent, and plaintiff is the administrator of decedent's estate, duly appointed by the superior court for the city and county of San Francisco; that decedent left no wife or child, but both his parents are living; and that by reason of his death "his estate" had suffered damage in the sum of $9,999.

Defendant's demurrer having been overruled, it filed its answer, and the cause went to trial on April 3, 1916, and on April 8, 1916, it filed an amended answer, which, in addition to a denial of negligence, set up a plea to the jurisdiction, based upon the original opinion of the Supreme Court in the case of North Alaska Salmon Co. v. Pillsbury, rendered a few days before the trial. In that opinion the Supreme Court held that, under the Workmen's Compensation Act, the Industrial Accident Commission had exclusive jurisdiction to award compensation to a person, employed here to work in California and Alaska, for injuries received in the course of his employment beyond the territorial jurisdiction of California. In the case at bar the lower court, evidently assuming that this decision disposed of the whole case, made its findings of fact bringing the case within the rule of the decision, "without passing upon any of the other issues in said cause" (so the findings read), and accordingly gave judgment for defendant on the sole ground of its want of jurisdiction to try the case.

As the original holding in North Alaska Salmon Co. v. Pillsbury was later reversed by the Supreme Court on rehearing (174 Cal. 1, 162 Pac. 93, L. R. A. 1917E, 642), when it was finally held that the Industrial Accident Commission was without jurisdiction to award damages for injuries received beyond the territorial jurisdiction of its state, the ruling of the lower court was admittedly erroneous; but respondent's counsel contend that the judgment should nevertheless be sustained on other grounds.

[1] Their first contention is that, as the findings support the judgment and the evidence taken on the trial is not before this court, every presumption is in favor of the judgment, and that this court cannot go into the matter of errors not appearing on the record. But, in the case at bar, the court expressly refused to pass on the issues of negligence and the amount of damages sustained, upon the assumption that plaintiff had no standing in court at all under the decision referred to, and that it would be an idle act to find on any issue other than those necessary to bring the case within the scope of that decision. Therefore it cannot be presumed that there was no evidence on the other issues, or that the evidence produced was unfavorable to plaintiff. The only reasonable inference to be drawn from the findings is that there was some such evidence, which the court, for the reasons stated, declined to consider at all.

Respondent's next contention is that plaintiff's alleged right of action for the wrongful death of his intestate, as given by the statutes of Alaska, is contrary to the policy of the law of California, and will not be enforced here. The statutes pleaded by plaintiff are section 1185 of the Compiled Laws of Alaska 1913, codified by authority of the Act of Congress of August 24, 1912, c. 387, § 19, 37 Stat. 518, and chapter 45 of the Session Laws of the Territory of Alaska for 1913, approved April 30, 1913. Section 1185 reads as follows:

> "When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed ten thousand dollars, and the amount recovered, if any, shall be exclusively for the benefit of the decedent's husband, * * * wife, and children, him or her surviving; and when any sum is collected it must be distributed by the plaintiff as if it were unbequeathed assets left in his hands, after payment of all debts and expenses, of administration, and when he or she leaves no husband, wife, or children, him or her surviving, the amount recovered shall be administered as other personal property of the deceased person; but the plaintiff may deduct therefrom the expenses of the action, to be allowed by the proper court upon notice, to be given in such manner and to such persons as the court deems proper."

Chapter 45 of the Session Laws of 1913 is entitled "An act to fix the liability of employers for personal injuries sustained by their employés," and the parts thereof material to this discussion are as follows:

> "Section 1. That every person, association, or corporation engaged in the business of man-

ufacturing, * * * building, or other business or occupation carried on by means of machinery or mechanical appliances shall be liable to any of its employés, or in the event of his death, to his personal representative for the benefit of his widow and children, if any, if none then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of * * * its or his or their officers, agents or employés, or by reason of any defect or insufficiency due to its or their negligence in the machinery, appliances and works."

"Sec. 4. That no action shall be maintained under this act unless it be shown that there exist beneficiaries as provided in section 1 hereof. * * *"

[2-6] It is settled law that an action for wrongful death, like other actions on tort, is governed by the law of the jurisdiction where the tort was committed, and, as it is a transitory action, it may be maintained in any jurisdiction where the defendant is found (Ryan v. North Alaska Salmon Co., 153 Cal. 438, 95 Pac. 862), unless the court where the suit is brought, in enforcing the remedy, would be acting in conflict with the express provisions or the general policy of the law of its own jurisdiction (11 Cyc. 663). It is also a well-established rule that, in considering a statutory remedy, such as an action for wrongful death, created by the law of a foreign jurisdiction, the court will adopt the construction of the statute given to it by the courts of that jurisdiction. Osborne v. Home Life Ins. Co., 123 Cal. 610, 612, 56 Pac. 616. But, if the statute has never been construed in the state of its origin, the court will construe it as it would a like statute of its own state. 36 Cyc. 1104. Examining these Alaska statutes in the light of the rules above given, we find that section 1185 has been construed by the United States Circuit Court of Appeals for the Ninth Circuit, which has appellate jurisdiction in cases arising in Alaska, in the case of Jennings v. Alaska Treadwell Gold Mining Co., 170 Fed. 146, 95 C. C. A. 388. It was there held that section 1185, like the Oregon statute from which it was originally taken, confers a right of action for wrongful death on the personal representative of the decedent for the benefit of the estate, and that any damages recovered become assets of the estate, to be administered like any other assets. The creditors and the expenses of administration are to be paid out therefrom, if necessary, the balance going to the heirs, if there are any; and, in default of heirs, the state takes by escheat.

[7, 8] We fully agree with counsel for respondent that this right of action, created by section 1185, is contrary to the policy of the laws of California, for our Legislature in creating the action for wrongful death, which was unknown at common law, followed the provisions of Lord Campbell's Act, adopted by Parliament in 1846, and our courts have adopted the construction given that act in Great Britain and in those states which have similar laws, namely: That the action for wrongful death has been created for the benefit of those relatives of the decedent who have the right to look to him for aid and support, and that the damages to be given are limited to the actual pecuniary loss suffered by those relatives by being deprived of such aid.

Therefore, if appellant's right of action rested on section 1185 alone, we would be compelled to hold that the action could not be maintained, for it would not be in accord with the policy of our laws to make a resident of our state pay damages for the death of decedent where no one was shown to have suffered any pecuniary loss thereby.

[9, 10] But the second statute pleaded, chapter 45 of the Session Laws of Alaska for 1913, which is a later enactment than section 1185, presents the matter in an entirely different light. Section 1 of that act gives the right of action against the employer for wrongful death of an employé to his personal representative "for the benefit of his widow and children, if any, if none for his parents, if none then for his next of kin dependent upon him," and section 4 provides that the action shall not be maintained unless it be shown that there are beneficiaries such as are described in the clause just quoted. We are satisfied that this act in effect repeals the provisions of section 1185 in so far as cases between employer and employé are concerned, and provides a remedy for the wrongful death of an employé which is in full accord with the spirit of our law. The language quoted is almost identical with that used in section 1970 of our Civil Code, which provides that the action may be maintained "for the benefit of the widow, children, dependent parents, and dependent brothers and sisters, in order of precedence as herein stated," and the objectionable features of section 1185 are therefore eliminated from the later act. As this later statute has never been construed in any Alaska case, so far as we have been able to ascertain from an examination of all of the cases reported in the Federal Reporter since its passage, and as its provisions so closely resemble our own statutes on the subject, it is our duty to construe it as we do our own statute as an act for the compensation of dependents.

[11] We therefore feel that appellant should be given an opportunity to present his case on the merits on a new trial, provided that he can show that the parents of decedent on whose behalf the action was brought were in fact dependent upon him for support and suffered pecuniary loss as a result of his death. We appreciate that there was no allegation of the parents' dependency in the complaint, but in view of the fact that the defendant's demurrer was overruled, and the case went to trial and was disposed of on an erroneous ruling on a question of jurisdiction alone, we think that as a matter of substantial justice plain-

tiff should be permitted to amend to supply this allegation, if he can do so.

It is ordered that the judgment be reversed, and the cause remanded for further proceedings in accordance with this opinion.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

(37 Cal. App. 439)

CONNELL v. McGAHIE et al. (Civ. 2263.)

(District Court of Appeal, First District, California. June 5, 1918.)

1. New Trial 🔑7—Default Judgment.

Where judgment was rendered by default in favor of the cross-complainant on plaintiff's failure to answer the cross-complaint, the court was without power to grant a motion for new trial as to the issues raised by the cross-complaint.

2. Easements 🔑61(8) — Pleading — Sufficiency.

In action for damages for trespass and injunction restraining further trespass, cross-complaint, claiming easement in land, referred to as "Ackerman's Cove," alleged to be the property described in the complaint, sufficiently described the lands.

3. Pleading 🔑21—Contradictory Allegations—Easements.

In an action for damages for trespass and for injunction to restrain further trespass, cross-complaint was not contradictory by reason of its setting up a private easement in the cross-complainant and a public easement in the use of the navigable waters which were the subject of the action.

4. Pleading 🔑147 — Cross-Complaint — Right to Assert.

Where plaintiff sued for trespass upon clam bed in navigable waters, defendant's alleged easement in the same waters, and his prayer that his easement be established, showed that the relief demanded thereby affected the property to which the action related, within Code Civ. Proc. § 442, and entitled him to file a cross-complaint, in view of Civ. Code, § 809, entitling an occupant of any estate in a dominant tenement to maintain action to enforce the easement.

5. Judgment 🔑28—Scope—Effect of Partial Invalidity.

Where plaintiff sued for trespass in navigable waters, where he maintained a clam bed, and defendant set up his own private easement and the easement of the public for fishing and navigating, though the judgment included a declaration of both easements, the declaration of a public easement being unwarranted, it was nevertheless valid as to the private easement.

Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Action by Elizabeth M. Connell against Robert J. McGahie and John P. Reed and others, wherein Reed and others filed a cross-complaint. On the death of Michael Connell, Elizabeth M. Connell, as administratrix, was substituted in his stead. From judgment for the cross-complainants, the administratrix appeals. Affirmed.

Henry F. Marshall and Walter J. Thompson, both of San Francisco, for appellant. Thos. P. Boyd, of San Rafael, and R. J. McGahie, of San Francisco, for respondents.

PER CURIAM. This is an appeal from a judgment declaring certain land subject to an easement and prohibiting interference with the same.

The complaint alleged ownership in plaintiff of certain tideland lots situated in Marin county, to which he deraigned title from the state by deed to his predecessors from the board of tideland commissioners. Upon these lots clam beds had been established, and to protect the clams from predatory fish plaintiff had erected and maintained fences thereon. He complained that the defendants had trespassed upon the property, broken down his fences, thereby admitting the predatory fish to the clam beds, to the consequent destruction of the clams, for which he sought damages and an injunction against future threatened injury.

To this complaint defendants filed a joint answer and cross-complaint, bringing in also another party defendant. The defendant Ackerman in his cross-complaint pleaded that his codefendants, the Reeds, were the owners of the upland, known as "Strawberry Point," surrounding "Ackerman's Cove," which, it appears from the pleadings, is the name by which plaintiff's lands are known, and were also the owners of a private easement to construct and maintain a wharf across the tidelands and out into the waters of "Ackerman's Cove," and a further right to the use of the waters of San Francisco Bay covering the cove for landing and mooring purposes for 150 feet on either side of the wharf, with the right of way from the end of the wharf across the waters of San Francisco Bay covering the cove to the channel of the bay. He further alleged that the wharf had been erected and maintained many years prior to the commencement of the action, and that cross-complainant was a tenant of the Reeds, renting one acre of land from them bordering on "Ackerman's Cove," together with the private easement above referred to; that he had erected a residence and boathouse on the leased premises, and engaged in the business of fishing and renting boats; and that plaintiff had destroyed the wharf and prevented its rebuilding, and had built a fence across "Ackerman's Cove," thereby obstructing access to his leased land and destroying his business. He also averred that the waters covering Ackerman's Cove are part of the navigable waters of the state, and that plaintiff had only a public right of fishing and navigation thereon common to all citizens.

This pleading in substance contains all the allegations of the other pleadings of the defendants, and the recital of the facts contained therein is all that is necessary for a discussion of the case. To this cross-complaint plaintiff interposed a demurrer, which was overruled, and, plaintiff failing to answer, his default was regularly entered, and, evidence being introduced in support thereof, judgment was entered by the court in favor of said cross-complainant. No separate judgment upon the default was ever entered; it being incorporated in the final judgment between all the parties.

Upon the pleadings of the other defendants the case went to trial, and judgment was against plaintiff and in favor of cross-complainants. The court found that plaintiff was the owner of the land described in the complaint, but that it was subject to two easements: One, in favor of the Reeds for a right of way for a wharf and the use of the navigable waters of the bay of San Francisco; and the other, a public easement for the use of those waters for navigating, hunting, and fishing. As conclusions of law the court found that the Reeds were entitled to $100 damages, that they were the owners of the private easement claimed by them, and that an injunction issue restraining plaintiff from interfering with the private easement, or from maintaining a fence on any of his land which interfered with the free use of the waters of Ackerman's Cove for hunting, fishing, or navigating. Formal judgment followed, in which it was also decreed that defendant and cross-complainant Ackerman have judgment from plaintiff for the sum of $970 damages, and that he have an order removing fence, and a permanent injunction restraining plaintiff from ever erecting any fence or obstruction upon his lands, and, further, that an injunction issue against plaintiff from in any manner obstructing the free use of the waters covering the lands by citizens of the state for the purpose of hunting, fishing, or navigation. A motion for a new trial was had, which was granted, "except as to the issues raised by the cross-complaint of Ackerman." From this order plaintiff has appealed.

[1] It is the claim of plaintiff that the judgment, in so far as the same rests upon such cross-complaint, should be reversed. As we view the record, the only question that is presented for our consideration is the sufficiency of the pleading to support the judgment. Aside from this question, it is first urged as ground for reversal that the court erred in inserting in the order granting the new trial the proviso excepting from its operation the issues raised by the cross-complaint of Ackerman. In this behalf it is argued that plaintiff's motion for a new trial was both in fact and by legal intendment directed solely to the issues of plaintiff's complaint and the cross-complaints of the Reeds, together with the respective answers thereto, and was not and could not be directed toward the Ackerman cross-complaint, for the reason that a motion for a new trial does not lie to a default judgment. Plaintiff, having failed to answer the cross-complaint of Ackerman, the court was undoubtedly without power to grant the motion for a new trial as to the issues raised by this cross-complaint. It is manifest, however, that the mention by the trial court of the Ackerman cross-complaint was a mere matter of precaution, made for the sole purpose of protecting Ackerman, and in no manner affected his judgment.

[2] As to the sufficiency of the pleading, it is argued by the appellant that the cross-complaint does not state a cause of action, for the reason that it utterly fails to describe the property claimed to be subject to the easement. The land over which the right of way is claimed is there referred to as "Ackerman's Cove," which it is alleged is the property described in plaintiff's complaint. The asserted private easement is not directed to any particular part or parcel of plaintiff's lands, but, according to the allegations, affects the entire tract. Under these circumstances, we are of the opinion that the description designating the lands subject to the easement in the manner indicated is sufficient.

[3] Again, it is contended that the cross-complaint is fatally contradictory, in that it alleges a public easement for the use of alleged navigable waters, and a private easement consisting in part of the same use of the identical waters. We see nothing contradictory in these allegations. They are based upon separate and distinct rights.

[4] Equally without merit is the claim that Ackerman is not entitled to assert a cross-complaint. It is alleged by him that his lessors were the owners of a right of way over the property described in plaintiff's complaint, and that he as lessee had been for more than 17 years in the use and possession of this right. It thus appears that the relief demanded affects the property to which the action relates, and this is sufficient to entitle him to the relief. Code Civ. Proc. § 442. And an occupant of any estate in a dominant tenement may maintain an action for the enforcement of an easement attached thereto. Civ. Code, § 809. See, also, 7 Cyc. Pl. p. 256.

[5] The judgment is further assailed for the reason that a portion thereof prohibits the obstruction of the free use of the waters covering the lands by the residents and citizens of the state for hunting, fishing, and navigating, which portion, it is claimed, is unwarranted. The grant of the tidelands in question from the state to plaintiff's predecessors was under the act of March 30, 1868 (St. 1867–68, p. 716). It is conceded that under the authority of Knudson v. Kearney, 171 Cal. 250, 152 Pac. 541, this portion of the judgment is without warrant and should be eliminated therefrom. This authority, however, in no manner affects the private easement adjudged to exist in favor of cross-complainant. This right was claimed to have accrued to him long subsequent to the date of the grant.

Other points do not require consideration.

For the reasons given, the judgment in favor of Ackerman, modified in the particular indicated, is affirmed; said respondent to recover his costs upon this appeal.

(37 Cal. App. 72)

ALLOGGI v. SOUTHERN PAC. CO. et al.

(Civ. 2314.)

(District Court of Appeal, First District, California. April 26, 1918. Rehearing Denied by Supreme Court June 24, 1918.)

1. Appeal and Error 🔑204(2)—Reservation of Exceptions—Objection Below.

In an action for the death of a passenger in an automobile struck by defendant's train at a crossing, an assignment of error that the absence of gates or barriers at the crossing was not evidence of negligence because defendant, not being the owner of the track in question, was not obliged to maintain barriers at the crossing, will not be considered in the absence of objection below to such evidence.

2. Railroads 🔑348(4) — Crossing Accidents—Evidence.

In an action for the death of a passenger in an automobile struck at night by defendant's train at a crossing over a spur track, evidence *held* to sustain a finding that defendants were negligent in shunting cars without lights and attendants and without warning.

3. Railroads 🔑350(26) — Crossing Accidents—Contributory Negligence.

In an action for death of a passenger in an automobile struck by defendant's train of flat cars at night while crossing a spur track, plaintiff, as the driver of the automobile, was not guilty of contributory negligence as a matter of law in attempting to cross without stopping at a point where he would have a clear view of approaching danger, where it did not appear that plaintiff by looking and listening could have seen the cars.

4. Railroads 🔑327(8) — Crossing Accidents—Stop, Look, and Listen.

The driver of an automobile crossing a railroad track is not required to stop, look, and listen at the most advantageous place; all that is required being the exercise of ordinary care.

5. Trial 🔑252(22)—Failure to Call Witnesses—Instructions.

In action for death of automobile passenger struck by defendant's cars at crossing, an instruction that defendant's failure to call and examine as witnesses employés whose fault caused or contributed to the accident created a presumption that their testimony would be unfavorable to defendant was properly given, in view of Code Civ. Proc. § 2061, subd. 7, as to instructions on failure to offer evidence, where the two switchmen who were in charge of the train at the time of the accident were present in court during the trial, but were not called.

6. Trial 🔑296(4, 5) — Instructions — Contributory Negligence.

In an action for the death of a passenger in an automobile struck by defendant's train at a railroad crossing, an instruction that one is not chargeable with contributory negligence in failing to anticipate the negligence of another, since every one has a right to presume that others will act in a lawful and proper manner, although erroneous, was harmless in view of other instructions given as to contributory negligence.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Achille Alloggi, administrator of the estate of Leonie Alloggi, deceased, against the Southern Pacific Company, a corporation, and others. From a judgment for plaintiff, and from order denying new trial, defendants appeal. Affirmed.

Louis Oneal, of San Jose, Chas. J. Heggerty, of San Francisco, and James P. Sex, of San Jose, for appellants. Bert Schlesinger, of San Francisco, and Fry & Jenkins, of San Jose, for respondent.

LENNON, P. J. At about 10 o'clock in the evening of September 19, 1913, the plaintiff, Achille Alloggi, and his wife, Leonie Alloggi, while riding in their automobile along San Salvador street, in the county of Santa Clara, attempted to cross a spur track leading from the right of way of the Southern Pacific Railroad Company into the yards of the Peninsular Railway Company, and in so doing the automobile, which the plaintiff was driving, came into collision with one of a train of several flat cars that was being switched by the defendant, the Southern Pacific Railroad Company, across San Salvador street and into the yards of the Peninsular Railway Company. The collision resulted in the death of the wife of the plaintiff. Plaintiff thereafter sued and recovered a judgment for the sum of $10,000 against defendants. From this judgment and from the order denying a new trial, the defendants appeal.

[1] It is contended that the evidence adduced upon the whole case does not suffice to support the finding of the jury, implied from the verdict, that the defendant the Southern Pacific Railroad Company was guilty of negligence which proximately caused the collision. The first point urged in this behalf is that the absence of gates or barriers at the crossing where the collision occurred was not evidence of negligence, because the defendant company was not the owner of the spur track upon which its cars were being switched, and consequently there was no duty imposed upon the defendant company to maintain barriers at this particular crossing. If this point as made was intended to be an assignment of error, the answer to it is that no objection was interposed at the trial to this particular evidence, and moreover the fact that there were no barriers or gates at the crossing where the collision occurred was eliminated from the case and taken from the consideration of the jury by the trial court's instruction (given at the request of the corporation defendant) that, if the jury found from the evidence that the spur track did not belong to the Southern Pacific Company, but was the property of the Peninsular Railway Company, then the Southern Pacific Company could not be held responsible for the failure to maintain gates, barriers, or flagmen at said crossing. The undisputed evidence showed that the Peninsular Railway Company owned the

spur track, and presumably the jury followed the instruction of the court and disregarded the fact of the absence of gates, barriers, etc., at the crossing in question.

It is contended that there was no evidence showing, or tending to show, the absence of bells, signals, or other warning of the approach of the train at the time of and at the point where the collision occurred, and that, even if such evidence existed, the absence of such signals could in no wise have contributed to the accident because of the fact that plaintiff knew of the existence, character, and condition of the crossing. The evidence showed that the spur track was being used by the defendant corporation in switching its cars; that the crossing in question, which was used by the general public, was very dangerous on account of a sharp curve which obstructed the view, and also because of lumber piles on the west side of the track, which, according to the testimony of one witness, were 12 feet high along the roadway and extended along the track 200 feet or more. Shortly prior to the collision three flat cars were standing near the crossing. No engine was then attached to these cars. The character of the crossing and the use made of it at the time of the accident are best shown by the testimony of the defendant Foster, the engineer of the defendant company, who, as a witness for the plaintiff, testified:

> "I had been employed in the capacity of engineer since July 27, 1913. On that night I was doing general switching, and was so engaged about 9:30 or 10 o'clock that evening. * * * I was switching on this spur track. Immediately prior to that we were coming in to pick up three cars on the spur track. I couldn't say how close we come to these flat cars here; I couldn't see them. My engine was along in here (indicating point B on the map on the sharp curve). There was four flat cars connected with my engine. As I attempted to make the switch I was looking across to get my signal; I got an 'easy sign' from Foreman Volkers. I was working on signals. I knew I was going in there and get some cars. I knew there were some cars on that spur track with which I was supposed to connect, and in making that switch it was the intention to connect with, and couple up, these cars. Foreman Volkers gave me the signal to take the switch. He is the engine foreman. * * * After receiving his signal I came in. I got an 'easy come ahead sign'; then Foreman Volkers was standing away out and gave me an 'easy come ahead sign' with his lantern. I was just creeping along, and I felt I was striking something. Then the foreman gave me a stop sign, and I stopped. I waited for a few minutes, and then he gave me another 'come ahead sign,' and I put my hand on the throttle and put the steam in the cylinder, and just before we started to move again he gave me an 'emergency stop sign,' to stop before the engine had got started. He came back to me and said: 'We hit an automobile down at the crossing, and we killed a woman, and the wheel of the car is right on the woman's body.' * * * Just before the accident I was coming forward around a sharp curve. I did not see Mr. Bunkers at that time. He was supposed to be working at the end of the train. I didn't see him at that time. * * * I couldn't see Mr. Bunkers, because I was working on the curve at the throttle of my engine. The curve was too sharp to enable me to see him. I had headlights on the engine, both ends, and I was connected with the rear end of those four flat cars. * * * I was new on that job at that time, and I hadn't noticed the pile of lumber along this track before the accident. After the accident I noticed the lumber pile. The lumber was piled up some considerable distance along the track. I could not and did not see Mr. Bunkers at the time of the accident, and do not know just where he was. I do not know whether the brakes were set on those flat cars."

The fact that the brakes were not set on the flat cars at the time of the accident is fairly deducible from this and other evidence, and it elsewhere in the evidence affirmatively appears that there was no flagman at the crossing, and that there were no brakemen on any of the three flat cars which were being shunted across the track. On the other hand, the evidence is conflicting as to whether a bell was rung, how far the lumber piles extended down between the road and spur track, whether the cars were standing still or moving, whether or not they had lights on them, and whether or not the moon was sufficiently bright to have shown the position of the cars and revealed the fact of whether they were standing still or moving at, and prior to, the time of the collision.

[2] The evidence was therefore susceptible of the construction, as the jury evidently found, that the defendants were guilty of negligence in shunting cars over a crossing used by the public, at night, without lights or attendants upon them, and without warning. The familiarity of the plaintiff with the crossing and his knowledge of its dangerous character was a factor to be considered in connection with the question of his contributory negligence, but in and of itself it is of no consequence in the determination of the question of the defendant company's negligence in the first instance.

The plaintiff testified that his wife called his attention to the fact that he was approaching the track; that in response he "kicked off the brake" of his automobile, at which time he was about 75 or 100 feet from the track; that he continued toward the track slowly for a distance of about 20 feet, when he stopped his machine; that he looked up and down the track, but could see nothing, "the light being so uncertain"; that his wife said, "There is nothing doing here; go ahead."

[3] He further testified that, if he had driven up closer, he could have looked further down the track, and because of this fact it is insisted that this case falls within, and must be governed by, the rule that, if the admitted physical facts establish that there was a point where, by looking and listening, plaintiff must have seen the descent of the cars upon him, he was, as a matter of law, guilty of contributory negligence in attempting to cross the tracks of the defendant company without first stopping at a point where he would have had a clear view of

approaching danger. This contention is answered, we think, by a reference to the state of the evidence upon this phase of the case as to just what was the situation with reference to the physical facts. If the flat cars were disconnected, with no lights upon them, and the moonlight was not sufficiently bright to reveal them, then it cannot be said that, by looking and listening, plaintiff must have seen them. And if, as there is some evidence to show, the cars were standing still and disconnected, assuming that there was sufficient light to have seen them, it does not follow that the plaintiff should be required to conjecture or surmise that the cars might suddenly be shunted backward without notice. Robinson v. Western Pacific R. R. Co., 48 Cal. 409; White v. S. P. Co., 122 Cal. 305, 54 Pac. 956; Chicago Co. v. Sharp, 63 Fed. 532, 11 C. C. A. 337; Ft. Smith, etc., Co. v. Pence, 182 S. W. 568.[1]

[4] The court did not err in refusing to instruct the jury that it was the duty of the plaintiff to stop, look, and listen at the most advantageous place. He was not required to look at the most advantageous place; for this would be putting upon him the burden of not only knowing the most advantageous point, but also of exercising the highest degree of care, while all that was required of him was ordinary care.

[5] Objection is taken to the court's instruction to the jury to the effect that, if the defendant company failed to call and examine as witnesses the employés whose fault caused or contributed to the accident, such failure created a presumption that the testimony of such witnesses would be unfavorable to the corporation defendant. The evidence showed, without dispute, that two of the employés of defendant, Bunkers and Volkers, were charged with the duty of switching; that they were the brakemen in charge of the train; that Volkers was the engine foreman who gave the signal to the engineer to take the switch; that Bunkers' place of duty was at the end of the train, but, as previously noted, Foster, the engineer, testified that, although Bunkers was supposed to be at the end of the train when the signal was given, he (Foster) did not know that such was the fact. The character of the train, the condition of the tracks, and the lights, and the location and doings of the various trainmen were peculiarly within the knowledge of Volkers and Bunkers, and, although not called as witnesses, it was stipulated that they were present in court during the trial of the case. The plaintiff established a prima facie case. The defendant offered very little testimony, practically submitting its case on the showing made by plaintiff. This case, therefore, falls within the well-settled rule that:

> "When the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which from its very nature must overthrow the case made against him if it is not founded on fact, and he refuses to produce such evidence, the presumption arises that the evidence, if produced, would operate to his prejudice, and support the case of his adversary." Bone v. Hayes, 154 Cal. 765, 99 Pac. 175; Code Civ. Proc. § 2061, subd. 7.

[6] The court gave, at plaintiff's request, an instruction (No. 17) which, among other things, declared that "one is not chargeable with contributory negligence in failing to anticipate the negligence of another, and in not providing against it. Every one has a right to presume that others will act in a lawful and proper manner; consequently the law will not hold it imprudent in a plaintiff to act upon a presumption that the defendant has done or will do his duty." This instruction in the particular quoted, and in so far as it might have been applied to the facts of the case, was error, for:

> "It is not the law of this state that a person approaching a railroad crossing is authorized to assume that the persons operating a train will not in any way be negligent in that operation. * * * Such a rule would abrogate the doctrine of contributory negligence in all such cases." Hutson v. So. Cal. Ry. Co., 150 Cal. 703, 89 Pac. 1094; Herbert v. S. P. Co., 121 Cal. 227, 53 Pac. 651; Griffin v. S. P., etc., Co., 170 Cal. 776, 151 Pac. 282, L. R. A. 1916A, 842.

We are satisfied, however, from a consideration of the instructions as a whole, that this general instruction did not operate to mislead the jury; for the correct rule relative to contributory negligence was, in several other instructions, stated and restated, and thereby the effect of the erroneous instruction was palliated, if not entirely negatived. Thus instruction No. 28, given at the request of the defendant, was one of several directed to the point that:

> "One who is approaching a railroad track cannot rely upon the fact that a whistle would be blown or that a bell would be rung, or that lights would be displayed, but he must so approach the track that, even though the whistle were not blown or the bell not rung or that no signals were given, he could stop his vehicle in time to avoid danger."

We are not unmindful of the rule that conflicting and contradictory instructions upon a material phase of the case require a reversal where it cannot be ascertained from the record before us which instruction prevailed or was likely to prevail with the jury. While it is true that the instruction complained of in the present case is erroneous, and in a measure in conflict with several other instructions which correctly stated the rule of law relative to contributory negligence, nevertheless the correct rule of law was so specifically stated and restated to the jury that we feel that the idea in the several correct instructions must have preponderated in the considerations of the jury, and that as a consequence the erroneous instruction neither contributed to nor controlled the verdict.

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[1] Reported in full in the Southwestern Reporter; reported as a memorandum decision without opinion in 122 Ark. 611.

Judgment affirmed.

We concur: FLOOD, Judge pro tem.; KERRIGAN, J.

(37 Cal. App. 423)

THIEL DETECTIVE CO. v. TUOLUMNE COUNTY. (Civ. 1812.)

(District Court of Appeal, Third District, California. June 3, 1918.)

1. District and Prosecuting Attorneys 🔑 7(2) — Authority to Hire Detectives — Statute.

The district attorney of a county, under Pol. Code, § 4307, subd. 2, has authority to incur an expense for detective hire to secure evidence concerning violations of the criminal laws.

2. Counties 🔑 197—Board of Supervisors—Presentation of Claims—Statute—"County Charge."

Compensation of detectives engaged by the district attorney, being a county charge under Pol. Code, § 4307, subd. 2, the claim must be presented to the board of supervisors, whose duty it is, under section 4041, subd. 12, to examine, settle, and allow all accounts legally chargeable against the county.

3. Counties 🔑 206(3)—Rejection of Claims—Action—Statute.

A claim against a county for the compensation of detectives engaged by the district attorney stands on the same footing as other charges that must be presented to the board of supervisors, and, if rejected, the claimant may bring his action in court, as provided by Pol. Code, § 4078.

4. Counties 🔑 204(1) — Board of Supervisors—Duty as to Claim.

It was duty of board of supervisors of county, when detective company claimed compensation for services under engagement by district attorney, to determine whether services were performed by company, were authorized by district attorney, were necessarily incurred in pursuance of his duty as prosecutor, and whether demand was reasonable in amount.

5. Counties 🔑 206(1) — Contract Claims against—Status as Vested Rights.

Contract rights with a county, as well as vested rights of property, are placed by Constitution and statutes under protection of courts where questions of law and fact may be finally determined after rejection of claim by board of supervisors.

6. Injunction 🔑 76—Issuance of Warrant by County Auditor.

Equity will not restrain a county auditor, a mere ministerial officer, from issuing his warrant upon a claim against the county adjudged by the proper tribunal; the claim being valid on its face, and within scope of statutory authority of board of supervisors.

7. Evidence 🔑 83(4)—Board of Supervisors—Action as to Claim—Presumption.

The board of supervisors of a county, being clothed with quasi judicial functions to pass upon claims against the county, is the appropriate tribunal to pass upon a claim in the first instance, and the court, in suit to enjoin the board from allowing an illegal claim, must presume the board will do its duty and reject the claim.

8. District and Prosecuting Attorneys 🔑 7(2)—Expense in Detecting Crime—Obligation to Consult Court.

There is no law requiring the district attorney of a county to consult any court or obtain any order as a prerequisite to incur any expense which he may deem proper in detecting or prosecuting for crime.

9. Counties 🔑 206(3) — Claim against — Allowance by Supervisors—Attack.

Where a claim against the county has been allowed in full by the board of supervisors, if within the jurisdiction of the tribunal, it can be attacked only by a suit in equity on the ground of fraud.

10. Counties 🔑 206(1) — Claim against — Improper Allowance by Supervisors.

If it is apparent that a county board of supervisors has exceeded its jurisdiction in allowing a claim, its order may be nullified, through an action brought in court, or treated as nugatory by any officer called upon to give effect to the invalid determination.

11. Counties 🔑 206(3) — Claims against — Rejection by Supervisors — Action at Law.

If a claim against a county, within the power of the board of supervisors to allow, has been rejected or allowed only in part, the board's decision is not final, but, by virtue of Pol. Code, § 4078, the claimant may bring action at law, and thus establish his claim.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by the Thiel Detective Company, a corporation, against the County of Tuolumne. From a judgment for plaintiff, defendant appeals. Affirmed.

C. M. Delameter (Frank W. Street and Horace M. Street, both of Oakland, of counsel), for appellant. Henry G. W. Dinkelspiel and Frank W. Hooper, both of San Francisco, for respondent.

BURNETT, J. The appeal is from the judgment in favor of respondent for detective services performed for the county by virtue of an agreement with the district attorney. The claim was properly presented to the board of supervisors, and by said board it was rejected. Thereafter, within the statutory period, an action was brought in the superior court, and by said court it was found that plaintiff was employed by the district attorney of the county "to make certain investigations and secure evidence concerning the alleged violations of certain of the criminal laws of the state"; that certain services were performed in pursuance of this employment at an agreed compensation; that in the performance of said services, plaintiff incurred certain expenses incidental to said investigation; that the charges for the same, together with said expense, were reasonable; that they were necessarily incurred in the course of said employment; were a proper charge against the county; and that a claim therefor, properly verified, was filed with the clerk of the board of supervisors, and thereafter rejected by said board.

[1] There is no question of the authority of the district attorney to incur an expense of this character. Subdivision 2 of section 4307 of the Political Code provides that:

"The traveling and personal expenses of the district attorney, incurred in criminal cases arising in the county * * * and all other expenses necessarily incurred by him in the detection of crime and prosecution of criminal cases" are county charges.

That this includes the services of detectives in proper cases is not disputed. He may employ them at the expense of the county when necessary for the detection of persons guilty of crimes or to obtain evidence of their guilt. Rocca v. Boyle, 166 Cal. 94, 135 Pac. 34, Ann. Cas. 1915B, 857.

[2] The compensation therefor being a county charge, the claim must be presented to the board of supervisors, as it is the duty of this tribunal "to examine, settle and allow all accounts legally chargeable against the county," etc. Subdivision 12, § 4041; Political Code; Rocca v. Boyle, supra.

[3] Such claim stands upon the same footing as other charges that must be presented to the board of supervisors; and, if it be rejected, the claimant may bring his action in court as provided by section 4078 of said Code. In that respect the statute makes no distinction between different claims, and the courts are not justified in making any. It is true, as said in Fulkerth v. County of Stanislaus, 67 Cal. 336, 7 Pac. 754, that said provision is general and "applies to all accounts presented against the county." In the Fulkerth Case, the sheriff of the county brought suit to recover compensation for meals furnished to prisoners in the county jail, and it was held that it was for the board of supervisors to determine in the first instance what was a reasonable compensation, but that the determination by said board was no more final than would have been a similar finding in an account for any other proper county charge.

[4, 5] So, herein, it was the province and duty of the board of supervisors to determine whether the services were performed by claimant, whether they were authorized by the district attorney, whether they were necessarily incurred in pursuance of his duty as public prosecutor, and whether the demand was reasonable in amount. But when the claim was rejected, the foregoing considerations all became the subject of cognizance and determination in an action brought in the superior court. To hold otherwise would be to nullify the plain provision of the statute and to oppose the decisions of the Supreme Court. Of course, if the decision of the board is final, that is an end of the matter, and the remedy by an action at law is not available. But the truth is that such contract rights, as well as "vested rights of property," are placed by the Constitution and statutes "under the protection of the courts," where the questions of law and fact may be finally determined. Glide v. Superior Court, 147 Cal. 30, 81 Pac. 225.

Appellant, in its contention that the determination of the board of supervisors is final and conclusive, has been misled by certain expressions used by the appellate courts in cases wherein claims had been allowed in full by the board of supervisors. In such instance, the situation is quite different from this, as must be apparent.

To illustrate the distinction, we may refer to some of the leading decisions in this state, wherein it was sought to review the action of the board of supervisors in allowing the claim.

[6] In Colusa County v. De Jarnett, 55 Cal. 373, the action was brought to restrain the defendant as county auditor from issuing a warrant in favor of one Dyas upon a claim in his favor, which had been allowed against the county for legal services rendered by him for said county. The Supreme Court held that there was nothing in the complaint to authorize the interposition of a court of equity. Hence it was plain that the court would not be justified in restraining the auditor, who is a mere ministerial officer, from issuing his warrant upon a claim which had been adjudged by the proper tribunal, the claim being valid upon its face and within the scope of the statutory authority of the board of supervisors.

McFarland v. McCowen, 98 Cal. 329, 33 Pac. 113, is a similar case. The claims therein were for constable fees, and were allowed by the board of supervisors. The auditor refused to draw his warrant for their payment, and the Supreme Court declared that:

> "It is the privilege and duty of the auditor to refuse to draw his warrants upon the treasurer for claims, which, although sanctioned and ordered paid by the board of supervisors, are void upon their face for want of jurisdiction in the board of supervisors, or showing an excess of jurisdiction, or other plain and palpable violation of law."

In the absence of any such showing, it was held that the decision of the board was conclusive, since "there should be an end of litigation in every case, and when a case has once been heard upon its merits and fully determined, it should be held conclusive until reversed, modified, or set aside in the mode prescribed by law."

[7] In the case of McBride v. Newlin, 129 Cal. 36, 61 Pac. 577, the action was brought by a taxpayer to enjoin the board of supervisors from allowing an illegal claim against the county for printing, and also to enjoin the auditor and treasurer from acting officially upon such claim. The following statement made therein is manifestly true:

> "The board of supervisors, being the body clothed with quasi judicial functions, is the appropriate tribunal to pass upon the claim which it is alleged will be allowed. We must presume that the board will do its duty, and if the claim is illegal that it will be rejected."

In County of Santa Cruz v. McPherson, 133 Cal. 282, 65 Pac. 574, the action was to recover money from the defendants to whom it was paid by reason of the allowance by the board of supervisors of the claim of the former against the county for printing. It was held that the action of the board was a conclusive adjudication of the claim, since it was of a subject-matter within its jurisdiction. The action was sought to be justified by virtue of section 8 of the County Government Act (Stats. 1893, p. 347), authorizing and directing the district attorney to institute suit for the recovery of money paid out "without authority of law."

Such claims being, however, within the range of legal county charges, the validity of the alleged indebtedness could not be retried in said suit, and the determination of the board of supervisors manifestly constituted the "authority of law."

County of Alameda v. Evers, 136 Cal. 132, 68 Pac. 475, was a somewhat similar case, and it was held that the action involved a collateral attack upon the order of the board of supervisors, and that:

> "From the decision of the board of supervisors on questions of fact, in regard to matters of which it had jurisdiction, there is no appeal. If the board exceeds its jurisdiction, or allows claims which are illegal upon their face, or in direct violation of law, there is a remedy."

County of Yolo v. Joyce, 156 Cal. 429, 105 Pac. 125, was in principle the same as the last two foregoing citations, and it was held that the action of the board in allowing the claim could not be reviewed in that proceeding.

[8] The contention of appellant herein that the district attorney should consult the board of supervisors before incurring such expense was virtually answered in said decision as follows:

> "There is no provision of the law which requires the district attorney to consult any court or obtain any order therefrom as a prerequisite for his incurring any expense which he may deem proper in the discharge of his duties in detecting crime or prosecuting criminal cases."

It may be said also that there is no provision requiring him to consult the board of supervisors, but the matter is left to his discretion in the first instance. It is true that in the Joyce Case it was declared that his discretion is ultimately to be reviewed by the board of supervisors alone, and when that body determines that the discretion has been properly exercised, that the expense was necessarily incurred by him and the charges fair and reasonable, "that is the end of the matter." But, for the reason already pointed out, the converse does not follow, that where the board rejects the claim "that is the end of the matter."

The case of Victors v. Kelsey, 31 Cal. App. 796, 161 Pac. 1006, involved the question of the authority of the district attorney to incur an expense in securing the testimony of an expert in a criminal case. The board of supervisors allowed the claim, but the treasurer refused to pay it, and it was justly held by this court on appeal, affirming the decision of the superior court of Plumas county, that the board of supervisors acted within its authority in determining that the expense was a just charge against the county, and that the treasurer had no discretion in the matter, but that it was his plain duty to honor the warrant.

[9-11] We think the matter can be summed up in these words: Where a claim has been allowed in full by the board of supervisors, if it be within the jurisdiction of such tribunal, it can only be attacked by a suit in equity on the ground of fraud. If it be apparent that the board has exceeded its jurisdiction in the allowance of the claim, the order may be nullified through an action brought in court, or such order may be disregarded and treated as nugatory by any officer who is called upon to give effect to the invalid determination of the board. If, however, a claim within the power of the board to allow has been rejected, or allowed only in part, the decision of the board is not final, but by virtue of the statute the claimant may bring his action at law and establish his claim against the county as fully and effectively as it could be by a favorable order of the board in the first instance.

We think the appeal, it being upon the judgment roll alone, is without merit, and the judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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